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Cartelization: Malum Prohibitum

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ABSTRACT

The Constitution of India secures the balance between economic and social justice. It bestows and protects the rights of all citizens of India, and simultaneously seeks growth and development of the Indian economy. Fair-trade practices and healthy competition warrants diversification of industries, generation of new opportunities, consumers triumph, efficient use of factors of production, traders' opulence, and rise in national income. Conversely, cartelization contravenes the modus operandi set forth by various legislations. Cartels are a confederacy to knock out competition by administering unfair trade practices. The cartel-members, by market apportionment, cooperate to increase their profit without considering other cogent factors. It undermines the interests of consumers as well as of co-traders. Moreover, the poor suffer disproportionately from the ramifications of collusion in commerce.

Cartels are commonly evident where few business entities have dominant market shares in the industry, whereas it is untraceable in the informal sector. Cartels avoid disclosure of any information through agreement containing adamant terms. However, the Parliament has formulated various laws to promote and regulate competition in trade and commerce, such as the Competition Act, 2002. Competition law prohibits anti-competitive practices, including cartels. The Act of 2002 has established the Competition Commission of India and the Director-General as ombudsman to prosecute firms indulged in unlawful trade practices for hampering robust competition. Cartelization is the most egregious of offenses under competition law. The Commission has put meticulous efforts to investigate cartels and has imposed heavy monetary penalties to dissuade others. Besides, CCI sponsors research works for assessing competitiveness in different sectors of the Indian economy.

In the post-pandemic era, both authorities and companies shall reject superannuated conventions and adopt new ideologies. Multidisciplinary policies, sincere compliance, and effective enforcement practices would ameliorate the current situation and eliminate the propensity to form cartels.

Keywords: *Cartelization, Competition, Constitution, Economy, Trade.*

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I. INTRODUCTION

An integrated domestic market is essential to make any economy competitive and efficient. Free flow and exchange of trade and commerce is prerequisite for the economic unity, stability, and prosperity of the nation. All federations, through constitutional provisions, make attempts to frame, regulate, and preserve national economic fabric by removing impediments that are coming in the way of inter-state trade, commerce, and intercourse so that available resources are productively employed for the collective good.² But freedom of inter-state trade and merchandise has presented obfuscating problems for countries with a federal constitution such as America, Australia. The Constitution of India is not purely federal (distinguished as quasi-federal), yet stumbling blocks are present in free trade, commerce, and intercourse.³ Cartelization or cartel formation is one such fly in the ointment.

Cartels are formed by independent firms in the same business to eliminate competition by colluding on production, pricing, and marketing practices. The word ‘cartel’ originates from the Italian word *cartello*, which means “leaf of paper” or “placard.” It was pronounced *cartel* in French, and the English language has adopted the same.⁴ A cartel is a consortium created through a formal agreement between several producers of goods or services for regulating supply or for manipulating the price of products.⁵ Cartelization is discouraged from time immemorial. Kautilya, in Arthashastra, has exhibited a lack of trust in traders. He forewarned the trader’s propensity to form cartels to fix prices and make excessive profits. Therefore, he propounded heavy penalties to suppress cartels and upheld the rights of consumers.⁶

During the eighteenth and nineteenth, *laissez-faire* economic conditions were prevailing in Europe and North America. Free economies widened windows for entry of cartels. Soon, cartels were present in every developed economy. Austria-Hungary and Imperial Germany were ‘the lands of cartels.’⁷ From the late nineteenth century, they shaped business and economic history.⁸ After World War I, cartels were the predominant form of market organizations. Sinaloa Cartel became the largest cartel in the world. Organization of the Petroleum Exporting Countries (OPEC), a group of fourteen oil-exporting nations, was

² Dr. J.N. Pandey, Constitutional Law of India 737 (52nd ed. Surendra Sahai Srivastava, 2015)

³ Chapter II- Meaning of Trade and Commerce and its Development: A Historical Perspective (August 06, 2020, 3: 15 p.m.) https://shodhganga.inflibnet.ac.in/bitstream/10603/129409/9/09_chapter%202.pdf

⁴ Cartel (August 06, 2020, 3: 36 p.m.) <https://en.wikipedia.org/wiki/Cartel>

⁵ James Chen, Cartel (August 07, 2020, 12:07 p.m.) <https://www.investopedia.com/terms/c/cartel.asp>

⁶ Cuts International & National Law University, Jodhpur, Study of Cartel Case Laws in Select Jurisdictions – Learnings for the Competition Commission of India viii (2008)

⁷ Cartel (August 06, 2020, 3: 36 p.m.) <https://en.wikipedia.org/wiki/Cartel>

⁸ 07-011, Jeffrey Fear Harvard Business School, Cartels and Competition: Neither Markets nor Hierarchies, 01 (2006)

sporadically reckoned as an international cartel due to its apparent anti-competitive conduct. In the early twentieth century, countries realized the detriments of cartels over the interest of consumers and on the economy. After analyzing the ill-effects, several steps were taken by governments to promote competition and discourage cartelization.

II. CIRCUMSTANCES FACILITATING THE FORMATION OF A CARTEL

Effective competition makes it difficult for firms to form cartels, but several conditions are conducive to cartelization. *First*, cartels may be formed in a market dealing with homogenous products. *Second*, the concentration of market shares in a few firms creates duopoly, in the case of two firms, or oligopoly, in the case of more than two firms. Every firm influences the price-output policy of competitors that creates price rigidity.⁹ So, competitive firms form a cartel to eliminate competition and earn more profit. *Third*, inflexible entry and exit barriers also support cartel formation. *Fourth*, the higher demand for a product creates low demand elasticity. It provides an opportunity for traders to manipulate the prices and quality of goods and services. *Fifth*, the record of collusion gives rise to suspicion of subsequent conduct. *Sixth*, the ability of firms to exchange information and involvement of trade associations also boosts the probability of cartelization. *Seventh*, the lack of implementation of laws further escalates cartelization.¹⁰ The firms find ways to form a cartel because it all together helps them to make a high profit with low risk and minimal competition.

III. CHARACTERISTICS OF A CARTEL

The ubiquitous features of a cartel are as follows:

- *Secrecy* - A cartel operates behind closed doors for evading the surveillance of the watchdogs. Generally, the agreement contains a secrecy clause to avoid disclosure of any information about the cartel.
- *Retaliation threats* - Retaliation threats secures the existence of a cartel. If any member reveals information about the cartel, other members temporarily reduce prices and seclude the cheating member from the market.
- *Compensation Schemes* - Under this scheme, if a member sells goods more than the allocated share, he has to compensate other members. It helps to deter cheating by any member.¹¹

⁹ Dr. S.R. Myneni, Principles of Economics 313 (5th ed. 2015)

¹⁰ Vinod Dhall, Cartels and Other Anti-Competitive Agreements 09 (2006)

¹¹ Competition Commission of India, Provisions relating to Cartels, Competition Advocacy and Awareness Programme of the Competition Commission of India, 07 (2020)

IV. TYPES OF CARTELS

Von Beckerath classifies cartels¹² into the following-

- *Quota fixing cartels* - These cartels restrict the supply of goods and services. It fixes production quotas for each member. If every member agrees to produce up to the allotted share, the cartel cleverly slows down supply and creates a shortage in the market; by the market mechanism, prices automatically surge.¹³
- *Price-fixing cartels* - These cartels fix, raise, or otherwise manipulate prices of goods or services. Price fixing is likely to occur where there are few sellers in a particular market. Pricing-fixing includes the reduction or elimination of discounts, advertisement costs, adoption of the standard formula for computing prices.
- *Term-fixing cartels* - These cartels decide terms of trade in the market. Terms of the business comprise of credit period, insurance, packing, interest rates, means of transportation, delivery time.¹⁴
- *Market sharing cartels* - It is an alternative to a price-fixing cartel. Market sharing agreement can deal with either level of business or kinds of contract. The cartel may allocate specific territories or customers among members, customarily called zonal cartels and customer assigning cartels.
- *Super Cartels* - A super cartel is formed by an agreement between cartels of two or more countries. An export cartel is made firms belonging to one country but draft an agreement to cartelize the market in a foreign country. An import cartel is constituted to eliminate competition among importers belonging to a cartel.¹⁵ Such cartels injure healthy competition at international levels. It subdues the foreign exchange of any country by influencing imports and exports.
- *Syndicates* – A syndicate is a joint-selling agency formed by competing firms to sell all the produced goods to the said agency at a fixed price called accounting price. Syndicate study the market and sell the said goods at the highest possible price. Later,

¹² What is a Cartel | Types of Cartels (August 09, 2020, 2:10 p.m.) <https://accountlearning.com/what-is-a-cartel-types-of-cartels/>

¹³ Types, Chapter 2- Cartels under the Competition Law (August 09, 2020, 2:22 p.m.) https://shodhganga.inflibnet.ac.in/bitstream/10603/207272/9/6_chapter%202.pdf

¹⁴ What is a Cartel | Types of Cartels (August 09, 2020, 2:10 p.m.) <https://accountlearning.com/what-is-a-cartel-types-of-cartels/>

¹⁵ Imports and Export Cartels, Chapter 2- Cartels under the Competition Law (August 09, 2020, 2:22 p.m.) https://shodhganga.inflibnet.ac.in/bitstream/10603/207272/9/6_chapter%202.pdf

members share profit among themselves at a pre-determined profit-ratio.¹⁶ The members, therefore, earn higher profits because the accounting price includes profit per se.

V. PITFALLS OF CARTELIZATION

Productivity and innovation are the driving forces of economic growth and national competitiveness. Companies collaborate with scientific research institutions and invest more in innovating new technologies to survive in the competitive market. Fair enforcement of trade laws and healthy competition prompts balanced market price and yield choices to consumers. Market economy and free trade give rise in GDP levels that promote economic growth and prosperity of the nation. Conversely, cartels are the most harmful form of anti-competitive conduct. Cartelization estops competition and allows colluding companies to make profits by administering proscribed practices. Cartels often reduce output and raise prices over competition level and do not change it for a prolonged time. In Japan, cartelization caused an average price rise of 16.5%; in the US, it soared prices up to 60% - 70%.¹⁷ Consumers either do not purchase cartelized goods or services at a higher price, forgoing the desired product, or pay the cartel price and unknowingly increasing the wealth of cartels.¹⁸ Cartels in informal sectors are malevolent for the economy. They operate with a high degree of self-regulation and contravenes government regulations. The deterrence rate shows that *at least 3 out of 4* existing cartels remain uncovered.¹⁹ Researchers have found that in developing country aggregated cartels' affect sales, and aggregated cartels generate more revenues when compared by the GDP of the country.²⁰

Cartels also impede new entries in the market. It becomes difficult for a new company to charge lower prices for the same goods or services. Cartels dissuade expansion of the market because a new company may lead to divulgence of the cartel. International cartels, correspondingly, negatively affect the developing economy. To ensure cartel survival, members take recourse of multiple measures to bar rival producers from exporting in the market. It may use tariff barriers, anti-dumping duties, and the threat of predatory price war to block entry of developing country producers. If these cartels impose costs on producers, it

¹⁶ *ibid*

¹⁷ Vinod Dhall, *Cartels and Other Anti-Competitive Agreements* 09 (2006)

¹⁸ Harm caused by Cartels to the Consumers and the Economy, Chapter 5- Effects of Cartels on Consumers and the Economy (August 10, 2020, 11:11 a.m.) https://shodhganga.inflibnet.ac.in/bitstream/10603/207272/12/9_chapter%205.pdf

¹⁹ Marc Ivaldi, TSE Aleksandra Khimich, TSE Frédéric Jenny, ESSEC, *Measuring the Economic Effects of Cartels in Developing Countries* 08 (2014)

²⁰ *ibid*

will knock the development process back of the country.²¹ International cartels allocate national markets among individual producers, who abuse their dominant position that deters necessary facilities for the importation of goods. Transnational abuse adversely affects the price and supply of products as opposed to market participants, per se directly impacts the multilateral trading system.²²

Organisation for Economic Cooperation and Development (OECD) proclaims that the prosecution of hardcore cartels is its priority. Its prohibition is an indispensable part of domestic competition law.²³ World Trade Organization, in the Doha Ministerial Declaration, has formed a working group to clarify core principles that include hardcore cartels. It focused on voluntary cooperation by WTO members on competition policy.²⁴ Considering stringent actions taken by developed countries, international cartels may begin to focus on developing countries. Developing countries with nascent competition regimes, like India, are not yet equipped to handle cross border anti-competitive practices.²⁵ In this aspect, the involvement of international institutions is invaluable, as it promotes public awareness, international cooperation, and assist in capacity building of developing economy.

VI. FREE TRADE, COMMERCE, AND INTERCOURSE – A CONSTITUTIONAL PRINCIPLE

The preamble of a statute is a key to open the mind of the makers. The preamble of the Constitution of India articulates what the framers had thought or dreamt for so long.²⁶ The Supreme Court, in the landmark judgment, has observed, “the edifice of our Constitution is based upon the basic elements mentioned in the preamble.”²⁷ *Economic justice* is one of the objectives which the preamble secures to all its citizens. The preamble also supports *equality of opportunity* to all the citizens of India. It denotes India’s resolution for the socio-economic revolution.

The term ‘economic justice’ read with ‘equality of opportunity’ evidently embraces the protection of the interest of suppliers and consumers. Equality of opportunity demands fair

²¹ Margaret Levenstein, Valerie Y. Suslow, Lynda J. Oswald, Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy 14-15 (2003)

²² Robert D. Anderson, William E. Kovacic, Anna Caroline Müller, and Nadezhda Sporysheva, Competition Policy, Trade and the Global Economy: Existing WTO Elements, Commitments in Regional Trade Agreements, Current Challenges and Issues for Reflection 06 (2018)

²³ What are cartels and how do they affect consumers?, Cartels and anti-competitive agreements (August 13, 2020, 06:54 p.m.) <http://www.oecd.org/competition/cartels/>

²⁴ The Doha mandate, Trade and Competition Policy dealing with cartels and other anti-competitive practices (August 13, 2020, 7:15 p.m.) https://www.wto.org/english/thewto_e/minist_e/min03_e/brief_e/brief08_e.htm

²⁵ Joie Chowdhury, Private International Cartels – An Overview 05 (2006)

²⁶ Dr. J.N. Pandey, Constitutional Law of India 737 (52nd ed. Surendra Sahai Srivastava, 2015)

²⁷ Kesavananda Bharti v. State of Kerala, AIR 1973 SC 1461

market conditions for all. Cartelization forestalls the achievement of objectives set out by the preamble. The manipulation with prices or supply of products by cartels not only traumatizes small-scale businesses but also reduces the growth efficiency of the industry. *Pareto's unanimity rule* asserts that a framework of the income distribution, reorganization of production, and exchange would increase the welfare of society if it makes at least one individual better off without worsening the position of others.²⁸ The framers of the Constitution surmised the amelioration of citizens as well as the progress of the Indian economy. After a prolonged symposium preambulatory concept of economic justice and equality is put forward in various provisions of the Constitution.

With the emergence of democracy, fundamental rights have come into existence. During the freedom struggle, Indian leadership acknowledged the grievances of people and realized the want of these rights. Leadership comprehended the prevailing disparity in Indian society and embodied such rights in the Indian Constitution.²⁹ Part III of the Constitution bestows distinct fundamental rights to all the citizens of India. These rights are enforceable by courts under Article 32 and Article 226.

*Article 14*³⁰ of the Constitution embodies the principle of equality expressed in the preamble. The guarantee of equal protection of laws extends to both natural and legal persons that include any company, association, or body of individuals. The rule stipulates that likes shall be treated alike and not unlike shall be treated alike. Accordingly, the firms competing in the same business are entitled to equal opportunity to captivate consumers and earn the profit. But it does not give any inference that every trader shall make a similar profit. Articles 14 and 15 augment the positive concept of equality and do not perpetuate illegality or fraud.³¹ A cartel cannot contend that it ensures that every member receives continuous uniform income and secures the rights of the members, therefore, accomplishes the principle of equality. Article 14 guarantees the right to equality to foreign nationals and companies also. Every company, whether national or not, is entitled to equal treatment within the territory of India. Traders cannot form a cartel to expunge overseas companies because it is a violation of Article 14. Equality is trite; citizens or Courts cannot enforce it negatively. Furthermore, if the Court commits irregularity in order, no one can urge another Court to repeat the same

²⁸ Dr. S.R. Myneni, *Principles of Economics* 43 (5th ed. 2015)

²⁹ LXX No. 3, Rajbir Singh Dalal, *Fundamental Rights enshrined in Indian Constitution: Provisions and Practices* 779 (The Indian Journal of Political Science, 2009)

³⁰ INDIAN CONST. Article 14 states, "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

³¹ *Basawaraj v. The Spl. Land Acquisition Officer*, AIR 2014 SC 746

mistake.³²

Article 19(1)(c) of the Constitution of India preserves the fundamental right of citizens to form associations or unions. Cartelization is not safeguarded as fundamental rights because it is detrimental to the interest of the community at large, a reasonable restriction on the freedom to form association or union.³³ Personal rights are always subject to the well-being of the public. The Court must strike a balance between fundamental rights and the exhaustive interest of society. When the former right clashes with the welfare of the country, it must vie the latter.³⁴

Article 19(1)(g) further confer freedom to carry on occupation, trade, or business to all the citizens. The term ‘trade’ refers to the exchange of goods for goods or money intending to earn a profit. It is a repeated activity in the form of a business carried on with a profit motive. The term ‘business’ includes any trade, commerce, or manufacture but does not any profession carried on by an individual on his qualification. The term ‘occupation’ refers to vocation or merchandise in which a person is engaged or hired for income. It expresses an idea of continuity and regularity in a specific line of activity and excludes an occasional or temporary venture.³⁵ Every citizen has the right to do trade or business of its choice. But this Article does not warrant a monopoly to any individual, firm, or company. No existing traders have the right to be free from the competition of new traders.³⁶ However, Article 19(6) authorizes the State to eliminate competition and establish its monopoly. The State (as defined under *Article 12*)³⁷ may impose a reasonable restriction on freedom of any trade, occupation, or business.³⁸ It may bar merchandise that is illegal, immoral, or injurious to

³² *ibid*

³³ INDIAN CONST. Article 19 (4) states, “Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.”

³⁴ Ahmad Ali Akhtar and anr. v. Union of India and anr., 1993 (2) BLJR 1203

³⁵ Trade/Business/Profession: Differentiates between them and how?, Chapter 2- Comprehensiveness of Occupation (August 14, 2020, 1:16 p.m.) https://shodhganga.inflibnet.ac.in/bitstream/10603/7957/8/08_chapter%202.pdf

³⁶ Nagar Rice Mills v. N.T.C. Bros., AIR 1971 SC 246

³⁷ INDIAN CONST. Article 12 states, “In this part, unless the context otherwise requires, the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.”

³⁸ INDIAN CONST. Article 19(6) states, “ Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.”

public health. The formation of cartels infringes the right of other traders to establish their business in the same sector. It uses various trade barriers, tariffs, or non-tariff barriers to expel non-members from the cartelized industry. At times, it colludes with the authorities to acquire contracts. Cartels exercise restrictive trade practices to uphold oligopoly in the market that is a direct infringement of Article 19(1)(g). Such right does not allow the State or body to make any trade lucrative or procure customers to any business.

The right to life and personal liberty³⁹ is ever-evolving right. Justice Subramanian has revered *Article 21* as the heart and soul of the Constitution.⁴⁰ It embodies the constitutional value of the democratic society. By exercising judicial activism, the Supreme Court has augmented the scope of Article 21. In *Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni*,⁴¹ the Apex Court held that the right to life includes the right to livelihood. The Court reiterated that Article 21 safeguards persons' right to livelihood as no person could live without means of living.⁴² Every person has the right to set up his business to earn his livelihood. The State is also bound to interdict persons to threaten others.⁴³ These protections are the sine qua non to secure livelihood, protect family, social security,⁴⁴ and advance life with dignity. Besides, the approach of carrying out trade must be just, fair, and reasonable. Article 21 cannot be stretched to avocation or business injurious to the public interest or public order.⁴⁵ Consequently, the State may deprive a person of such right according to the procedure established by law.

In this backdrop, cartelization violates fundamental rights guaranteed under Article 14, Article 19, and Article 21.

Directive Principles of State policy, in Part IV of the Constitution, envisions an era of the Welfare State. It lays down social, economic, and political principles that are suitable to conditions prevailing in India. *Article 38* and *Article 39* manifest the doctrine of distributive justice. The State shall endeavor to eliminate discrepancies in opportunities amongst individuals and groups of people engaged in different vocations.⁴⁶ There must be equitable

³⁹ INDIAN CONST. Article 21 states, "No person shall be deprived of his life or personal liberty except according to procedure established by law."

⁴⁰ Special Correspondent, Article 21's scope needs to be expanded, says SC judge, The Hindu, December 22, 2019, <https://www.thehindu.com/news/national/andhra-pradesh/article-21s-scope-needs-to-be-expanded-says-sc-judge/article30369486.ece>

⁴¹ 1983 AIR 109

⁴² *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180

⁴³ *National Human Rights Commission v. State of Arunachal Pradesh*, 1996 AIR 1234

⁴⁴ *Calcutta Electricity Supply Corporation (India) Ltd. v. Subhash Chandra Bose*, 1992 AIR 573

⁴⁵ *M.J. Sivani v. State of Karnataka and Ors.*, Civil Appeal 4564 of 1995

⁴⁶ INDIAN CONST. Article 38

distribution of material resources to sub-serve the common good.⁴⁷ Cartels derelict guiding principles as it aims to the concentration of wealth and means of production.⁴⁸ DPSP being standards of achievement to promote the prosperity and well-being of people, the State shall, while honoring said Articles, do its utmost to restrain cartelization.

Part XIII of the Constitution appertains trade, commerce, and intercourse in toto. It emphasizes economic unity that is the cornerstone for the stability and progress of federal polity. The Articles manifest three principles: firstly, it promotes the free flow of both inter-state and intra-state trade, commerce, and intercourse; secondly, the State shall not ignore regional interests; thirdly, the Parliament has the power to intervene in the related crisis in any part of India.⁴⁹ *Article 301* makes a pious declaration of freedom of trade, commerce, and intercourse within the territory of India. The provisions rest upon the theory that people of several states shall sink and swim together so that prosperity and salvation remain united and not divided in the long run.⁵⁰ However, the freedom professed by Article 301 is subject to other expressed provisions of Part XIII. It would never protect undesirable or criminal activities⁵¹ includes the conduct of cartels. Legislatures have the authority to impose restrictions for the protection of public interest.

Article 246 exclusively empowers the Parliament and the State legislature to make laws for any matters respectively enumerated in the Union list and State list of the Seventh Schedule. Whereas, Parliament, as well as State Legislature, have the power to make laws for any matters enumerated in the Concurrent List. The Parliament or/and the State Legislature may frame legislations to check and curb cartelization under various entries of the Seventh Schedule, such as entries 41, 42, 43 of the Union List; entries 26, 28 of the State List; entries 20, 21, 33 of the Concurrent List.

VII. COMPETITION LAW: A COUNTERPOISE FOR CARTELIZATION

In 1956, adhering to the objectives set out by DPSPs, the Parliament adopted the Industrial Policy Resolution to reduce disparities in income and to prevent private monopolies and concentration of economic power. '*The Distribution of Income and Level of Living Committee*' was formed under the chairmanship of Dr. P.C. Mahalanobis. The Committee reported that the localized concentration of industry had glaringly increased exercise of

⁴⁷ INDIAN CONST. Article 39(b)

⁴⁸ INDIAN CONST. Article 39(c)

⁴⁹ Primary Object and Aim of Part XIII—Atiabari Case, Chapter XVIII- Trade, Commerce and Intercourse within the territory of India (August 18, 2020, 4:23 p.m.) <http://interstatecouncil.nic.in/wp-content/uploads/2015/06/CHAPTERXVIII.pdf>

⁵⁰ Charles H Baldwin v. GAF Seelig, 294 US 511, 523 (1935)

⁵¹ State of Bombay v. RMD Chamarbaughwala, AIR 1957 SC 699

monopolistic power in 1951-58. It recommended the establishment of a full-time agency to collect and comprehend different aspects of economic power. Accordingly, the Union Government appointed a five-member Commission to enquire into the extent and effect of concretion of economic power by private players. On the legislative recommendations of the *Monopolies Inquiry Commission*, the Parliament enacted the *Monopolies and Restrictive Trade Practices Act, 1969* (popularly referred to as the MRTP Act).⁵² The Act aimed to foster economic development and prevent practices maleficent for competition simultaneously. The Act set up the MRTP Commission to inquire, investigate, and pass remedial orders against restrictive trade practices. But the performance of the Commission bespoke its inefficiency. After the LPG policy of 1991, it was conspicuous that despite the jurisprudential adaptations, the Act and Commission did not improve market distortions. To assess the necessary changes, the Central government devised a high-powered committee under the chairmanship of SVS Raghavan. Raghavan Committee recommended the annulment of the MRTP Act and the enactment of modern competition law to meet the challenges. In such wise, the Parliament has enacted the Competition Act, 2002.⁵³

The Act brings forth the philosophy of ‘*Appreciable Adverse Effects on Competition*’ (commonly called AAEC). *Section 3* prohibits anti-competitive agreements, including cartels (horizontal agreements) that cause or are likely to cause AAEC in India. The Act lays down a broad and inclusive definition of cartels⁵⁴ to cover both trade and competition and includes every conduct that may try to limit competition, control production, restrict or inflate prices, or bars entry of new players in the market. Competition Commission of India with its investigating arm, Director General, may initiate proceedings against alleged anti-competitive conduct. On prima facie case, CCI shall direct DG to investigate the matter and report its findings, and for that, it has extensive investigative powers⁵⁵ including search, seizure, and dawn raids. The CCI may rely upon the recommendations made in the DG’s report, and after giving an opportunity of being heard to the parties, pass such orders as it deems fit, including an order of seizure and penalties.⁵⁶ The CCI also has power, notwithstanding that parties have entered into an agreement outside India, to inquire that said agreement has or is likely to have AAEC in the relevant market in India.⁵⁷ However, the aggrieved party may file an appeal

⁵² Dr. S.R. Myneni, *Indian Economics* 411-419 (6th ed. 2014)

⁵³ 41 (2), Manas Kumar Chaudhari, *MRTP Act to Competition Act: The Way Forward* 170-172 (2016)

⁵⁴ Competition Act 2002 Section 2(c) states, “an association of producers, sellers distributors, traders, or service providers who, by agreement among themselves, limit, control or attempt to control the production, distribution, sale, or price of, or, trade in goods or provision of services.”

⁵⁵ Competition Act 2002 Section 41

⁵⁶ Competition Act 2002 Section 19 and Section 26

⁵⁷ Competition Act 2002 Section 32

against the order/direction/decision of the Commission, within sixty days, before the Competition Appellate Tribunal.⁵⁸ Further, any aggrieved party may file an appeal against the decision/order of the Appellate Tribunal, within sixty days, before the Supreme Court of India.⁵⁹

While in 2009, CCI initiated several cartels investigations, it reaches fruition in only 2011, with twenty-seven orders involving notable colloquy on cartelization. Thenceforth, the Commission's maneuvers are uniform with a brief dip in 2016. It has imposed monetary penalties in 41 out of 55 cases, the total quantum of INR 17,160.67 crores. It has also framed *The Competition Commission of India (Competition Assessment of Economic Legislations and Policies) Guidelines, 2016*, to identify portions in legislations and policies that have potential risks to restrict competition in the market. A detailed analysis has exposed that the following six sectors are highly prone to cartelization:

- Entertainment⁶⁰
- Construction and Cement⁶¹
- Agriculture/Agro-processing⁶²
- Pharmaceuticals⁶³
- Public Procurement⁶⁴
- Transportation (excluding railways)⁶⁵

In the past, CCI has sponsored market studies to assess competitiveness in various industries of the Indian economy. The assessments have thrown light on the following prominent sectors: in the pharmaceuticals sector, the drug promotion matrix has revealed unfair trade

⁵⁸ Competition Act 2002 Section 53B

⁵⁹ Competition Act 2002 Section 53T

⁶⁰ Competition Commission of India v. Coordination Committee of Artists and Technicians of West Bengal Film and Television & Ors., Civil Appeal No. 6691 of 2014; FICCI - Multiplex Association of India v. United Producers/ Distributors Forum, Case No. 01 of 2009; Consumer Online Foundation v. Tata Sky Limited and Ors., Case No. 02 of 2009

⁶¹ Builders Association of India v. Cement Manufacturers Association & Ors., Case No. 29 of 2010; Re Alleged Cartelisation by Cement Manufacturers v. Shree Cement & Ors., RTPE No. 52/2006; Re: Manufacturers of Asbestos Cement Products, Suo Moto Case No. 01 of 2012

⁶² Re: Sugar Mills case, Suo Moto Case No. 01 of 2010; Re: Indian Sugar Mills Association and Ors. v. Indian Jute Mills Association and Ors., Case No. 38 of 2011

⁶³ Varca Druggist & Chemist & Ors. v. Chemists and Druggists Association, Goa, MRTP C-127/2009/DGIR4/28; The Belgaum District Chemists and Druggists Association v. Abbott India Ltd. & Others, C-175/09/DGIR/27/28-MRTP

⁶⁴ Excel Crop Care Limited v. Competition Commission of India, AIR 2017 SC 2734; Re: Aluminium Phosphide Tablets Manufacturers, Suo Moto Case No. 02 of 2011

⁶⁵ Express Industry Council of India v. Jet Airways (India) Ltd. & Ors., Case No. 30 of 2013; Swastik Stevedores Private Limited v. Dumper Owner's Association, Case No. 42 of 2012; Shivam Enterprises v. Kiratpur Sahib Truck Operators Co-operative Transport Society Limited & Ors., Case No. 43 of 2013

practices; in transport and energy sectors, competition concerns may arise during the life cycle of concession agreements; the petroleum industry is very close to a monopoly; in the air transport industry, price parallelism, though not price collusion, is ostensibly visible. Such reports help CCI for building capacity to screen the market for effective enforcement of laws.⁶⁶

VIII. A FUTURE OUTLOOK

The outbreak of COVID-19 has threatened the health and economic well-being of people across the globe. It has unprecedentedly created challenges for businesses, including temporary closure, a dramatic reduction in revenues, an impending wave of insolvency will. It has affected the jeopardize conditions for efficacious competition and consumer welfare. While direct support facilities such as loans and aids are available for individual companies; CCI has, under a temporary framework, issued an advisory for allowing businesses to coordinate specified activities, by way of sharing data on stocks, distribution networks, R&D, production, to cope with changes in demand and supply patterns.⁶⁷ Although it promotes pro-consumer cartels, such ad hoc relaxation has also laid ways for the formation of more cartels. The authorities shall cautiously monitor business behavior. The present crisis shall not become a cover for unnecessary collaborations.

Both companies and competition authorities need to adopt new ideologies and techniques to refrain cartelization in the post-COVID era. Companies shall actively undertake a central role in changing values and ensuring sincere compliance to supplement enforcement by competition law watchdogs. It shall provide appropriate internal incentives to align its policy following the law. Similarly, the authorities shall change their normative values and endeavor more creative enforcement activities. It shall encourage robust and credible compliance strategies to fight against illegal customary norms in Corporates. The relative costs and benefits of compliance may shape the response of companies towards trade and competition laws.

The Constitution lays down exemplary principles that promote equity, consumer satisfaction, expansion of industries, satisfactory living conditions, employment opportunity, scientific temper, and economic growth and development of citizens and India. The trade and competition policies, along with the zestful deeds of market players, shall follow in the

⁶⁶ International Competition Network and Competition Commission of India, Cartel Enforcement and Competition ICN Special Project (2018)

⁶⁷ Competition Commission of India, Advisory to Businesses in Time of COVID-19 (August 19, 2020, 8:32 p.m.) https://www.cci.gov.in/sites/default/files/whats_newdocument/Advisory.pdf

footsteps of the Constitution. Cartelization is the transgression of the Constitutional canons and must be curtailed jointly by all drivers of the economy.
