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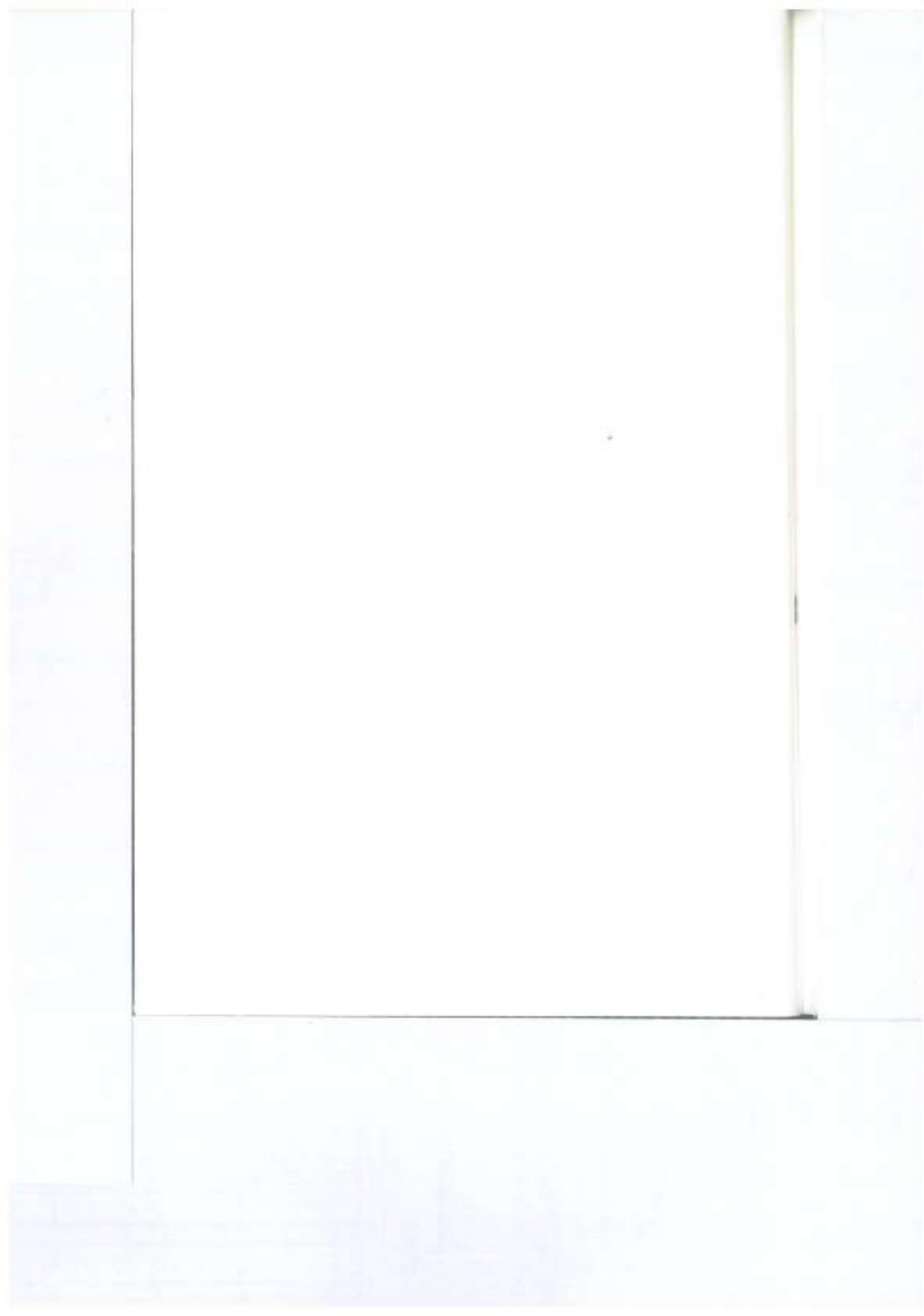
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THE EVOLUTION OF PRISON SYSTEM IN INDIA: TOWARDS THE IDEA OF RESTORATION AND REHABILITATION IN MODERN PRISON SYSTEM

—Abhijeet Nandy*

ABSTRACT

The concept of justice has evolved with the changing patterns of crimes in society. Society has therefore witnessed not only a change in the nature of crimes but also a change in the idea of prisons. The idea of prisons is rooted in the concept of retribution majorly. However, with the idea of justice constantly evolving, prisons have developed in a way that the purpose is to serve the welfare of society by rehabilitation criminals. In this paper, the author traces the evolution of the prison system in India in each era in Indian history. The paper examines the way prisons have operated in their utility, structure and administration. One of the major findings that are discussed in the paper is how the development of restorative justice in the modern prison system has gradually replaced the traditional approach of retribution. The paper identifies the methods and approaches of restoration adopted in modern prisons in the contemporary period. The aim is to focus on the consequent rehabilitation of criminals in society.

Keywords: Prison, Jail Reforms, Correctional Homes, Rehabilitation, Historical Perspective, India.

* PhD Scholar and University Junior Research Fellow, The West Bengal National University of Juridical Sciences, Kolkata.

I. INTRODUCTION

From time immemorial, all the old countries of the world had prisons. They were mostly in the shape of dungeons. Various countries like China, Egypt, Rome, Babylon, Renaissance Europe and even India had developed the system of imprisonment to be a kind of punishment. Prison, as we know it today, is a comparatively newer origin. Initially, it was being used as an interim centre for the detention of the culprit who was waiting for his trial and punishment, but when it was found that this sort of detention usually involves a separation from family and other members of the society and also that the culprit has to live in a very unfavourable condition, most countries, then, decided to adopt this method as a system of punishment as a suitable replacement for corporal punishment.¹ In matters of structure or appearance, the early prisons were not very different from the dungeons. They were mostly maintained by corrupt private persons who were trying to make profits out of these, and it was only after several protests from various social workers that the maintenance of the prisons was taken over by the governments.² The main intention behind this imprisonment was to reform the culprit and make him a better human being after his release, but in reality, it served the opposite purpose.³ However, the development of behavioural sciences has gradually replaced the traditional approach of retribution with the modern idea of social defence, which mainly focuses on the protection of society and the avoidance of criminal activities.

II. ANCIENT INDIA

In ancient India, the structure of society was based on the principles expressed by Manu and explained by YajnaValkya, Kautilya, and others. In ancient India, penology imprisonment was considered the mildest form of punishment in comparison to others which included hanging, mutilation, and even death. Keeping the culprit away from society so that they cannot defile the other members was the primary motive behind imprisonment.⁴ These prisons were mostly dark dens, devoid of any light, heat, or any proper facility of sanitation or human dwelling. But even during this period, there were some notable references when the existing ruler or the lawgiver of that period have given a thought regarding the restoration and rehabilitation of prisoners of that period.

¹ Norval Morris and David J. Rothman, *The Oxford History of the Prison: The Practice of Punishment in Western Society* 7 (Oxford University Press 1998).

² AMAKENDRA MOHANTY AND NARAYAN HAZARY, *INDIAN PRISON SYSTEMS* 18 (Ashish Publishing House India 1990).

³ R.E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87(4) *ETHICS* 279-301 (1977).

⁴ *Id.*

Kautilya, in his *Arthashastra*, points out that it is the capital where the jails should be constructed, and it should have separate arrangements for men and female prisoners.⁵ He has further stated the three instances where the prisoners should be released: the birthday of the ruling king, during the royal prince's birth or the coronation of an heir, and thirdly, on every fifth day a prisoner should be set free if he has paid a fine or has undergone any mild punishment or has decided to perform social services. Kautilya also describes the duties of the jailor and states that the jailor must be put to death if a prisoner escapes from the prison under his watch.⁶ This proves the fact the jail authority (*Bandhanagaradhyaksha*) always had to remain very vigilant. During the early years of Asoka, the prisoners had to undergo severe tortures, which most of the time killed them.⁷ But, after Asoka became a follower of Buddhism, he started to show leniency towards the prisoners. Although capital punishment was still in vogue, but we find references in his edicts where he shows mercy towards the prisoners. While on the one hand, he has given the magistrates the authority to inflict extreme punishments upon the offenders, at the same time, he has granted pardons to many as well. He used to release all condemned prisoners on every anniversary of his coronation.⁸ He also ensured that the jail authorities paid a visit to the prisoners at least once a day and sometimes for five days to keep track of their health and work.⁹ Sometimes they also gave them some money for their personal use. That's not all; from the twentieth year of his reign, he also used to grant a respite for three days to all the prisoners who had been granted capital punishment so that they could prepare themselves for the next world.¹⁰ During the Gupta period, the punishments became milder, and the collection of fines was the most prevalent form of punishment.¹¹ But still, references to Emperor Samudra Gupta freeing the Kings, whose territories were forcibly occupied by him, can be found.¹² However, they were released after they accepted Samudra Gupta's suzerainty. Kalidasa records that when the constellation in which a king was born had an evil aspect, astrologers advised the release of all the prisoners during the Royal Coronation.¹³ On the other hand, Banabhatta's *Harshacharita* provides information regarding the deplorable conditions of prisoners during the seventh

⁵ *Supra* note 2.

⁶ *Id.*

⁷ ROMILA THAPAR, *ASOKA AND THE DECLINE OF THE MAURYAS* 27 (Oxford University Press 2012).

⁸ VINCENT ARTHUR SMITH, *ASOKA, THE BUDDHIST EMPEROR OF INDIA* 29 (Oxford 1901).

⁹ I.J. SINGH, *INDIAN PRISON: A SOCIOLOGICAL ENQUIRY* 21 (Concept Publishing Company 1979).

¹⁰ *Id.*

¹¹ V. Sathiyu, *Judicial Administration during Ancient Period in India*, 3(2) INTERNATIONAL JOURNAL OF RESEARCH IN HUMANITIES AND SOCIAL SCIENCES 72-73 (2016).

¹² *Chandragupta — 2 of Gupta Dynasty*, INDIA A-Z.COM, S.V. (Nov. 1, 2022, 10:04 AM), <https://www.india-a2z.com/chandragupta-2.html>.

¹³ L. Szczepanik, *Prisons in Sanskrit Literature: A Comparison of "Arthashastra" and "Vāgmandanagopadīnakēya"* Descriptions, 15 CIS 101-118 (2013).

century in India.¹⁵ The records of Hiuen Tsang inform us that the prisoners were not allowed to shave and received very harsh treatment.¹⁶

Thus, it can be safely said that although sources are quite scanty, but references to the humane treatment of the prisoners can be found in the ancient period. And this behavior towards the prisoners depended entirely on the will and nature of the ruler of that period.

III. MEDIEVAL INDIA

Medieval India's legal system is quite similar to that of Ancient India. The main source of law during the Mughal period was the *Quran*. Crimes were of three kinds: crimes against God, crimes against the State, and crimes against private persons.¹⁶ Four kinds of punishments were prevalent - *hadd*, *diya*, *qisas*, and *tashir*.¹⁷ The punitive measures were mainly in the form of fines, confiscation, whipping, banishment, forfeiture of titles, mutilation, etc. Imprisonment was mainly used as a means of detention and not punishment.¹⁸ Criminals, whose trials and judgment were pending, were mainly imprisoned in fortresses that were situated in various areas of the country. During the Mughal period, there were three such prisons: Gwalior, Ranthambore, and Rohtas. Criminals who were sentenced to capital punishment were usually sent to Ranthambore.

Originally the prisons were supposed to be visited by the Qazis in order to examine the conditions of the inmates and also decide who among them was to be released.¹⁹ But they usually neglected their duty. Prisoners were usually released on special occasions like the birth anniversary of the ruling monarch or if the king or any of his sons had recovered from a very serious illness.²⁰ Transfer of prisoners was a rare phenomenon, but when they were transferred, they were generally tied with iron chains on the neck and feet. Under the Mughals, the prisoners were often required to engage in different kinds of work in order to earn their keep.²¹ Some of them were also granted parcels, and they were made to stay at a place that had minimum security. Many times, special punishments or probationary detachments were assigned to them so

¹⁵ Sukshi Gupta, *System of Prison, its History and Types in India*, LEGAL SERVICE INDIA (Mar. 27, 2023), <https://www.legalserviceindia.com/legal/article-4501-system-of-prison-its-history-and-types-in-india.html>.

¹⁶ SURLA DAS, CRIME AND PUNISHMENT IN ANCIENT INDIA 74 (Abhinav Publications 1990).

¹⁷ M. Kaur, *The Prison System*, 5(2) GJLS 55-61 (2016).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ S.P. Sangar, *Administration of Justice in Mughal India* in PROCEEDINGS OF THE INDIAN HISTORY CONGRESS 41-48 (D.N. Jha, R.L. Shukla, et al. (eds), Indian History Congress 1992).

²¹ *Id.*

²² ANDREW DE LA GARZA, *THE MUGHAL EMPIRE AT WAR: BAHUR, ARBAR AND THE INDIAN MILITARY REVOLUTION 1500-1605* (Routledge 2016).

that they could win back the good graces of the Empire. Sometimes, the prisoners of the enemies were released as a part of a truce to end the war.²² The freed prisoners were sometimes bought into the labor market of the military, and many a time, they were included in the Mughal army, especially if their commanders had been pardoned and also included as officers.²³ Emperor Akbar ensured a more enlightened and systematic approach towards his enemies towards the end of his reign. One of the main reasons behind this approach was that one of the central features of Islam is mercy. He issued a proclamation where he denounced the forceful enslavement and sale of women and children of his defeated enemies. He ensured that no woman or children were captivated.²⁴ However, there were exceptions to these rules, but the right to enslave could not be enforced without the sanction of the Emperor. Thus the soldiers lost their right to treat the defeated enemies as they wanted to.

Prisoners who have committed serious crimes used to have several rooms in various forts reserved for them. Such rooms were called Bandikhana or Adabkhanas.²⁵ The treatment they received there depended upon their age and the severity of the crimes they had committed. Adulterous women and persons belonging to lower castes had to work as laborers in building various fortresses.²⁶ The rank of the prisoners also determined the quantity and quality of the ration.²⁷ Special leaves were granted to them so that they could attend certain religious rituals at their homes.²⁸ The political prisoners were, however, treated well. Although they were not allowed to see their relatives, they were still given better food and other sorts of comforts compared to other prisoners.

IV. BRITISH INDIA

The beginning of British Rule in India changed the form of the administrative structure of India. The Supreme Court of Calcutta was established in 1773, which exercised civil, criminal, admiralty and, ecclesiastical jurisdiction.²⁹ It also pointed out that the introduction of 'The English Rules of Law' and 'English Superintendence of Law and Justice' was the ultimate motive of the British government.³⁰ The Indian Penal Code was enacted in 1860 and in 1861, the Criminal Procedure Code were enacted. Imprisonment as a kind of

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ B.K. Nagla, *Prison Administration in India*, 35(4) JPA 1011-1021 (1989).

²⁶ *Id.*

²⁷ *Supra* note 2.

²⁸ Dr L.P. Raju, *Historical Evolution of Prison System in India*, 4(5) IJAR 298-300 (2014).

²⁹ H. Verma, *Concept and History of Judicial Independence in India*, 8 INDIAN J.L. & JUST. 33-35 (2017).

³⁰ *Id.*

punitive measure was applied in India from 1773 onwards, and from 1860, this system was applied on an uniform basis.

The smallest unit of the prison system is the jail. The institution of jail originated in Britain, and this system began in India as a part of the British administration.³¹ As we have seen, earlier imprisonment was never a popular form of punishment. Jails were mainly used as detention centers for undertrials. But the British changed that form of penal structure, which was unduly harsh and barbarous, and substituted it with imprisonment as the primary method of punishment in the criminal justice administration of India. Initially, English East India were not very interested to spend a good amount of finances on such a system of punishment. As a result of this, the condition of the jails became very poor. The inmates were deprived of proper food, clothing, or even medical services.

An important development in regard to the prison system in western India, particularly in reference to those offenders whose guilt was not totally proven but at the same time cannot be termed as innocent, can be witnessed under the Governorship of Mountstuart Elphinstone. In his Report of 1819, he mentioned his concern regarding the treatment of those prisoners whose guilt was not sufficiently proven and, at the same time, who could not be declared innocent.³² And in order to preserve the distinction between them and the proven criminals, he suggested setting up a new type of prison that would function more like a workhouse than a prison.³³ Despite not being a Benthamite, he was still very much influenced by certain policies, and one of them was then was the building of a Panopticon.³⁴ English philosopher and social theorist Jeremy Bentham invented this mechanism of social control in the mid-1700s. His fundamental principle behind the building of the panopticon was to look after the maximum number of prisoners with the fewest guards. Elphinstone thought that this would be an effective way to bring about a justice system that would be more cost-effective and rational. The sociological effect of this was that although the prisoners would be aware of the fact that they were being watched, they would still not know when they were being watched. But before Elphinstone could build the first panopticon in Pune, he was transferred to the Bombay Presidency, where he became the new Governor. But he never dropped this idea and sent his plan of the panopticon to his successor in Pune, William Chaplin, who eventually built it. In the course of time, as the Governor of Bombay, Mountstuart Elphinstone built several panopticons in Bombay.

³¹ M.H. EDNEY, *MAPPING AN EMPIRE: THE GEOGRAPHICAL CONSTRUCTION OF BRITISH INDIA 1765-1843* (University of Chicago Press 1997).

³² Martha Kaplan, *Panopticon in Pune: An Essay on Foucault and Colonialism*, 10 *AMER. ANTHRO. ASSO.* 85-98 (1995).

³³ *Id.*

³⁴ KENNETH BALLHATCHEE, *SOCIAL POLICY AND SOCIAL CHANGE IN WESTERN INDIA: 1817-1830* 35-36 (Oxford University Press 1961).

Under the Company's rule, there were one hundred and forty-three civil jails, seventy-five criminal jails, and sixty-eight mixed jails, which had a total capacity of seventy-five thousand one hundred prisoners.³⁵ Reforms of the Indian prison system got attention for the first time with enactment of 1824. The Prison Discipline Committee was set up in 1836, of which Lord Macaulay was also a member. H. Shakespeare was the president of the committee. The report was submitted in 1838, which emphasized the corruption in the system and the slackness of discipline. This committee terminated the practice of employing prisoners to work on roads. This committee rejected all ideas of reforming criminals through an educational or religious system and imposed very rigorous treatment for all prisoners.³⁶ However, the Committee paid serious attention to the unhealthy conditions of the prisons and the poor health of the prisoners.

In 1864 Lord Dalhousie appointed a second commission of Enquiry into Jail Management and Discipline mainly to inquire into the rationale behind the high death rates inside the prisons in India.³⁷ And as per the recommendations of this commission, it was decided that in all provinces Civil Surgeons should be appointed as Superintendents of District Jails.³⁸ It also made certain suggestions regarding changes in the condition of diet, accommodation, clothing, bedding, and medical care of the prisoners. But it did not pay any attention to matters related to the welfare of the prisoners. In 1877 a third jail committee was formed, which reviewed the general jail management and was more concerned with details in prison work.³⁹ It recommended the formation of a uniform Prison Law, but due to some unfavorable situations, the work got postponed. In 1888 separation of prisoners and also certain important reforms in prison administration were suggested by the fourth Jail Committee. It again reiterated the need for a uniform prison law and, along with these, recommended certain forms of rigorous punishments like whipping, penal diet, solitary confinement, gunny clothing, etc. The All-India Committee of 1892 continued the works of the fourth jail committee, and the final result of this committee was the Prison Act (1894), which administers all the prisons of India.⁴⁰ This Act tried to make bring uniform treatment of the prisoners as far as possible throughout the country and also divided the different classes of prisoners.

³⁵ *Supra* note 2.

³⁶ BUREAU OF POLICE RESEARCH AND DEVELOPMENT, NATIONAL POLICY ON PRISON REFORMS AND CORRECTIONAL ADMINISTRATION (2007), <https://bprl.nic.in/WriteReadData/userfiles/Files/5261991522-Part%20L.pdf>.

³⁷ *Id.*

³⁸ Abhijeet Nandy, *Historicizing the Criminal Justice Administration in India: Tracing its Evolution in British Colonial Era of 1757-1947*, 7 *NUM. J. OF REG. STU.* 114-130 (2022).

³⁹ *Id.*

⁴⁰ *Id.*

The year 1897 was a landmark year for the history of prison reforms in India because in this year the Reformatory Schools Act was passed. As per this Act, the courts are supposed to send offenders who are below fifteen years of age to reformatory schools rather than jails. Despite such efforts, the Indian Prison System failed to apply civilizing and humanizing influences on the prisoners. Their medical well-being and food was still neglected.

The last Jail Committee before independence was set up in 1919. Sir Alexander G Cadrew was the chairman of this committee which examined not only the jails in India but also of other countries like the United Kingdom, United States of America, Japan, etc. its report included a number of recommendations on certain subjects like prison hygiene, prison staff, medical facility, classification of prisoners, prison labour, etc.⁴¹ 'Reformation and Rehabilitation' were recognized as the aims and objectives of prison for the first time in the history of the prison.⁴² For juvenile delinquents, separate institutions called Borstal School were recommended.⁴³ The committee also suggested separating the under trials from the convicted prisoners and differentiated the convicts between 'habitual and casual'.⁴⁴ It also recommended abolishing the transportation of prisoners and opening up schools and libraries for the inmates inside the prison.⁴⁵ Provision of probation and parole were also advocated.⁴⁶ Non-official visitors were allowed, and the prisoners were also allowed to meet their family members or write letters to them.⁴⁷ Remission for a convict, who has stayed more than six months, was also suggested.⁴⁸

With the passing of the Montague Chelmsford Reforms in 1919, Jails came under State subjects, and the provinces made serious attempts to bring about a few reforms in jail as well as the conditions of the prisoner's life there. And with this aim in view, a number of Jail Committees were enacted, like the Punjab Jail Reform Committee (1919) and the Uttar Pradesh Jail Reform Committee (1929, 1928, 1946), etc. But due to the unfavourable political environment at that time, these measures could not be implemented successfully. With the passing of the Government of India Act 1935, provincial governments began to control jails which resulted in the elimination of the possibility of uniform implementation of prison policy throughout the country. In the last ten years before independence, certain levels of concerns regarding

⁴¹ GOVERNMENT OF INDIA, GOVERNMENT CENTRAL PRESS, REPORT OF THE INDIAN JAIL COMMITTEE (1920), <https://jailmp.gov.in/sites/default/files/Report%20of%20the%20%20Indian%20Jail%20Committee%201919-1920.pdf>.

⁴² *Supra* note 37.

⁴³ *Supra* note 14.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

prison conditions were raised in certain progressive states like West Bengal, Maharashtra, Tamil Nadu, etc. The first-hand experience of the freedom fighters of these States had compelled the government to look into the matters of the conditions of the prison, which resulted in the formation of various committees relating to prison reforms (the Mysore Committee on Prison Reforms, 1940-41, the U.P. Jail Reforms Committee, 1946, the Bombay Jail Reforms Committee, 1946-48) and legislations (The Bombay Probation of Offenders Act, 1936, the C.P. and Berar Conditional Release of Prisoners Act, 1936, the U.P. First Offenders Probation Act, 1938).

Thus, the British, from time to time, tried to make adjustments to the prison system and bring about elements of modernization in the system. Although they introduced this institution mainly to put away political prisoners, maintain law and order, curb the national movement, and thus extend their stronghold in the nation but at the same time, being influenced by the ideas of utilitarians like Bentham, also due to the hue and cry raised by different political prisoners of India, the British started to think about the reformatory approach in matters of prison administration, at least from the beginning of 20th century onwards. However, since the political situation at that time was very volatile, and the Indian national movement for independence was in full swing at different corners of the country, it was difficult for the British to implement a reformatory and humanistic approach towards the convicts inside the prison. Thus, it can be said that although the British had developed certain progressive ideas, they did not feel the urge to implement them when their hold over India was at stake.

V. POST-INDEPENDENT INDIA

The work on the reformation of jails gained acceleration after the independence of India. In order to improve the conditions of prisons in India, various committees were constituted from time to time. The first such committee was the Pakwasa Committee (1949) which suggested the idea of employing prisoners as labour for road work and paying them wages for their services.⁴⁹ In the course of time, certain other measures were also introduced, like remission in the sentence of well-behaved prisoners.

In 1951 an expert on correctional work from the United Nations, Dr. W.C. Reckless, was invited by the Government of India in order to study the prison administration in India and suggest suitable changes in it.⁵⁰ His recommendations were accepted at the Eighth Conference of the Inspector General of Prison (1952), and subsequently, the All-India Jail Manual Committee (1957) was appointed in order to prepare a model prison manual. In 1960 it submitted

⁴⁹ G. Ranga Rao & Vinod Kumar, *PRISON REFORMS IN INDIA* (2017), http://parliamentlibraryindia.nic.in/writercaddata/Library/Reference%20Notes/Prison_reforms_in_India.pdf.

⁵⁰ *Supra* note 30.

its report, which suggested uniform policy regarding jail administration all throughout India, probation, juvenile and remand homes, suppression of immoral traffic, reformatory schools, etc.

In matters of providing humane treatment to the prisoners inside the prison and also preventing the jail authorities from unnecessarily torturing the prison inmates, the Supreme Court of India gave a landmark judgment in *Sunil Batra Case*. In *Sunil Batra v. State (NCT of Delhi)*³¹ the Supreme Court raised objections to Section 30(2) and Section 56 of the Prison Act of 1894 and found them to be a violation of the fundamental rights of the prisoners.³² The apex court stated that Section 30(2), which gives the jail authority the right to put prisoners in solitary confinement, does not give them the right to torture them.³³ Moreover, the court also found this provision too arbitrary because it found Section 30(2) to violate Article 21, which states that a prisoner's rights can only be curtailed when there is substantial backing of the law.³⁴ It also said that the jail authorities would only have the right to put prisoners in solitary confinement when their death sentence is irreversible.³⁵ The court found Section 56 to violate human dignity and decided it should be controlled. It put the powers of the Superintendent under constant check and also took away their right to put the prisoners in chains unless and until the local government advised him to do so.³⁶

In 1980, a committee on Jail Reforms under the chairmanship of Justice A.N. Mulla was set up by the Government of India. It submitted its report in 1983. In order to bring modernization of prisons in India, the committee suggested the setting up of a National Prison Commission. It also suggested the abolition of the practice of keeping juvenile offenders together with hardened criminals and the creation of an All-India Service called Indian Prisons and Correctional Service in order to recruit prison officials. This committee further recommended allowing media persons and public men to visit the prison so that they can experience first-hand the actual condition of the prisons. In 1986, the Juvenile Justice Act was enacted to keep juvenile delinquents away from non-juvenile ones in prison, and for this purpose, special homes were created. In 1987 the Justice Krishna Iyer Committee was appointed by the Government of India to examine the present condition of women prisoners in India. It recommended the inclusion of more women in the police force in order to deal with women and child offenders.

³¹ (1980) 3 SCC 488.

³² Pratap Alexander Muthalaly, *Case Analysis on Sunil Batra v. Delhi Administration & Others, 1978*, *INEXCESS* (Jan. 29, 2021), <https://blog.ipleaders.in/case-analysis-sunil-batra-v-delhi-administration-others-1978/>.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

In *Ramamurthy v. State of Karnataka*, the Supreme Court was directed to bring uniform prison laws and draft a model prison manual.⁵¹ The Bureau of Police Research and Development set up a committee for this. In order to replace the Prisons Act, 1894, a draft Prison Management Bill was circulated in 1999 by the central government to the state governments. But this bill has not yet been finalized.

In 2003 a model prison manual was prepared by the Government of India and sent to all State Governments.⁵² It was related to issues regarding prison reforms. In the course of time, the need to bring about certain changes to this manual was realized, and in 2014, an expert committee was constituted to reform the model prison manual of 2003. The Home Ministry finalized the Model Prison Manual 2016 and sent it to all the states and union territories. Among its various recommendations included the computerization of prisons, special care for women prisoners, rights of prisoners who have been awarded capital punishment, repatriation of foreign prisoners, etc.

VI. UNDERSTANDING RESTORATIVE METHODS IN PRISON SYSTEM

A prison is a place where prisoners and under trials are kept for a specific period of time as per their sentencing. It is a place which is under constant surveillance and very strictly regulated. Individuals hardly enjoy any freedom within the prison. Every country treats its criminals differently, and thus, the environment within the prison also varies greatly across the world.⁵³ The United Nations adopted the United Nations Standard Minimum Rules for the Treatment of Prisoners in 1955, which declared that reformation and rehabilitation is the ultimate motive of the prison administration.⁵⁴ In 1977, The International Covenant on Civil and Political Rights, propounded by the United Nations, of which India is also a member, also observed the same objective.⁵⁵ In 2015, The Standard Minimum Rules for the Treatment of Prisoners were revised and adopted as Mandela Rules. The Mandela Rules provide detailed guidelines about how a prisoner should be treated, but sadly most prisons around the world do not follow them.⁵⁶ A nation's prison administration

⁵¹ *Ramamurthy v. State of Karnataka*, (2009) 16 SCC 296.

⁵² BUREAU OF POLICE RESEARCH AND DEVELOPMENT, GOVERNMENT OF INDIA MODEL PRISON MANUAL FOR THE SUPERINTENDENCE AND MANAGEMENT OF PRISON IN INDIA (2003) https://bprd.nic.in/WriteReadData/userfiles/file/52306_47148-Model%20Prison%20Manual.pdf.

⁵³ UNITED STATES DEPARTMENT OF STATES, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, REPORT ON INTERNATIONAL PRISON CONDITIONS, <https://2009-2017.state.gov/documents/organization/210160.pdf>.

⁵⁴ *Supra* note 55.

⁵⁵ *Id.*

⁵⁶ PENAL REFORM INTERNATIONAL (July 24, 2022), <https://www.penalreform.org/issues/prison-conditions/issue/>.

depends upon a variety of factors. Various proponents have tried to point out different theories behind punishing an offender, and one of the questions that have been raised over the years is whether punishment is awarded for reforming the offender or for taking revenge for his actions. Regarding punishing offenders, various opinions have been raised over the years, starting from traditional methods to modern methods. And from such opinions, broadly, four categories or theories of punishment have evolved. The first among them is the deterrent theory which believes in inflicting harsh penalties on criminals with the intention of creating fear in their minds and also of others from committing such criminal acts in the future.⁶³ The second theory is the retributive theory which basically means the idea of revenge or vengeance.⁶⁴ The third theory is the preventive theory which believes in the idea of preventing crimes rather than avenging them. Imprisonment is one of the vital parts of the preventive theory because it helps in confining the offenders inside the jails, away from society, and prevents the reoccurrence of such illegal acts.⁶⁵ And the final theory is the reformatory theory which believes in the idea of reforming and rehabilitating criminals so that they can go back to society as law-abiding members.⁶⁶

In modern times the purpose of punishment has been highlighted to be the deterrence or prevention from occurring such incidents in the future. It has been found that prisoners who have faced very bad experiences are likely to suffer from severe physical and mental problems throughout their lives and find it very difficult to get back to their normal lives. In order to avoid such a situation, a need for prison reform has evolved throughout the world, which has shifted the focus towards a scientific, societal approach from a punitive approach, a part of dealing with prisoners. The rationale behind such an approach was reform rather than revenge.

The integrity that focuses on taking a person back to his former position or lifestyle is termed Restoration. Restoration in prison administration is linked to the formulation of diverse and unique management strategies for prisoners. In the field of penology, restoration mainly focuses on changing the person who has committed the crime and emphasizes the fact that he gets proper treatment inside the prison so that when he gets out after serving his term, he gets a chance to re-establish himself within the society and lead a normal life.⁶⁷ The policy of restoration is a part of the preventive theory that promotes the prevention of crime and not avenging it. Thus, reformatory theory can also be defined as the rehabilitative theory or corrective theory.

⁶³ N.V. PARANJPE, *CRIMINOLOGY AND PENOLOGY* (Central Law Publications 2001).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *A Restorative Justice Agency, INSIGHT PRISON PROJECT* (July 24, 2022), <http://www.insightprisonproject.org/a-restorative-justice-agency.html>.

In the early days, the conditions of the prisons were very deplorable, and practically no attention was paid to improving their conditions. Such situations affected the physical and mental well-being of the prisoners. After quite a long time, the penologists finally realized the futility of brutality in punishing the prisoners and decided to bring about changes in methods of punishment. Various factors led to this change in mindset, including various movements related to prison rights, overcrowding, lack of funds, etc.⁶⁸

Restoration is very much required for the prisoners because after being imprisoned for so many days inside the prison cells, it was not easy for them to get back to their normal lives. With the objective of redress, compensation, and pacification in mind, the process of restoring a prisoner can be achieved. The prisoner stays in prison with a mind full of guilt and a diminished self-confidence level. Thus, it is important to lift their spirits through the restoration process, which will eventually help them to get rid of the after-effects of their prison life. The prisoner should be allowed to socialize by engaging in various kinds of educational, vocational, and artistic activities that will help them to divert their minds toward constructive activities.⁶⁹ Prisoners should be given the opportunity to realize their mistakes, reform themselves and not engage in criminal activities in the future. Many a time, prisoners, especially younger ones, find it difficult to adapt to the prison environment.⁷⁰ Thus, it is the responsibility of the prison management to address this issue. Various initiatives that are being taken regarding the restoration of prisons should address the various needs of prisoners with a focus on rehabilitation.

A. Methods of Restoration

The prison environment plays a crucial role in determining the behaviour of prisoners. A darker and isolated inner prison creates an environment that is more susceptible to violence. Since inmates inside the prison come from different criminal backgrounds, prison violence is a very common phenomenon in many prisons. Improved prison environments can reduce the occurrence of such crimes. Moreover, if the prisoners are engaged in purposeful activities, that could also create an environment that is less violent in nature. The UN Standard Minimum Rules for the Treatment of Prisoners states that the environment of the prison should be suitable enough that human dignity can be conserved.⁷¹ Besides this, since many of the prisoners lives with various kinds

⁶⁸ INTERNATIONAL COMMITTEE OF THE RED CROSS (Aug. 21, 2022), <https://www.icrc.org/en/document/annual-conference-international-corrections-and-prisons-association-icpa>.

⁶⁹ H. Farley & A. Pike, *Engaging Prisoners in Education: Reducing Risk and Recidivism*, 1 JICPA 65-73 (2016).

⁷⁰ KEELE UNIVERSITY, (July 24, 2022), <https://www.keele.ac.uk/research/researchnews/2021/july/incarcerated-children/survival-strategies.php>.

⁷¹ UNITED NATIONS OFFICE ON DRUGS AND CRIME, THE UNITED NATIONS STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS, <https://www.unodc.org/documents/justice-and-prison-reform/>

of criminals inside the prison for a very long time, it sometimes creates certain kinds of psychological damage. Also, lack of mental stimulation within the prison has a degrading effect on the mental health of the prisoners. To avoid these, certain kinds of mental health programs must be organized, which include treatment for substance abuse, psychotherapy, etc. Considering the level of damage it does to the mind of the prisoners, the system of putting prisoners in solitary confinement should also be reconsidered at times.⁷²

The maintenance of good relations between prisoners and their family plays a crucial role in their restoration and rehabilitation process. Prisoners should be allowed to meet their families; that will help them to develop loving sentiments and repair their relationships with their family members. Thus, family members should be allowed to participate in their restoration process.⁷³ This will also give them hope for a better life with their family members once they are released. As a part of their restoration process, the prisoners can be engaged in a variety of constructive works. This will help them to divert their minds from criminal activities and also to learn certain necessary skills that will help them to fetch certain kinds of jobs once they are released.⁷⁴ The prisoners must be allowed to practice their religion inside the prison. This will help him to inculcate mental peace and induce him to divert his mind away from unlawful activities.⁷⁵

Proper restoration of prisoners will help the government to save expenses on prison administration which is currently quite large in India as well as in other countries. In the United States of America, the average rate is somewhere between \$20,000 and \$40,000, whereas in the United Kingdom, it is around 65,000 pounds, and it is \$110,000 in Australia per prisoner every year.⁷⁶ In India, the average expenditure on prisoners per year is around Rs. 29,538.⁷⁷ With the rate at which the number of prisoners is increasing each year, it is important to develop a proper restoration process so that it could cut down the prison administration costs.

Nelson Mandela_Rules-E-book.pdf.

⁷² A. Morin, *The Mental Health Effects of Being in Prison*, VERYWELL MIND (Nov. 21, 2022), <https://www.verywellmind.com/mental-health-effects-of-prison-5071300>.

⁷³ Express Web Desk, *What is the Status of Conjugal Rights for Prisoners in India?*, THE INDIAN EXPRESS (Jan. 25, 2018), <https://indianexpress.com/article/what-is-what-is-the-status-of-conjugal-rights-for-indian-inmates-5038969/>.

⁷⁴ K.D. GAOH, *TEXTBOOK ON THE INDIAN PENAL CODE* (Universal Law Publishing 2009).

⁷⁵ N. Moustafa, *The Right to Free Exercise of Religion in Prisons: How Courts Should Determine Sincerity of Religious Belief under RLUIPA*, 20 MICH. J. RACE & L. 213 (2014).

⁷⁶ Jeanne Hirschberger, *'Imprisonment is Expensive' – Breaking Down the Costs and Impacts Globally*, PENAL REFORM INTERNATIONAL (July 24, 2020), <https://www.penalreform.org/blog/imprisonment-is-expensive-breaking-down-the-costs-and/>.

⁷⁷ R. Dubboda, *How Much is Spent on a Prisoner in India?*, NEWSLAUNDRY (June 22, 2016), <https://www.newslaundry.com/2016/06/22/how-much-is-spent-on-a-prisoner-in-india>.

The prison officials play a very important role in the restoration process of the prisoners because once the accused person enters the prison, he is at the mercy of the various officials that run the prison. So, prison officials should inculcate certain basic qualities that will help in the restoration process. Primarily the officials should make sure that the environment within the prison is conducive to human dignity. He should try to avoid conflicts and fights among the prisoners and prevent prison victimization. The officials should be caring and sympathetic towards the prisoners and treat them like human beings.⁷⁹ He must make sure that when the prisoner leaves the prison, he is a better person who can find his place in society.⁸⁰ He should not hurl abuses at them, bully them or discriminate against them on the basis of caste, religion, language, etc. The officials should develop good relations with the prisoners so that the prisoners don't hesitate to communicate any problems that they are facing with them. One of the serious issues that the officials had to deal with inside the prisons was HIV/AIDS infection among the inmates. Since the prisoner does not get the chance to fulfil their sexual needs with the opposite sex inside the prison many a time, they engage in homosexual activities that lead to the development of HIV infections among them.⁸¹ Thus, the officials must be properly trained to deal with such situations by implementing effective strategies.

B. Restorative Approaches in Jails in Modern India

It is worth mentioning here that the prison conditions in today's world are far better than the ones in the past. But still, a lot of work is yet to be done, especially in the arena of proper treatment of prisoners. Still, Indian prisons are trying their best to live up to that standard of treatment of the prisoners. In matters of restoration of the prisoners, the Indian prison administration is trying its best by providing education, vocational training, industrial work, etc. They are also engaged in certain physical activities like yoga and meditation for their physical as well as mental well-being. All these attitudes arise from the belief that no one is a perpetual criminal, and if given a chance, they can change and be a good member of society. Keeping this view in mind, various prisons in India have started to adopt different kinds of measures as a part of their restoration process. The Central Prison in Kannur, Kerala, has opened a male beauty parlor called Phoenix Freedom Expression.⁸² The Tihar jail has

⁷⁹ K.R.R. Jala, *Effective and Humane Restoration of Prisoners with Special Reference to India*, 3(1) JVVJ 113-127 (2020).

⁸⁰ *Id.*

⁸¹ E. Sagarin, *Prison Homosexuality and its Effect on Post-Prison Sexual Behaviour*, 39(3) PSYCHIATRY 245-257 (1976).

⁸² Express News Service, *Kerala Capital Gets First Beauty Parlour Run by Inmates of Poojapura Central Prison*, *The New Indian Express* (Dec. 17, 2019, 04:26 AM), <https://www.newindianexpress.com/cities/thiruvananthapuram/2019/dec/17/kerala-capital-gets-first-beauty-parlour-run-by-inmates-of-poojapura-central-prison-2077096.html>.

established an automotive manufacturing unit where the inmates work and acquire the necessary skills for future employment. It also engages the inmates in preparing various kinds of products related to bakery, handloom, furniture, textiles, food items, bags, candles, lamps, etc.⁸² the Talaja Jail in Mumbai allows the prisoners to spend time with their near and dear ones without the presence of a glass wall.⁸³ An organic farming venture, as a part of the restoration process, has been planned by the Balasore District Jail in Odisha.⁸⁴ The Telangana Prisons Department organized a Job Mela in 2018, where many released prisoners found various kinds of jobs, which eventually helped them to re-establish themselves in society.⁸⁵ The National Human Rights Commission, in association with the National Institute of Criminology and Forensic Sciences, organized a seminar on 'Prison Reforms' in 2000, where matters regarding the restoration and rehabilitation of prisoners were emphasized.⁸⁶ Similar seminars were also organized by the National Human Rights Commission in 2011 and 2014, where proper restoration of prisoners was one of the important issues that were discussed.⁸⁷

As per the Prison Statistics Report, in the year 2020, a total of more than 82000 prisoners have been educated. Around 40% of them were provided with elementary education, 39% with adult education, and 13.80% of them received higher education.⁸⁸ Besides these, various states have adopted certain individualistic attempts to improve the quality of education for the prisoners, like the state of Andhra Pradesh, which has recruited teachers to impart primary and secondary education to the prisoners and also started graduate and post-graduate courses. It has also established computer labs. Indira Gandhi National Open University (IGNOU) and National Open School (NIOS) are imparting education to prisoners across many states like Andhra Pradesh, Bihar, Assam, Chhattisgarh, Haryana etc. Madhya Pradesh is conducting training to enable

⁸² *Pacific Mall partners with Tihar Jail to promote TJs — "Redefining Life Behind Bars"*, Core Sector Commu/ogut, <https://www.corecommunique.com/pacific-mall-partners-tihar-jail-promote-tjs-redefining-life-behind-bars/> (last visited Jan. 6, 2023).

⁸³ M. Plumber, *Now, Thane, Talaja Prisoners Can Call Family from Jail*, DNA (May 1, 2014, 07:40 AM), <https://www.dnaindia.com/mumbai/report-now-thane-talaja-prisoners-can-call-family-from-jail-1983837>.

⁸⁴ Sibdas Kundu, *Organic Farming in Jail*, THE TELEGRAPH ONLINE (Oct. 25, 2017, 12:00 AM), <https://www.telegraphindia.com/odisha/organic-farming-in-jail/oid/1390323>.

⁸⁵ *Id.*

⁸⁶ *Initiatives on Prison Reforms*, NATIONAL HUMAN RIGHTS COMMISSION, <https://nhrc.nic.in/press-release/initiatives-prison-reforms#:~:text=A%20seminar%20on%20Prison%20Reforms,seminar%20Chairperson%20NHRC%20Justice%20J.S.> (last visited July 25, 2022).

⁸⁷ *National Seminar on Prison Reforms*, NATIONAL HUMAN RIGHTS COMMISSION, <https://nhrc.nic.in/press-release/national-seminar-prison-reforms> (last visited July 17, 2022).

⁸⁸ NATIONAL CRIME RECORDS BUREAU, MINISTRY OF HOME AFFAIRS, PRISON STATISTICS INDIA 2020, New Delhi, 2021, https://ncrb.gov.in/sites/default/files/PSI_2020_08_on_27-12-2021_0.pdf (last visited Dec. 22, 2022).

the prisoners to read and write. Tamil Nadu has started a drive to completely eradicate illiteracy among all prisoners.⁸⁹

In matters of health and sanitation, many states have taken certain serious steps to ensure that prisoners receive proper health care. States like Assam, Nagaland, Tripura, and Sikkim conduct regular checks on T.B. and HIV prisoners. Besides these, Andhra Pradesh has developed hospitals inside its prisons. They have also installed water purifiers to prevent the prisoners from water-borne diseases. They are also organizing medical camps. In order to keep a check on the mental health condition of the prisoners, Union Territories like Jammu and Kashmir, and Delhi have organized psychotherapy sessions. Besides these, many states across India have started to organize Meditation, Yoga, and P.T. sessions for the physical and mental well-being of the prisoners.⁹⁰ Along with these, the inmates are engaged in various kinds of outdoor sports like volleyball, cricket, and badminton and indoor games like ludo, carrom, etc. Some of the prisons are even providing television, radio, and library facilities for their inmates. The state of Assam is also imparting music lessons to its prisoners as a part of their recreation activities. In order to destress the prisoners, many states across India, like Haryana, Andhra Pradesh, Rajasthan, Tripura, Jharkhand, Odisha, etc., are organizing spiritual and cultural activities. Different NGOs and spiritual organizations visit these prisons and conduct lectures on religion and morality and also sing bhajans for the mental well-being of the prisoners.⁹¹

The inmates are also provided with vocational education where they are trained to make various kinds of products, including garments, baskets, brick, dyeing, weaving, phenyl, pickle, notebooks, jute bags, shampoo, Hawai slippers, etc. They are also trained in agriculture, animal husbandry, horticulture, and poultry farming. These products are then sold in the market. In the year 2020, Tamil Nadu had the highest value of products sold in the market, which is followed by Telangana and Bihar. Many states and union territories are also providing telephone and video conferencing facilities to their prisoners. STD facility is provided to inmates of Goa and Bihar. A telephonic system called e-Mulakath was started by the Karnataka state for their prisoners. Creche and Nursery facilities are provided in women's prisons of Andhra Pradesh and Delhi.⁹² In order to integrate and computerize all activities which are related to the prison and prisoner management in the jail, the National Informatics Centre has developed an application suite called the ePrisons.⁹³ Through this suite, important information regarding the prisoners would reach the jail

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ ePrisons, NATIONAL INFORMATICS CENTRE, <https://www.nic.in/products/eprisons/> (last visited Nov. 17, 2022).

authorities in a quick time, and through this application, online grievance redressal and requisition for visits can be made.⁶⁴

In matters of legal aid, 1,45,822 prisoners received it in the year 2020. Delhi ranks highest on the list, followed by Uttar Pradesh and Chhattisgarh. Legal aid clinics have been set up in the prisons of Assam, Gujarat, Haryana, Jharkhand, Sikkim, Tripura, Andaman and Nicobar Islands, etc. As a part of the rehabilitation program, the Tamil Nadu government have started the 'Pattam' (Personality and Attitude Transformation through Therapeutic Assistance and Management) program in order to reform young offender (18-24 years) and help them to reform themselves and reintegrate in the society. Besides legal assistance, financial assistance is also provided to prisoners of Gujarat, Odisha, Rajasthan, etc.⁶⁵

VII. CONCLUSION

Despite significant reforms in the policies and legal measures undertaken by the judicial system in order to restore and rehabilitate the prisoners of India, the ground reality is far from the desired results. Diverse reasons relating to police, judiciary, and, more importantly, the mainstream society's approach towards convicted criminals becomes significant reasons for the unfortunate state of the prisoners. Primarily there is a huge pendency for cases of undertrials which has prolonged the time period in justice delivery. This has resulted in forcing the prisoners to be incarcerated for an indefinite amount of time. As a result of this, most prisons suffer from the problem of overcrowding. In March 2019, when the Covid-19 pandemic started to spread in India, the Supreme Court ordered all the states to decongest their respective prisons as quickly as possible since this disease spreads very rapidly and is also life-threatening. After this, various state governments formed various kinds of committees in order to chalk out plans to decongest their prisons. But surprisingly, the population of prisons has increased drastically. In India, there are a total of 1378 prisons that can accommodate 4,03,739 prisoners.⁶⁶ But as of July 2022, the number raised to 6,22,585, a jump of 155 percent.⁶⁷ Among the states, Haryana has shown the maximum jump, followed by Uttar Pradesh, Delhi, and Maharashtra.⁶⁸ More than 80 percent of these prisoners are pre-trial detainees who have been waiting for their trials for many years.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Sukanya Shanthi, *Over 6 Lakhs in Spaces Meant for 4 Lakhs: Indian Prisons are Seeing Unprecedented Overcrowding*, THE WIRE (July 18, 2022), <https://thewire.in/rights/indian-prisons-congested-overcrowded>.

⁶⁷ *Id.*

⁶⁸ *Id.*

Due to the prolonged process of trials and consequent overcrowding of prisons, first-time offenders are often incarcerated with criminals convicted of serious crimes. The presence of criminal subculture hinders the reformatory approaches, not only on the part of the prison authorities but also for prisoners who seek to be reformed. This is contrary to what Justice Iyer suggested in *L. Vijayakumar v. Public Prosecutor* –

"The need to keep first offenders who were young, however grave the nature of their offense may be, away from the hardened criminals in jail, so as to provide them with opportunities of reforming themselves into better citizens".⁹⁹

Secondly, the atmosphere inside the prisons and police custody is hostile and violent, often leading to police torture while extracting confessions from probable suspects. Violation of the rights of prisoners is a serious barrier, and, in this connection, it is mentioned that prison authorities should be properly trained in the modern version of criminology and psychology. They should be trained to become less violent and adopt a more humane attitude towards the convicts. In various instances, the Supreme Court of India has intervened by issuing writs in order to curtail the illegal actions of the jail authorities, exposing the corruption in the way of the rehabilitation process of the criminals. Thirdly, despite the suggested reforms of the Supreme Court of India on the Prison Act and Jail Manuals, the states have not been able to implement the suggestions due to paucity of funds, lack of political will, lack of infrastructure and planning, etc. Lastly, there is a notion against convicted criminals, which many a time forbids mainstream society to recognize them as a part of society. After the prisoner has served their sentence, they constantly face social stigma and a lack of scope to rehabilitate themselves back into society. Consequently, due to a lack of employment opportunities and social acceptance, they are forced to return back to the world of crime.

However, in light of the above scenario in prisons, measures have been undertaken to change the brutal and inhuman scenario of the prisons in India. The condition and position of the prisons have changed a lot in the past fifty years. Now restoration and rehabilitation of prisoners have become a prime focus of the prison authorities. The restoration process should be conducted with the right attitude and intention in mind. Prison officials should strive to provide prisoners with a proper, humane, and safe environment within the prison that will help them to preserve their physical and mental health. And once this is achieved, they will participate in the various kinds of activities that will be organized for them in prison willingly. Activities as a part of their restoration process should be chosen carefully as per a person's need and

⁹⁹ G.S. Nair, *Problem's and Prospects of Correction and Rehabilitation in India*, 3 CULR 194-214 (1981).

capacity. The training which would be provided to them will help them to find a job once they are released and eventually help them to reintegrate into society. The prisoner should leave the path of crime permanently and start a new life. Prison officials also have an important role to play in this restoration and rehabilitation process. They need to inculcate a humanistic attitude to deal with prisoners, communicate with the prisoners, look into their needs and manage the various kinds of conflict that arise in prison and maintain a healthy and safe environment in prison. As per the World Prison Population List (2021), there are more than eleven million prisoners all around the world, and this ever-increasing number and rapid acceleration of recidivism do question the effectiveness of the various restoration measures that have been applied in prisons both in India and across the world.¹⁰⁰ The United States of America tops the list with more than two million prisoners, followed by China and Brazil.¹⁰¹ India, which has 478,000 prisoners, ranks fourth on that list.¹⁰²

As a part of the restoration and rehabilitation programs, the concept of open prisons can be applied on a wider basis. Recent developments in the correctional field of penology in many Anglo-American countries have made Indian penologists realize that they also cannot deal with crime problems by putting criminals behind bars. Thus, as an alternative to the severe imprisonment system, open prison seemed to be a very suitable alternative. The main objective behind this system is to keep criminals distant from criminal activities after their release and bring them into mainstream society. And keeping this aim in view, they are allowed to engage themselves in a variety of activities and live a normal life. The security is very low in these prisons. In 1949 Uttar Pradesh was the first state in India set up an open-air camp that was attached to the Model Prison at Lucknow. Open-air camps can also be seen in Andhra Pradesh, Gujarat, Punjab, Kerala etc. The open jails will give the prisoners the opportunity to roam around without confined areas. Such prisons will also help to solve the problem of overcrowding of prisons, and since it does not require a lot of security personnel to look after, the cost of maintaining such prisons will also be comparatively lower. Besides this, After-care Programmes are also a primary requisite to determine whether the person has really changed or he is continuing his old lifestyle. Such programs will also help to assess the mental condition of the person and the effectiveness of the rehabilitation programs, and whether such programs require any changes. Along with these, the separation of prisoners from hardcore criminals and juveniles or undertrials, providing proper educational facilities to prisoners inside the prison, good and adequate coordination among the various stakeholders while pronouncing

¹⁰⁰ WORLD PRISON BRIEF, <https://www.prisonstudies.org/> (last visited July 19, 2022).

¹⁰¹ WORLD PRISON POPULATION LIST, WORLD PRISON BRIEF, https://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_13th_edition.pdf (last visited July 19, 2022).

¹⁰² *Id.*

judgments, and granting parole and probation are some of the other methods that can be utilized as a part of the implementation of the reformation and rehabilitation process of the prisoners in Indian prisons. While keeping in mind the fact that restoration and rehabilitation are the main purposes behind the prison administration in India, various states under the aegis of the Union government have adopted various initiatives in order to rehabilitate the inmates.

Very recently, the Ministry of Home Affairs, Government of India, as part of its 'Modernisation of Prison' Project, has decided to provide financial assistance to all the states and union territories of India so that they can improve the conditions of the prisons.¹⁰³ This will include buying modern equipment that will enhance the security of the prisons, installing video conferencing facilities inside the prisons, training prison officials so that they treat the inmates more humanely, appointing counselling experts and psychologists for the prisoners, and providing skills and vocational training for them.¹⁰⁴

The usual response of contemporary societies to crime is that the offender must be punished, and the judicial system of the State bears the responsibility of inflicting that punishment upon the perpetrator. However, the concept of restorative justice is somewhat different from the usual response of society toward crime. The primary focus of restorative justice is more on repairing the damage the offender has caused and less on the question of what should be done with the offender. It addresses questions like who has been harmed, the extent of that damage, how it can be repaired, and who will repair it. However, repair, in this case, refers to moral repair. It seeks to develop empathy among the offenders for those they have harmed. It aims to change the offender's mentality, so much so that he becomes an entirely new person when he leaves the prison.

Moreover, in restoration justice, both the offender and the victim (along with his near and dear ones) get the opportunity to decide the way of reparation. Thus, the victims get to play a part in the system of restorative justice, many a time, helps to overcome his or her trauma of crime. This does not mean that the State has no role to play in this but in this case, the State does not impose its own decisions upon the parties but lets the parties participate in the decision-making process. In connection to this, it can be said that restorative justice emphasizes less on the use of repressive measures to bring about desired changes upon the offenders and more on the efficacy of a face-to-face conversation between the two parties, with the assistance of a facilitator. It usually involves an acceptance from the offender's end of the harm he has

¹⁰³ MINISTRY OF HOME AFFAIRS, https://www.mha.gov.in/sites/default/files/GuidelinesModernisationPrisons_09042022.pdf (last visited Sept. 10, 2022).

¹⁰⁴ *Id.*

caused and what he should do to mend things. In this case, such conferencing usually occurs when the offender is a child, and the offences he has committed are not that serious.

But it is difficult to apply restorative approaches inside the prison for all practical purposes. The prison subculture tends to change the prisoners' identity, which usually pulls them back from participating in such restorative approaches. Moreover, the prisoners themselves undergo such hardships inside the prison itself that it gets increasingly difficult to expect empathy for the harm they have caused to others.

Actually, the process of restoration of prisoners is a very complex one and has various layers. And each layer has to work diligently and honestly to provide the prisoners a better life both within and outside the prison. Not all the responsibilities lie with the Government and prison authorities only. They indeed have the lion's share of responsibility in restoring the prisoners, but prisoners also need to reciprocate their efforts. They also need to inculcate in their minds the desire to be a changed person and lead an honest life.

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INDIA IN DIGITAL AGE - A CRITICAL ANALYSIS OF THE INTERPLAY BETWEEN ARTIFICIAL INTELLIGENCE AND COMPETITION LAW

—Anish Mahapatra*

*"AI is a new digital frontier that will have a profound impact
on the world".*

- WIPO Director General Francis Gurry

ABSTRACT

India is an exceptional market for both domestic and foreign technological firms. The technology and AI accessibility that became a boon for humanity and made human tasks quite easier have also become a threat to the human landscape. While Artificial Intelligence (AI) expanded its horizons by developing a more advanced technological system, AI may potentially lead to issues with economic inequality and technological sovereignty. The fast pace of technological progress has transformed our methods of communication, engagement, and commerce, and the current antitrust framework is trying to find a viable answer to the risks posed by AI algorithms. The question is, is it achievable for the Indian Competition Law and Policy to deal with the difficulties created by AI? The discussion around whether to use Antitrust or Competition Laws to regulate AI is still in its early stages. It's important to note that Competition Law is typically applied to data, but it will be difficult to develop methods for preventing collaboration between self-learning algorithms, especially given the outdated 2002 Act. Arguably, this is the biggest hurdle competition law enforcement has ever had to deal with. Due to the lack of human interaction involved in these algorithms' computations, they are unambiguous and impact positively on the market. The authors

* Student, LL.M, 2022-2024 Admitted Batch, KIIT School of Law.

endeavor to critically analyze the interplay between Competition Law and Artificial Intelligence in the Digital India era with the assistance of pertinent judicial pronouncements.

Keywords: Competition, Competition Law, Artificial Intelligence (AI), Data, Markets.

INTRODUCTION

Competition law is seen as the most important regulation for creating a more effective market structure in the current era. It is crucial to remember that the main aim of the law is to establish a setting where products can be freely bought and sold, protect the rights of individuals, and improve the purchasing power of buyers.¹ This involves improving market efficiency and regulating market conduct. Although the Competition Act of 2022 was created with these objectives in mind, the emergence of Artificial Intelligence (AI) has introduced a more sophisticated technical system.

Upon review of the Competition Act of 2022's Preamble and Statement of Objects and Reasons, it can be inferred that the primary objectives of the act are to eradicate actions that could harm competition, cultivate and maintain market competition, and crucially safeguard the welfare of consumers while upholding the liberty of trade exercised by diverse market players. Essentially, the legislation prioritizes the protection of consumer interests above all else, in addition to mandating the preservation of free trade. The Act's goals include exposing unfair business practices as well as fostering and maintaining market competitiveness. Effective enforcement is necessary axiomatically both to punish anti-competitive behavior and to discourage similar behavior in the future. The CCI has a duty to take immediate action to prevent the conditions that tend to ruin the competition. The CCI must make sure that consumers benefit from the ensuing advantages of robust competition.² As a result, CCI must address the worries about competitiveness brought on by technology advancements, particularly AI's capacity to affect market demand and supply forecasting. AI has the potential to make predetermined behavior suggestions, which could negatively impact the market's spirit of competition.

¹ Gupta, Sumeet, & Udgata, Sankalp, *Rethinking the Contours of Competition Law: The AI Perspective* (Aug. 28, 2019), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3444343_code3073299.pdf?abstractid=3444343&mirid=1 (last accessed on Feb. 19, 2023).

² *Rajasthan Cylinders and Containers Ltd. v. Union of India*, (2020) 16 SCC 615 : 2018 SCC OnLine SC 1718.

The market's own competitors pose the biggest threat to it. In most cases, one of two scenarios—the first of which occurs when a corporation attracts customers by lowering the price to the initially established price—will result in market rivalry. A business that is unable to sell a product for less than the initial price is forced to close as a result. Second, in terms of how a business draws customers by leveraging its service and marketing strategies. From a competitive standpoint, the second scenario was deemed to be the greatest course of action because it provides the best conclusion for the buyer while also assisting the business in maintaining a stronger strategy. In a landmark case³, the main goal of the Competition Law, according to the judgment passed by the Apex Court of India, is to increase purchasing power and wealth while taking special care to avoid any form of anti-competitive behavior in the market. This will allow for the control of state aid to be considered in the future to a significant degree. Generally speaking, the Competition Law of 2002 aims to regulate business agreements by determining if they are in collusion with market fundamentals and guiding principles.

The Competition Act of 2002's main goal is to further the objectives of the Competition Act of 2002 by preventing anti-competitive agreements, outlawing the misuse of dominant positions, and controlling corporate mergers through state aid. The current expansion of AI-related technologies presents a problem for the Act since AI has the potential to foster new market collusion, which is a new means or form of making an anti-competitive agreement.

It would be preferable for the competent authorities to implement regulations by establishing a defined schedule for wrapping up investigations, inquiries, and final dispositions of matters before the Commission in light of the impact of AI in the current circumstances.⁴ The court should permit them to research methods for preventing anti-competitive behavior utilizing machine learning and AI mechanisms until explicit regulations are developed for AI. As businesses often facilitate the formation of cartels, the State must prevent both their formation and any resulting price escalation. Customers should not be subject to the negative effects of unfair competition. AI technology poses challenges to the competitive market and also presents risks such as customer disloyalty. The Competition Act of 2002 effectively defines what a fair market entails. The present competition law system is insufficient to address the anti-trust issues posed by artificial intelligence, likely due to its outdatedness over time.

The dilemma now arises in this situation. The Competition Act of 2002 typically outlines the process to punish an individual who engages in anti-competitive behavior manually. It also mandates the assessment of agreements to

³ CCI v. SAIL, (2010) 10 SCC 744.

⁴ *Id.*

determine whether they violate any specific Competition Laws. Whereas, how can a contract be evaluated in the realm of AI? This could make it easier for many businesses to breach the terms set forth to that end and question the conventional meaning that has been used for who knows how long.

In today's world, although technology and the availability of AI have provided benefits and blessings to humanity, they have also become a threat to the human condition. Similarly, Artificial Intelligence (AI) has expanded its influence to establish a more advanced technological system. The question of whether the Indian Competition Law and Policy can address the challenges posed by AI remains unresolved.

DEVELOPMENT OF ARTIFICIAL INTELLIGENCE IN INDIA

Understanding the nature of human intelligence and creating intelligent artifacts that can complete activities that, when carried out by people, are considered to require intelligence are the two main goals of artificial intelligence (AI). Among rapidly advancing technologies, Artificial Intelligence (AI) has been the most groundbreaking invention and is expected to have a profound impact on the progression of humanity. By aiding humans in their work, AI has the potential to greatly enhance workplace productivity. AI takes on tedious business operations tasks, freeing up human labor to focus on jobs that require creativity and empathy.

AI, to put it simply, is the area of computer science that focuses on making computers into intelligent machines. Artificial intelligence (AI) and related technologies like Machine Learning (ML) are able to simulate human behaviour, provide solutions to complex problems, and duplicate human behaviour through the application of complex algorithms. Indian start-ups are expanding and creating AI solutions in the sectors of education, health, financial services, and other areas to address social issues. Technology is undergoing a significant transformation as a result of AI, which may be used to increase production, succeed, and streamline systems. It has proven to be a ground-breaking technology across the board, not just in technology.

The distinguishing characteristic of technology industries from traditional industries is their technical aspects. The rapid pace of invention drives technology markets, making it a challenge for companies to maintain dominance.⁵

⁵ Assocham, 5th International Conference on Competition Law & Tech Sector, Bangalore, India, Keynote Address by Augustine Peter, Member, CCI (2018), <http://164.100.58.95/sites/default/files/speeches/Key%20Note%20Address%2C%20ASSOCHAM%205th%20International%20Conference%20on%20Competition%20Law%20and%20Tech%20Sector.pdf?download=1> (last accessed on Jan. 27, 2023).

Market power in certain technology markets can be temporary. The fact that digital businesses' business models depend on gathering and analyzing massive amounts of data in real time also allows them to offer a wide range of tailored services. The advantages of technology, however, come with the possibility that certain businesses would use innovation to gain market dominance. Undoubtedly, AI is a technological advancement that poses a threat to market dominance. In general, academic and policy forums are increasingly recognizing the role that algorithms and AI play in collusion. People use algorithms as a shortcut when instructing machines on what to do. At its most basic level, an algorithm tells a computer what to do next by employing "AND," "OR," or "NOT" expressions.⁴ There are four potential cases of algorithm-induced collusion presented in the academic literature:

1. **Messenger** - wherein people use technology and the IT environment to more effectively carry out cartels,
2. **Hub and Spoke** - where a single algorithm is employed by many users to calculate the pricing,
3. **The Predictable Agent** - Pricing algorithms that exhibit algorithm-enhanced conscious parallelism behave as predictable agents and continuously adapt to one another's prices and marketplaces, and
4. **Digital Eye** - When improved market openness caused by AI results in an anti-competitive outcome

Considering the Act's dated status⁵ and obsolete nature, the prevention of cooperation between self-learning algorithms will be difficult. It's possible that this is the biggest obstacle competition law enforcement has ever had to deal with.⁶

India has a rich background when it comes to artificial intelligence. Over the past few decades, the artificial intelligence sector has experienced significant growth. AI systems have become more prevalent in recent years due to their ability to reveal economic value and address social problems. A report was released by the National Institute for Transforming India (NITI) Aayog in 2018⁷ stated that, "AI has the potential to contribute approximately US\$ 957 billion or 15% of the current gross value to the country's economy in 2035." The compelling value proposition of AI technology has played a significant role in the swift adoption of AI in India. AI has the potential to enhance results in key economic sectors. AI will also be essential in providing

⁴ A Beginner's Guide to AI: Algorithms (last accessed on Jan. 27, 2023).

⁵ Competition Act, 2002 (Act No. 12 of 2003).

⁶ Assocham, *supra* note 6.

⁷ NITI AAYOG, AIRAWAT — ESTABLISHING AN AI SPECIFIC CLOUD COMPUTING INFRASTRUCTURE FOR INDIA, (2018), https://www.niti.gov.in/sites/default/files/2020-01/AIRAWAT_Approach_Paper.pdf (last accessed on Jan. 27, 2023).

specialized services, in addition. AI provides the world with many potentials to augment and complement human intelligence, improve people's ability to work and live, and more. Machine learning and AI have had a profound impact on a variety of industries and have completely changed how firms run thanks to their numerous uses.

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Can the issues brought about by AI be effectively dealt with by the Indian Competition Law and Policy? Does the Competition Law completely eliminate the danger posed by AI's exploitation of technicalities?

That still remains an open issue. Hence, while advances in technology made life a little bit easier for people overall, they also greatly facilitated access to the criminal underworld. It has been demonstrated in today's society that a person can be held accountable for a crime committed using technology. The biggest obstacle to a competitive market often comes from the market players themselves. For example, in a market dominated by a single entity, there's a high likelihood that the monopolist may engage in an agreement that impacts the availability, quality, and cost of goods or services, thereby limiting the market's freedom in these areas. The freedom of commerce and practice, which is a basic right guaranteed by the Indian Constitution, should be exercised in a conducive environment throughout the nation. Because of this, the market's sole threat comes from its users. The legislation should not only protect people's rights but also increase the market's purchasing power to build a more effective market economy system for the country in order to abolish these monopolistic situations.

Broadly speaking, there are two situations that give rise to competition in the market. The first is when a company attracts customers by lowering prices to a level that another business, unable to sell at that price, is forced to shut down. The second scenario involves a company using its services and promotional tools to draw in customers. This second scenario is generally considered the most effective method of global competition, as it benefits the customer the most while allowing the corporation to maintain a better strategy.

In a significant legal case, the Indian Supreme Court emphasized that the primary aim of the competition law is to safeguard the purchasing power and financial well-being of consumers, specifically by eliminating any anti-competitive conduct in the market. This is crucial to effectively regulating state assistance. Generally speaking, the 2002 Competition Law makes an effort

to regulate corporate agreements and determine whether they are in collusion with market foundations and guiding principles.¹⁰

The Competition Act of 2002 aims to prevent anti-competitive agreements, stop the exploitation of dominant positions, and control corporate mergers through oversight of state help. However, the increased use of AI-related technologies poses a significant threat to the Act, as these technologies can enable new forms of market collusion and anti-competitive agreements. While the Act provides a process for punishing those who engage in such practices manually, evaluating agreements in the realm of AI poses a new challenge. This could potentially allow businesses to circumvent the existing rules and cast doubt on the traditional definition applied thus far.

The Competition Act of 2002 has encountered difficulties in addressing certain issues since its inception, such as the emergence of new forms of implicit collusion that are difficult for the Act to regulate and curtail on a large scale. This has become apparent following extensive research on artificial intelligence. It has also been discovered that the primary issue with AI and the Act is how companies can determine a reasonable level of caution and effectively navigate the challenges posed by AI algorithmic processes. Additionally, it was discovered that it was known that the competitors' acknowledgment of anti-competitive tactics was a crucial factor to take into account. Hence, the judiciary determined in several instances that,¹¹ "it is the duty of the Competition Commission of India to protect and preserve the contentions and fundamental principles of the Competition Act, 2002." It must therefore guarantee that free market entry is feasible and that the Competition Act of 2002 is upheld in accordance with its legal purpose.¹²

It should be noted that artificial intelligence has the potential to significantly affect the market, introduce new techniques for collusion and anti-competitive behaviour with rapidly evolving technology, and introduce new types of collusion that fall outside the purview of the Competition Act of 2002.

Given these circumstances, it is imperative that the Indian lawmakers and policymakers modify the Competition Act of 2002 to incorporate a specific section on artificial intelligence. Failing to do so would make it impossible to anticipate the adverse impact that AI could have on competition in the market, potentially undermining the free-market approach and driving away current competitors from the marketplace.

¹⁰ CCL, *supra* at 4.

¹¹ Rajasthan Cylinders and Containers Ltd., *supra* at 3.

¹² HENNEMANN, MÖRTZ, REGULATING THE ARTIFICIAL INTELLIGENCE 361-368 (Springer 2020).

JUDICIAL DECISIONS IN RELATION TO COMPETITION WITH LAW WITH ARTIFICIAL INTELLIGENCE

In the landmark judgment of *Matrimony.com* case,¹³ the Competition Commission of India penalized "Google" for engaging in anti-competitive behavior such as abusing its dominant position as the leading player in the internet search sector. According to the source, Google discriminatorily manages its main businesses of search and advertising, which hurts advertisers and ultimately hurts customers. Also, it was argued that Google is unfairly favouring its own partners and services by manually modifying its search results in order to favour those of its vertical partners.

According to reports, Google provides various vertical search services such as YouTube for videos, Google News for news, and Google Maps for mapping, in addition to its search engine. The Competition Commission of India punished "Google" for abusing its monopoly in the online search market. As a result, when an individual searches for a song's name on Google, they may receive links to Google-owned businesses like YouTube or Google Video with videos of that song. The Commission emphasized that the internet's exponential expansion has enabled an ever-expanding range of commercial activities in online markets. The emergence of substantial internet platforms with access to significant personal data and full internet infrastructure could potentially hinder innovation or harm customer welfare, leading to a role where they can influence market players. The CCI recognized a noteworthy example of technological innovation being employed against it.

Section 4(2)(a)(i) of the Act was determined to have been broken by Google's search engine results. The CCI's order states that Google's search algorithm has limited market access for other verticals in addition to giving its own company a prominent position on search results. Additionally, consumers are directed to Google Flight's specialized search result page by the use of an extended chain in Google's commercial units, placing an unfair burden on users of general search services. The CCI has identified potential risks to competition in the internet services platform sector. The use of online search engines and AI systems raises concerns about violating fair competition norms since the coded data is the lubricant for AI's engine, and big data processing often powers AI. The combined impact of AI and data requires regulatory and enforcement bodies to consider the potential implications.

¹³ *Matrimony.com Ltd. v. Google LLC*, 2018 SCC OnLine CCI 1 (India).

According to the CCI, in the 2018's Ride-hailing case,¹⁴ the internet services platform poses potential competition risks. The rise of AI also raises concerns that the use of online search engines and AI systems may violate fair competition standards. Coded data plays a crucial role in powering AI, and big data processing is often used to fuel AI. The combined impact of AI and data can be complex, and regulatory and enforcement bodies must consider this when making decisions.

The CCI disagreed, arguing that even if drivers charged the prices set by algorithms, they did not concur to give the apps the authority to set prices. The CCI stated that taxi aggregators are not organizations for drivers. They were therefore unable to set up fares while riding in vehicles. Also, the CCI came to the conclusion that prices were dynamically priced by considering a number of criteria, such as:

1. Distance;
2. Traffic;
3. The number of riders;
4. and drivers.

As seen with Webtaxi, such algorithmic pricing may be advantageous as well.¹⁵ In this instance, cabs from various businesses used Webtaxi, a booking site in Luxembourg, to create their own taxi charges based on a number of variables. Although the Luxembourg Competition Authority identified it as a "by-object restriction," the agreement was deemed beneficial because the algorithmic pricing, which was based on a decreasing price per kilometer, would consistently be equal to or lower than the metered price and less costly than rivals.

Similarly, in both the Airlines cases,¹⁶ in order to determine whether airfares were being artificially inflated by algorithms, the CCI looked at the pricing of the top Indian airlines twice between 2014 and 2016. The Competition Commission of India investigated whether commonly used software was utilized or deployed based on a mutual understanding, or if such software in any way facilitated collusive pricing.

Just like the case involving ride-hailing, the Competition Commission of India concluded that there was no evidence of collusion. This determination

¹⁴ *Samir Agrawal v. ANI Technologies (P) Ltd.*, 2018 SCC OnLine CCI 86; *Samir Agrawal v. CCI*, 2020 SCC OnLine NCLAT 811.

¹⁵ Luxembourg Competition Authority decision 2018-FO-01, June 7, 2018.

¹⁶ *Shikha Roy v. Jet Airways (India) Ltd.*, 2021 SCC OnLine CCI 31; *Alleged Cartelization in the Airlines Industry, In re*, 2021 SCC OnLine CCI 3.

was bolstered by various factors, such as the use of different pricing software and the customization of the same program based on previous inputs from the pertinent airlines. Also, for the reasons listed below, the CCI decided to clear the airlines:

1. There isn't any price parallelism;
2. The involvement of the relevant airline route analysts in setting airfares; and
3. There is evidence that supply-demand conditions have an impact on pricing.

In one instance, the CCI also brought attention to the airlines' wildly shifting market shares over the purported cartel era.

CCI'S POSITION WITH RESPECT TO ARTIFICIAL INTELLIGENCE

AI poses three main regulatory concerns, which include new forms of collusion and pricing discrimination, market foreclosure, and related exclusionary actions, as well as market foreclosure itself. Income inequality and technological sovereignty concerns may also arise due to AI. The development of technology and automation of computerized systems has brought changes to how we communicate and trade, such as the reliance on technology, the internet, and computers for purchasing products and services. The growth of technology has caused a decrease in high street commerce. Competition enforcement traditionally assumes the existence of human behavior, with court bodies ruling on anti-competitive behavior, including bid rigging, anti-competitive vertical constraints, the exploitation of dominating market position, and mergers that have the potential to significantly stifle competition. While such anti-competitive behavior and collusive agreements may involve human involvement, the rise of pricing algorithms means that it is not necessary for CEOs to actively conspire. Instead, algorithms can independently set prices, and there may not always be an anti-competitive intent. Prices may increase as a result of the business's implementation of pricing algorithms, but the executive members might not be able to predict when, when, or how long this will happen. More subtle forms of collusion constitute a hazard in this environment as opposed to blatant cooperation.¹⁷

¹⁷ Ariel Ezrachi & Maurice E. Stucke, *Artificial Intelligence & Collusion: When Computers Inhibit Competition*, 2017 U. ILL. L. REV. 1775, 1782 (2017), <https://illinoislawreview.org/wp-content/uploads/2017/10/Ezrachi-Stucke.pdf> (last accessed on Feb. 16, 2023).

CONCLUSION

Artificial intelligence is being used more and more frequently, and the work it produces is likewise protected by copyright. Because AI makes it simpler for people and businesses to generate more and more money, it seems clear that the poor world would embrace its adoption even though there are technological challenges. Thus, it is crucial that the Competition Act of 2002 be amended in order to include or put AI wrongs under its purview. As a result, the possibility of a further extension is also disregarded or dropped. India has a lot of laws, which is generally acknowledged; all that is needed is stringent execution of the rules. In order to prevent others from having a chance to do the aforementioned activities to some extent, it is advised that the Competition Act, 2002's requirements be applied more strictly. In addition, it is crucial to take into account if any agreement would have a significant negative impact. If not, the essential right granted inside the agreement will be affected.

The current antitrust framework is seeking a way to address the risks posed by algorithms that are powered by artificial intelligence. In order to create complex algorithms using sensitive data and achieve the intended result, big data juggernauts may use covert competition violations. Because there is no human interaction involved in these algorithms' computations, they are straightforward and have a positive market impact. These intricate problems are not adequately addressed by the current framework of competition law. Because it is particularly difficult to establish responsibility when a decision is made using an automated process that uses sensitive data, algorithms, and self-learning capabilities, it is equally crucial for legislators to foresee the issues presented by AI.

In conclusion, it is yet too soon to judge whether AI will live up to its promise of providing big procompetitive consumer gains or whether it will cause major harm to competition generally. The management of the possible negative effects of AI technology on consumers, firms that might be affected by AI-enabled anti-competitive behaviour, and the economy at large will undoubtedly rely heavily on competition regulation. As a result, it will be vital to coordinate efforts across regulatory and policy disciplines to ensure that regulatory frameworks encourage innovation and procompetitive AI applications without adding extra burdens or impediments to competition.

If market participants are informed about AI applications, the market, which governs every country's economic background, can benefit from the adoption of AI by becoming more efficient. The Competition Law Act has to be updated due to the market sector's accelerating developments, and it is past time to do so. The only approach to handle the difficulties swiftly and successfully is by long-term adoption of technology and digitalization, when it comes to the

market. The market's competitors change along with it, thus the controlling law should adapt along with it as well. Trying to fit the price statute into the current market conditions would only lead to issues. Many of the market's players are completely unaware of the swarm of new fonts that digitalization and artificial intelligence are introducing. These companies ought to be given equal chances to successfully compete. Competition can never be healthy or fair if rivals are fighting over their own shortcomings.

MOST FAVOURED NATION TREATMENT: AN ANALYSIS IN RESPECT TO INTERNATION INVESTMENT REGIME

—Aswini Patro*

ABSTRACT

MFN is essential in order to avoid discrimination. The main aim behind investor protection is the provision of an independent international body to solve disputes between investors and host states in order to avoid any bias. The reasonable apprehension is that dispute resolution is within the intention of parties when submitting to an MFN clause which requires them to provide equal treatment to all member states. It is, by its very nature, a general provision and should be given the widest import absent any intention to the contrary. When read along with BIT it is absolutely clear that the ordinary meaning of the word "treatment" would include the scope dispute settlement unless contrary intended. This was affirmed by the tribunal in Suez v. Argentina¹, which held that "there is no basis to treat the dispute settlement provisions any differently from other treaty provisions for the purpose of the applicability of the MFN clause - by reversing the presumption of applicability — as it constitutes as essential a part of the investment protection regime as any other provision."

INTRODUCTION

The term Most Favoured Nation (MFN) is that if any favour is being extended to one party, then the same has to be unconditionally extended to other parties. When we apply this concept to investment law, we need to see treaties. Every nation enters into treaties with other nations with regard to their investments need after thorough negotiation. So when the negotiation takes

* Dr Aswini Patro, Principal and Professor, IFIM Law School, Bengaluru.

¹ Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic, ICSID Case No. ARB/03/17.

place the clauses are designed specific to the need of different treaties. The background and framework of every treaty differs from nation to nation. Trade relations are defined with every nation in a varied manner. MFN clause states that we can borrow any favourable treatment from another treaty. Now here comes the issue as we have already seen that the treaty is built upon a particular background of negotiations and is based on individual negotiations of every single substantive provision. The major debate today is how far this borrowing of favourable condition extend to. There is no harmony or uniformity of arbitral awards with respect to MFN clauses across all the ICSID tribunals. Some tribunals allow favourable treatment to the extent that it deviates from the original intention of the parties. For instance, suppose one treaty has the original intention to have a waiting period and in another treaty there is no such provision and you can immediately submit for arbitration. So, the investor who has a waiting period can borrow from the treaty who doesn't have a waiting period, this hampers the preliminary negotiation defeating the intentions of the party. This kind of scenario affects the base treaty. Base treaty is the fundamental treaty with which the parties have a dispute and the borrowing treaty is the one from which the favourable treatment is borrowed. From what we can understand is that there is no uniform pattern or principle established with respect to the extent and scope of how far this favourable treatment can go to. The scope of MFN depends completely on the typology of how it's drafted. They can be drafted in way to apply to the entire treaty or to any specific clause of the treaty. They can be extended to dispute resolution mechanism all well. Also, they can be applicable only to the substantive part of the treaty. Under MFN in Investment Treaties, parties are able to borrow favourable conditions from different treaties. Under MFN under Trade Treaties, parties are part of the same trade agreement. WTO being an umbrella agreement, whatever conditions are extended to one has to be extended to the other.

The scope of this article is limited to the scope of the MFN clause under Investment Treaties, its applicability to dispute settlement clause and analysed under Model India BIT. The article is restricted to MFN clause interpretation with respect to borrowing of the dispute settlement clause under Investment Treaties and MFN clause exclusion under the Model India BIT.

MFN clauses in investment treaties were initially employed in the 15th century, and their usage in investment contracts became commonplace in the 17th century. At its conception, the MFN provision was intended to prevent discrimination in international commerce. With the objective of encouraging and preserving international investments, it was then expanded to encompass cross-border investments and related treaties and subsequently in bilateral investment treaties (BITs).² There is no globally accorded definition or standard

² Yannick Radi, *The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the "Trojan Horse"*, 18 EJIL, 757.

form of an MFN clause followed worldwide. The MFN provision may be found in almost all major global investment treaties.

CHARACTERISTICS OF THE MFN CLAUSE

MFN clause has some basic characteristics that we would look into:

- It is a pact-based requirement. Due to this feature, it binds another state only through a treaty.¹
- It acts as a relative obligation and it has no hard and fast rule to what we mean by "no less favourable treatment" that is to be granted. There is no specific definition or scope of MFN clause, it completely depends upon which nation the treaty is with and what is the background of the investment treaty. So what we can deduce is that the host state might agree to give some states the similar treatment which it was earlier giving to some.
- MFN clause can only come into place and be compared when there are like circumstances.

TYPOLGY OF MFN CLAUSE

The ambit of this clause rely completely on the typology of how it's drafted. They can be drafted in way to apply to the entire treaty or to any specific clause of the treaty. They can be extended to dispute resolution mechanism as well. Also they can be applicable only to the substantive part of the treaty. Let's understand how we can draft MFN clauses:

- MFN can be a standalone clause such as "Neither Contracting Party shall subject investments and activities associated to treatment less favorable than that accorded to the investments and associated activities by the investors of any third State."²
- It can be combined with another clause like that of National Treatment such as "Each Contracting Party shall grant to investments made by its own nationals or by the nationals of any third State, in all cases the treatment that is the most favourable to the national concerned."³

758-774 (2007).

¹ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (I), ICSID Case No. ARB/03/29, Award, Aug. 27, 2009, para 307.

² China-Benin BIT, 2004, art. 3.2.

³ Netherlands-Burkina Faso BIT, 2001, art. 3.2.

- Unspecified MFN Clause, whereby the scope of treatment is not provided. In these kind of clauses the coverage of the MFN clause is not defined.
- There are clauses which have language about "like circumstances" whereby the tribunals are to interpret and demarcate upon like circumstances in order to establish the scope of MFN principle. For example "Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords in like situations, to investors of a third country and to their investments ... in its territory."

EXCEPTIONS TO THE MFN CLAUSES

These are basically put in place to limit the scope of MFN. Their aim is to make MFN clause inapplicable to some areas like dispute resolution and will only apply to substantive provisions or some specific substantive provisions. Certain sectors, such as aviation, fisheries, maritime matters (ex. Salvage),⁶ have generally been excluded from MFN. Others add specific exceptions like "...any arrangements for facilitating small scale frontier trade in border area,"⁷ or "...matters related to the acquisition of land property."⁸ It is therefore entirely possible for the signatory countries to grant specific exemptions in order to comply with their national investment policies. There are two major exceptions to which investment contracts apply.

- Benefits or privileges conferred by a state as a result of free trade agreements, customs unions, labour integration markets, or other regional economic accords.⁹
- International agreements dealing with taxation issues partially or completely, also domestic taxation laws at time. The rationale for this is that, in order to minimise double taxation, contracting parties partially waive their ability to tax investors residing in their territory on a mutual basis under double-taxation treaties. MFN treatment rules may result in the so-called "free-rider" problem, which occurs when non-members receive advantages from customs unions, free trade agreements, or economic integration organisation agreements. The following clause highlight the exception: "Issues of taxation on income

⁶ See, for example, the Canada-Peru BIT, 2008, annex II of the Canada List.

⁷ China-Benin BIT, 2004, art. 3.3.c.

⁸ Japan-Kazakhstan BIT, 2014, art. 4.2.a.

⁹ This treatment does not extend, however, to the privileges that one contracting party grants to the nationals or companies of a third State, by virtue of its participation in or association with a free trade area, customs union, common market or any other form of regional economic organisation.

and on capital... for the avoidance of double taxation... In case there is no such double taxation agreement between the Contracting States, the respective national tax law shall be applicable. The treatment granted under this Article shall also not relate to advantages which either Contracting State accords to investors of third States by virtue of a double taxation agreement or other agreements regarding matters of taxation."¹⁰

INTERPRETATION OF MFN BY INVESTMENT TRIBUNALS

As we know, more than the legal provision what is important is how the interpretation of law is done. From what we have understood till now, the typology of MFN and the related interpretation of the clause is the essential crux of it. It decides the scope of the MFN clause and the extent to which 'favourable condition' can be borrowed. The objective of the interpretation is to identify the original meaning of the clause in its context and in the light of object and purpose of the treaty. The main purpose behind it is to interpret the intention of the contracting parties. The rules of interpretation laid down in the Vienna Convention on the Law of Treaties (VCLT) will apply to MFN as well.¹¹ "Article 31 of the Convention states that "a contract shall be interpreted in good faith in accordance with the usual meaning to be given in the context of the terms of the contract and in the light of its object and purpose." With respect to the question of MFN and its applicability to dispute settlement, what can be deciphered is that the tribunals focus on the specific text of the treaty and consider it to the primary way to understand the intention of parties. Under the *ejusdem* principle, an MFN clause "can only attract matters belonging to the same category of subject as that to which the clause itself relates". This is consistent with the VCLT and also with Article 9.1 of the International Law Commission's 1978 Draft Articles on Most-Favoured-Nation Clauses which states that MFN clauses confer "only those rights which fall within the limits of the subject-matter of the clause".

There are various queries and questions on the interpretation of MFN clause but we would focus under this paper on one of the most raised issue i.e. how far can the "favourable treatment" be extended to. The question here is whether the borrowing can be extended along with substantive clauses to procedural clause as well. One of the most controversial issues regarding the notion that whether treatment would include dispute settlement clause. The issue under consideration here is whether the MFN clause permits the inclusion

¹⁰ Egypt-Germany BIT, 2005, art. 3(4).

¹¹ See *National Grid Plc v. Argentine Republic*, para 85, Decision on Jurisdiction, June 20, 2006.

of dispute settlement provisions in BITs with third parties, in the absence of an explicit statement as to whether or not it covers dispute settlement provisions.¹²

There have been conflicting decisions by tribunals on the applicability of MFN principle to dispute settlement clause.

In *Emilio Augustin Maffezini v. Kingdom of Spain*¹³, it was with reference to a dispute brought by an investor of Argentina who had invested in an enterprise of Spain. The objection brought about by Spain in front of ICSID was that there was no jurisdiction of the tribunal pertaining to the fact that there was a pre-condition in the Argentina-Spain BIT to first bring the dispute in Spanish courts for 18 months before approaching international forum. The MFN clause under Argentina-Spain Bit read as: "In all matters subject to this agreement, this treatment shall not be less favourable than that extended by each Party to the investments made in its territory by investors of a third country." On basis of this clause Argentina claimed that the Spain-Chile BIT has no pre-condition of waiting period. As the clause read "in all matters" the tribunal upheld the claim of Argentina.

In *Siemens A.G. v. Argentine Republic*¹⁴, there was a similar situation whereby the German investor has approached the ICSID even though there existed a precondition to approach the domestic courts under the Argentina-Germany BIT. The German investor had relied on the Argentina-Chile BIT which had no such pre-condition. However, the tribunal said that the MFN clause here is narrower than the Maffezini case as it states only to "treatment" of investors and investment, and did not contain "in all matters subject to this agreement". But the judgement by the tribunal was on the ground that "treatment" in its scope included access to dispute settlement procedures. The rationale was that the object of the treaty was to "protect and promote" investments.

In *Plama Consortium Ltd. v. Republic of Bulgaria*¹⁵, there was a different line of thought by the tribunal. The investor here was a Cypriot company and was before the ICSID under the Cyprus-Bulgaria BIT of 1987 & Energy Charter Treaty. It claimed damages suffered by the company due to Bulgaria government. The MFN clause under BIT read as "each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favourable than that accorded to invest-

¹² For instance — there is explicit mention in the UK Model Investment Treaty, art. 3(3) which talks about MFN States "for avoidance of doubts it is confirmed that the treatment provided for in paras (1) and (2) above shall apply to the provisions of arts. 1 to 11 of this agreement". Arts. 8 and 9 provide for dispute settlement.

¹³ *Emilio Augustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/77 (Jan. 25, 2000).

¹⁴ *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8.

¹⁵ *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24.

ments by investors of third state". The investor want to extend the dispute resolution provisions of Bulgaria-Finland BIT which had broad jurisdiction.

The arbitral panel determined that the MFN treatment's 'basket of treatment' and 'self-adaptation' would result in 'the flexibility to select and choose clauses from various BITs. The tribunal considered that, in principle:

"An MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them."

The crucial point to note here is that both Maffezini and Plama recognise the need to distinguish between a valid expansion of rights and benefits under the MFN clause and disruptive treaty-shopping that would be devastating for policy objectives embodied in specific treaty provisions. The tribunal in Plama, said that Maffezini was a special circumstance case and hence cannot be taken as a general rule.

In *Wintershall Aktiengesellschaft v. Argentine Republic*¹⁶, the tribunal referred to the decision in Plama and stated the German investor cannot extend the resolution settlement clause of the Argentina-USA BIT to the Argentina-Germany BIT in order to avoid the 18 months domestic litigation before approach to international forum.

ANALYSIS OF THE ISSUE

Several tribunals despite the criticism, follow the precedence set forth in Maffezini case. While others have disagreed to use Maffezini as a precedent and stick to Plama stating that MFN clause cannot import procedural rules unless specifically and clearly stated in the agreement.

To understand the correct meaning of "treatment" as used in BITs we refer to its "ordinary meaning" in reference to Article 31(1) of VCLT. The main aim behind investor protection is the provision of an independent international body to solve disputes between investors and host states in order to avoid any bias. The reasonable apprehension is that dispute resolution is within the intention of parties when submitting to an MFN clause which requires them to provide equal treatment to all member states. It is, by its very nature, a general provision and should be given the widest import absent any intention to the contrary. When read along with BIT it is absolutely clear that the ordinary meaning of the word "treatment" would include the scope dispute

¹⁶ *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14.

settlement unless contrary intended. This was affirmed by the tribunal in *Suez v. Argentina*¹⁷, which held that “there is no basis to treat the dispute settlement provisions any differently from other treaty provisions for the purpose of the applicability of the MFN clause - by reversing the presumption of applicability — as it constitutes as essential a part of the investment protection regime as any other provision.”

EXCLUSION OF THE MFN CLAUSE UNDER MODEL INDIA BIT

In 2015, The Indian government released a new model BIT (the “Model BIT”) as a framework for future BIT discussions. India plans to cancel 58 of its current BITs later in 2017, the Model BIT restricts investor rights. This is perhaps in response to the large number of investor lawsuits filed against India in recent years. Concerns have been expressed about the Indian model treaty and its seemingly protectionist approach. One of the most controversial and important clause in bilateral investment treaties was the most favored nation clause.

For what is necessary, India's model BIT doesn't include the MFN clause. Article 3.1 does provide regarding how a country should be treated well and given equal treatment but these are nowhere nearer to the MFN clauses that existed earlier. The major reason behind this exclusion was due to the award passed against India in the case of *White Industries v. Republic of India*¹⁸ (“White Industries”) case. The investor was an Australian who argued on the basis of the MFN clause in India-Australia BIT for importing a favourable substantive provision on “effective means of asserting claims and enforcing rights” from India-Kuwait BIT. The claim by the investor was that India did not provide “effective means” for enforcement of the award while it did provide so in the India-Kuwait treaty and hence violated the MFN clause.”UNCITRAL considered that for white industries, an investor could borrow the India-Kuwait “effective assets” provision by relying on the India-Australia MFN BIT. The tribunal overruled India's objection that such borrowing will “fundamentally subvert the carefully negotiated balance of the BIT. The tribunal ruled that this balance can only be upset if the MFN clause is utilised to borrow an advantageous conciliation clause from another BIT. The panel determined that borrowing a favourable substantive provision from a third-party treaty does not undermine the BIT's negotiated balance, but rather fulfils the goal of the MFN clause's inclusion.

¹⁷ *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17.

¹⁸ *White Industries Australia Ltd. v. Republic of India*, Final award, IIC 529 (2011), Nov. 30, 2011.

Investors use MFN as a means to neutralise elements in the basic BIT that aims to reduce investor protection by using MFN clause for referring to a secondary BIT with stronger investor protection. Every country according to the relation with another country decides the level of protection to be given. The removal of this clause from Model BIT of India was done in order to give right to host's state over investor protection. By taking such a step, we have exposed foreign investment to the risk of discrimination. There will be reduction of foreign investments in India owing to this risk involved.

India could have expressly excluded the borrowing of advantageous procedural or material provisions from another country's BIT, unless the host State has adopted or maintains a national measure in accordance with an essential provision of the BIT, such as set out in the EU-Canada Comprehensive Economic and Comprehensive Agreement which is a Commercial agreement.¹⁹

CONCLUSION

After analysing different aspects of our MFN, we have understood how MFN is essential in order to avoid discrimination. We have gone through how MFN clauses are interpreted by tribunals and how they decide on the extent of "favourable treatment" that can be borrowed with a specific reference to dispute resolution clause. From what we can deduce, it is clear that there are various perspectives to the MFN and no such perspective is incorrect by face of it, some have prioritised investor protection while some have given primary importance to host state rights. It is pertinent to note that none of the tribunals have ignored the consent of the state, only where the state has consented to jurisdiction it has borrowed dispute resolution clause. On the other hand they have been quite vocal about exclusive pronouncement requirement with respect to dispute resolution clause applicability on MFN clause. The tribunals have simultaneously aimed at striking a balance between the protection of investors and potential treaty shopping.

¹⁹ EU-Canada Comprehensive Economic and Trade Agreement, art. 8.7(4).

THE CONCEPT OF BUYER'S CARTEL AND UNDERSTANDING IT FROM AN ANTITRUST ISSUE

—Kumar Utsav*

I. INTRODUCTION

The word "cartel" has a broader meaning, and most scholars and lawmakers around the world agree that it should be looked at in the real spirit of competition law, i.e., to have a free and fair market.¹ However, the reality is entirely different in today's world, since the terms have come to reflect unfair and unethical market collusion and have gained a negative meaning over the years.² In today's world, the term "cartel" has a negative connotation and is illegal. The laws around the world treat coordination on some of these variables as 'hard-core' and make them illegal. The Competition Act, 2002³ ("The Act") specifically defines "cartels"⁴ and under the Act, "cartels are presumed to cause an appreciable adverse effect on competition within India (AAEC)."⁵

In terms of competition law, the actions of sellers or suppliers are often closely watched. The Competition Commission of India ("Commission or CCI") like other jurisdictions, has also punished the cartel formed by the sellers on a number of occasions and has treated the cartelization among sellers as illegal.⁶ However, the CCI has not yet been able to establish a jurisprudence on the issues raised by buyers in the Indian market. Till now the Commission has failed to take note of the issues raised by the buyers' cartel and has missed the

* Kumar Utsav, Chanakya National Law University.

¹ Ravindran, M., *Buyer's Cartels: A Concern for Competition Law — Cartels, Monopolies — India*, KIRURANA AND KIRURANA (2022), available at <https://www.mundag.com/india/cartels-monopolies/1156294/buyer39s-cartels-a-concern-for-competition-law> (accessed Feb. 19, 2023).

² *Id.*

³ Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India).

⁴ Competition Act, 2002, §2(x), No. 12, Acts of Parliament, 2003 (India).

⁵ Competition Act, 2002, §3(3), No. 12, Acts of Parliament, 2003 (India).

⁶ See P.K. Krishnan Proprietor, Vinayaka Pharma, Is re, 2015 SCC OnLine CCI 187; International Subscription Agency v. Federation of Publishers' and Booksellers' Asms. in India, 2021 SCC OnLine CCI 4; Chief Materials Manager, South Eastern Railways v. Hindustan Composites Ltd., 2020 SCC OnLine CCI 28.

opportunity to punish the cartels formed by the buyers. This article sets out to prove that the behaviour of purchasers may also require monitoring, particularly if they are banding together to lower the purchase price.

In recent times, especially after the publication of the Competition Law Review Committee Report, a number of authors⁷ have attempted to study the concept of buyers' cartel and the approach of the CCI with respect to investigations against buyers' cartel. These studies have consistently found that the Commission has been reluctant to punish the cartelization by buyers and has, till now, failed to recognize the issues raised by the buyers' cartel. Studies have also shown that the CCI has in some way envisaged that a buyers' cartel can never pose any harm to the competition in the market and thus don't require the same attention as the seller's cartel.⁸ Despite this, the possible approach of CCI in dealing with the issue of buyer cartels is yet to be robustly researched. Further, the issues raised by the buyers' cartel has been studied in detail, however insufficient attention has been paid to the legitimate buyers' group which doesn't harm the competition in the market and how to differentiate it from the buyers' cartel.

This study sets out to answer the following questions, which will prove the author's assertions with regards to the monitoring of the buyers' cartel in the same parlance to the seller's cartel: Can the buyer cartels affect or restrict competition in the market like the seller's cartel? Is there any difference between the buyers' group and the buyers' cartel? What has been the approach of the CCI in dealing with the issues of buyers' cartel over the years, and how have different jurisdictions around the world dealt with the issues raised by buyers' cartel? What should be the ideal approach of the CCI while dealing with the buyers' cartel?

This paper aims to shed light on the issues raised by the buyers' cartel and how the CCI has addressed them. In Part II, the concept of buyers' cartel is explained to highlight the anti-competitive concerns that can be raised by it. This part also explains the concept of a buyer's group and how it differs from a buyer's cartel. In Part III, the author aims to provide an overview of the evolution of the buyers' cartel under the Indian Competition Law. Part IV critically examines the different observations of the Commission with respect to

⁷ See Kochher, Harje, *Buyer's Cartels: An Amendment too Late*, 3(1) INDIAPRASTHA LAW REVIEW (2020), Summer 2020; Kochher, Harje, *Buyers Cartels – Two Differing Opinions by the Competition Commission of India*, 2,1 VSELR 258 (2020); Samal, A., *Buyers' Cartels in Indian Competition Law: Is it Time?*, INDIACORPLAW (2020), available at <https://indiacorplaw.in/2020/04/buyers-cartels-in-indian-competition-law-is-it-time.htm> (accessed Jan. 15, 2023).

⁸ See Makkar, K., *CCI's Self-Devised Disability in Investigation of Buyer's Anti-Competitive Agreement*, Home, CCR, National Law School of India University, Bangalore (2019), available at <https://www.nls.ac.in/post/cci-s-self-devised-disability-in-investigation-of-buyer-s-anti-competitive-agreement> (accessed Jan. 20, 2023).

the buyers' cartel. Further Part V discusses the present scenario with respect to the buyer cartel under the Indian Competition Law. Part VI provides the global framework and approach regarding the buyers' cartel. Part VII suggests several amendments to the existing Competition Law to address the issues raised by buyers' cartel and recommends a change in approach by the Commission with respect to its investigation of buyer cartels. Finally, Part VIII presents the concluding remarks of the author.

II. UNDERSTANDING THE CONCEPT OF BUYER'S CARTEL

Hard-core cartels are regarded as the most extreme infraction of competition law, and it has been established and is generally acknowledged that these cartels harm market competition and consumers' interests. It is for this reason that the "*per se* rule" is applied to hard-core cartels, which means that the collusive action, if proved, will be enough to impose liability.⁹ However, there are also certain agreements that could be logically connected to the legal realisation of cost-saving or productivity-improving efficiency and are thus free from the purview of hard-core cartels. And as they are not treated on par with the hard-core cartels, these agreements are not dealt with on a *per se* basis, and the anti-competitive effects, if any, have to be seen in light of the pro-competitive effects, i.e., a reasoned assessment needs to be done.

A buyer's cartel can be defined as "*a group of purchasers who mutually agree to remove competition from the relevant market by fixing prices or to otherwise influence the behaviour of a supplier*".¹⁰ Such price fixing agreements may arise between purchasers at any point of the production process, including the end-user stage. Thus, the main objective of the buyer's cartel is to stifle the internal market's competition process.¹¹ Generally, in a buyer cartel, the buyers coordinate their actions with respect to their individual interactions with the suppliers in the purchasing market. They try to agree on a buying price first, and then each of the buyers negotiates and tries to buy individually from the suppliers at the agreed-upon price.

Therefore, it can be safely assumed that there is a buyers' cartel when the buyers communicate among themselves about the purchase prices (i.e., the maximum or minimum price and other elements of prices), the terms & conditions, volume and quantity, or any other parameters that affect the competition

⁹ Shahi, G. and Kumar, S., *Harmful or Negative Effects of Cartel*, in *TAXMANN'S INDIAN COMPETITION LAW: A COMPREHENSIVE SECTION-WISE COMMENTARY ON COMPETITION ACT 2002* 22-23 (New Delhi, NCT of Delhi, Taxmann Publications Pvt. Ltd.).

¹⁰ See Ravindran, M., *Buyer's Cartels: A Concern for Competition Law*, *JCLJ* (2022), available at <https://jclj.com/buyers-cartel-a-concern-for-competition-law/> (accessed Feb. 10, 2023).

¹¹ See Judgment of Nov. 7, 2019, *Campine and Campine Recycling v. Commission*, Case T-240/17, ECLI:EU:T:2019:778, para 297.

in the market. Thus, in a buyer cartel, buyers coordinate their actions with one another in light of their individual interactions with suppliers in the buying market.¹²

The International Competition Network (ICN)¹³ while defining "hard-core" cartels has pulled out three common elements across 18 Jurisdictions¹⁴ which are "(a) the existence of an agreement (form); (b) entered between competitors (parties); and (c) to restrict competition (object)". And even in the case of the Buyers Cartel, there's an agreement between the parties, who may or may not be competitors, to restrict competition, i.e., the Buyers Cartel possesses both form and object. Thus, buyers' cartels can also be classified as a form of "hard-core cartels."

So, under competition law, a buyers' cartel is generally considered to be an anticompetitive agreement between buyers, as it can limit competition and limit suppliers' capability to compete on price or quality.¹⁵ Many jurists and authors take a different approach to the theory of a buyers' cartel, arguing that "this is basically a group of independent buyers who come together to negotiate better terms, such as lower prices or higher quality from supplies, which will lead to increased bargaining power and better deals for the buyer and will also result in cost reduction." However, this may not be true in all cases, and instead, because of the buyers' cartel's effective economic power, it may even be possible that the buyers do not pass on the lower costs to their consumers on the selling side, and the undercharges may widen the cartel members' operating margins and yield higher combined economic benefits.¹⁶

Though buyer cartels are less common around the world in terms of enforcement practises, many jurisdictions, like the EU's *Treaty on the Functioning of the European Union* ("TFEU")¹⁷ and the *Sherman Antitrust Act*

¹² See Carstensen, Peter, *Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy*, WILLIAM & MARY LAW REVIEW 1 (2010), available at https://www.researchgate.net/publication/254601907_Buyer_Cartels_Versus_Buying_Groups_Legal_Distinctions_Competitive_Realities_and_Antitrust_Policy (accessed Jan. 26, 2023).

¹³ See DEFINING HARD CORE CARTEL CONDUCT, EFFECTIVE INSTITUTIONS, EFFECTIVE PENALTIES: ICN 4th ANNUAL CONFERENCE: BONN, GERMANY, 6-8 JUNE 2005, 1 Building Blocks for Effective Anti-Cartel Regimes, ICN 4th Annual Conference, Bonn, Germany 6-8 June 2005, ICN Working Group on Cartels, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_BuildingBlocks.pdf (January 2023).

¹⁴ Australia, Brazil, Canada, the European Union, Germany, Hungary, Ireland, Japan, Korea, Mexico, New Zealand, Russia, South Africa, Spain, Switzerland, the United Kingdom, the United States, and Venezuela.

¹⁵ See Carstensen, P., *Buyer Cartels: Defining Appropriate Competition Policy*, COMPETITION POLICY INTERNATIONAL (2021), available at <https://www.competitionpolicyinternational.com/buyer-cartels-defining-appropriate-competition-policy/> (accessed Feb. 18, 2023).

¹⁶ *Id.*

¹⁷ *Consolidated Version of the Treaty on the Functioning of the European Union* [hereinafter TFEU], *Common Rules on Competition, Taxation and Approximation of Laws*, ch. 1, Rules

of 1890,¹⁸ recognises the liability of buyer cartels. In essence, Article 101¹⁹ of the TFEU, which deals with the cartel prohibition, explicitly mentions *price fixing* as a prohibited type of agreement.²⁰ Further, even in the United States, the issue of buyer cartels has also been investigated by courts under the purview of the *Sherman Antitrust Act*²¹ and held them to be illegal. So, under both the EU and U.S. jurisdictions, buyers' cartels are recognised on par with sellers' cartels and are considered *per se* illegal.

A. Buyer's Cartel and Buyer's Group

Although buying cartels is *per se* illegal, there may be a situation where certain cooperation among buyers may bring benefits. Buyers' collaborative efforts are referred to as "joint purchasing agreements of buyer groups." In other words, buyer groups are individuals who use their purchasing activities to gain market advantage.²² This purchasing agreement are given an exception from the cartels and are rather given an assessment and reason of analysis in many jurisdictions.²³ The U.S., courts also allow the formation of buyer groups to enter into a purchasing agreement in line with their bargaining power like in *Balmoral Cinema, Inc. v. Allied Artists Pictures Corp.*,²⁴ the U.S., courts held that "an agreement allocating the rights to movies among theatres is not *per se* illegal."

Further, the European Commission, in its 2011 *Guidelines on horizontal cooperation agreements*²⁵ ('Horizontal Guidelines' or "Guidelines"), has dedicated a specific chapter for analysing the Joint Purchasing Agreements. In this chapter, the commission has specifically recognised that "the purchasing agreements that usually aim at the creation of buying power leading to a lower price or better-quality product or service for consumers"²⁶ Thus, the 2011

on Competition, §1, Rules Applying to Undertakings, 2007 O.J. (C 326), 47 2010 O.J. (C83), 2012 O.J. (C326), available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF> (accessed Jan. 22, 2023).

¹⁸ Sherman Anti-Trust Act, 15 U.S.C., §1, Resolution of Congress, 1890.

¹⁹ TFEU, ch. 1, §1, art. 101(1), 2012, (European Union).

²⁰ TFEU, ch. 1, §1, art. 101(1)(a), 2012, (European Union).

²¹ Sherman Anti-Trust Act, 15 U.S.C., §1, Resolution of Congress, 1890.

²² Ghosal, S., *Buyer Cartels: A Theoretical and Policy Framework*, COMPETITION POLICY INTERNATIONAL, available at <https://www.competitionpolicyinternational.com/wp-content/uploads/2021/06/8-Buyer-Cartels-A-Theoretical-and-Policy-Framework-By-Sayantan-Ghosal.pdf> (accessed Feb. 11, 2023).

²³ See TFEU, art. 101(3).

²⁴ 885 F.2d 313, 316-17 (6th Cir. 1989).

²⁵ *Communication from the Commission – Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-Operation Agreements*, European Commission, Publications Office of the European Union, OJ C 11, 1-72, Jan. 14, 2011, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114\(04\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN) (accessed Jan. 26, 2023).

²⁶ *Id.*

"horizontal guidelines" of the European Union specifically recognise buyer groups or agreements.

The purpose of the Commission's release of these horizontal guidelines is to act as a kind of guide for businesses that are involved in buyer cooperation or purchase agreements so that they can independently assess the agreements to which they want to be parties and determine whether or not they would be considered anti-competitive purchase agreements under TEFU.²⁷ Furthermore, because the Horizontal Guidelines lacked clarity in distinguishing between legitimate buyer groups and buyer cartels, the commission began a review with an evaluation of the Horizontal Guidelines in the year 2019 and eventually published a draft revised Guidelines for Stakeholders' Comment on March 1, 2022²⁸ which is scheduled to be implemented beginning in 2023.

III. EVOLUTION OF THE CONCEPT OF BUYERS' CARTEL UNDER THE INDIAN COMPETITION LAW REGIME

The Raghavan Committee Report (the "Report"), also referred to as the basic foundation or blueprint of the *Competition Act, 2002* (the "Act"), envisioned it as a tool to promote resource allocation, technical advancement, and regulation of economic power concentration, with "consumer welfare" as the ultimate aim of effective competition in the market.²⁹ Thus, the CCI aims to safeguard consumer welfare by achieving market efficiency. The Report emphasised the prevention of market concentration as one of its end goals.

It must be noted that the Act does not explicitly use the term "buyer" anywhere in the Act. However, it can be deduced from a cursory reading of the Act, that the intention of the legislature was to punish even the buyers' cartel. Further, it's important to note that, under the Indian Competition Law Regime, there's no distinction between the term "buyers" and "consumers." The definition of the term "consumer"³⁰ under the Act, encompasses both the purchaser who buys products and services for their personal as well as commercial use or reuse, and any reference to "consumer" signifies both consumers as well as buyers.³¹

²⁷ TFEU, ch. 1, §1, art. 101(1), 2012 (European Union).

²⁸ PUBLIC CONSULTATION ON THE DRAFT REVISED HORIZONTAL BLOCK EXEMPTION REGULATIONS AND HORIZONTAL GUIDELINES, EUROPEAN COMMISSION, Publications Office of the European Union, available at https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en (accessed Feb. 18, 2023).

²⁹ See Makkar, K., *CCI's Self-Devised Disability in Investigation of Buyer's Anti-Competitive Agreement*, Home, CCR, NATIONAL LAW SCHOOL OF INDIA UNIVERSITY, BANGALORE (2019), available at <https://www.ccr.nls.ac.in/post/cci-s-self-devised-disability-in-investigation-of-buyer-s-anti-competitive-agreement> (accessed Jan. 20, 2023).

³⁰ Competition Act, 2002, §2(f), No. 12, Acts of Parliament, 2003 (India).

³¹ Makkar, *supra* note 8, at 2.

The Raghavan Committee Report, clearly states that horizontal agreements regarding fixing prices and limiting or controlling are often presumed to be anti-competitive³² and therefore don't need the "rule of reason" test.³³ Thus, the intention of the Act was to treat buyers on par with sellers under the Competition Law. This intent to punish even purchasers who engage into a purchase price agreement or enter into an agreement to limit or control production can be seen in Section 3 of the Act, which prohibits Anti-Competitive Agreements.³⁴

Further, Section 3(3) of the Act that deals with horizontal agreements, lists out those agreements that are deemed to have an "appreciable adverse effect on competition" ("AAEC") within India.³⁵ These agreements are also referred to as "hard-core" cartels. It would not be wrong to say that AAEC is the pillar on which Section 3 of the Act stands. Under Section 3 of the Act, this AAEC serves as the criterion for differentiating between horizontal³⁶ and vertical³⁷ agreements. While these horizontal agreements,³⁸ also referred to as "hard-core" cartels, are presumed to cause AAEC (i.e., the *per se* approach), the same is not the case with vertical agreements, which mandate a reasoned analysis (i.e., the rule of reason approach).³⁹ Further, it's important to point out that the Competition Act does not define the phrase "AAEC", but Section 19(3) of the Act lists out the elements to determine whether an agreement causes AAEC or not.⁴⁰

Section 3(3)(a) of the Act stipulates that "any agreement entered into between persons or associations of persons, or decisions taken by associations of persons, including cartels, engaged in identical or similar trade of goods or provisions of services that directly or indirectly determine purchase or sale prices shall be presumed to have an AAEC." The text makes it quite evident that legislators intended to include anticompetitive agreements made by purchasers that directly or indirectly establish the purchase price on the same footing as the anti-competitive agreements entered by sellers. Thus, this section suggests that the cartels whether formed by a buyer or seller, will have an AAEC in the relevant market.

³² Raghavan Committee Report, para 4.3.6.

³³ The Report makes it clear that all agreements that directly or indirectly determine the purchase price or the sale price are often presumed to be anti-competitive. Raghavan Committee Report 4.3.7.

³⁴ Competition Act, 2002, §3, No. 12, Acts of Parliament, 2003 (India).

³⁵ Competition Act, 2002, §3(3), No. 12, Acts of Parliament, 2003 (India).

³⁶ Competition Act, 2002, §3(3), No. 12, Acts of Parliament, 2003 (India).

³⁷ Competition Act, 2002, §3(4), No. 12, Acts of Parliament, 2003 (India).

³⁸ Competition Act, 2002, §3(3), No. 12, Acts of Parliament, 2003 (India).

³⁹ Competition Act, 2002, §3(4), No. 12, Acts of Parliament, 2003 (India).

⁴⁰ Competition Act, 2002, §19(3), No. 12, Acts of Parliament, 2003 (India).

Further Section 3(1) of the Act, when read with Section 3(3)(a) of the Act, also supports the above-mentioned argument that the buyers' cartel is recognized under the Competition Law and is to be treated in the same way as a sellers' cartel. Also, if that was not the case, then there was no need for the legislator to specifically incorporate the words "purchase"⁴¹ and "acquisition of goods"⁴² in Section 3 of the Act, which concerns Anti-competitive agreements and cartels.

Hence, the legislature, through this Act, wished to promote healthy competition not only among the sellers, as has been the normal case, but also among the buyers, and for this, they tried to incorporate provisions that prohibit the agreements that the buyers may enter to determine the purchase price or impair the bidding process. Though the Competition Commission of India ("CCI or Commission") has punished the anti-competitive agreements entered into by sellers' cartels on various occasions,⁴³ it has failed to take note of the issues raised by buyer' cartels over the years and has instead self-presumed that the buyers' cartel is something that is alien to the Competition Act.⁴⁴

The Commission though not specifically but dealt with the case of buyer cartels for the first time in *Pandrol Rahee Technologies Case*.⁴⁵ ("Pandrol") In this case, the CCI has to deal with the issues raised by the procurers/buyers. In this case, the informant,⁴⁶ who was a leading designer and manufacturer of rail fastening systems, alleged anti-competitive conduct by DMRC and four other opposing parties by virtue of anti-competitive agreements and abuse of dominance. One of the main arguments given by the Commission to rule out the applicability of Section 3(3) of the Act to the buyers' cartel was that the definition of "trade"⁴⁷ doesn't include the word "acquisition" as mentioned in the definition of "enterprise"⁴⁸ and without that the purchasing activity of a consumer will not come under the definition of trade. The CCI in this case observed that:

'Section 3(3) concerns agreements between persons, etc. engaged in identical or similar trade.' The word 'trade' has

⁴¹ Competition Act, 2002, §3(3)(a), No. 12, Acts of Parliament, 2003 (India).

⁴² Competition Act, 2002, §3(1), No. 12, Acts of Parliament, 2003 (India).

⁴³ See *In Re Ministry of Corporate Affairs*, Reference Case No. 08 of 2013, Order dt. Aug. 31, 2018, where the CCI imposed penalties on tyre manufacturers for indulging in cartelisation by acting in concert to increase the prices of cross ply/bias tyres variants sold by each of them, which was in contraventions to ss. 3(3)(a) and 3(3)(b) of the Act.

⁴⁴ See *Pandrol Rahee Technologies (P) Ltd. v. DMRC Ltd.*, 2011 SCC OnLine CCI 64, available at <https://www.cci.gov.in/antitrust/orders/details/425/0> (India).

⁴⁵ 2011 SCC OnLine CCI 64.

⁴⁶ Under the Indian competition law, an information provider (i.e. an informant) has the status of the "party" to proceedings before the CCI.

⁴⁷ Competition Act, 2002, §2(v), No. 12, Acts of Parliament, 2003 (India).

⁴⁸ Competition Act, 2002, §2(A), No. 12, Acts of Parliament, 2003 (India).

been defined in Section 2(x) as "any trade, business industry, profession, or occupation relating to the production, supply, distribution, storage, or control of goods and includes the provision of any services." The word 'acquisition' mentioned in the definition of an "enterprise" in Section 2 (h) is not included here. As can be seen, the purchasing activity of a consumer does not qualify as "trade." Therefore, Section 3 (3) is not applicable to a consumer".⁴⁹ (emphasis supplied)

With this remark, the CCI effectively ruled out the application of Section 3(3) to consumers. Further, the CCI observed that the procurer in the instant case was a consumer (i.e., a buyer)⁵⁰, and a consumer cannot cause harm to the competition, and to substantiate this reasoning they gave the argument that since S. 19(3) of the Act indicates harm to the consumers, so it cannot be assumed that a consumer can indicate harm to the consumers. This observation by the Commission is erroneous, and a critical analysis of this judgement will be done in the next chapter.

After some eight years, the CCI has to again deal with the issue of buyers' cartels in the case of *Indian Oil Corp. & Others (XYZ)*.⁵¹ In this case, the informant, who operates a business that offers the services of tank trucks for the transportation of bulk LPG, alleged that the Ops (opposing parties) in this case entered into a joint tendering/collusive tendering agreements and these agreements were in nature of price fixing and thus violated Section 3(3)(a) of the Act.⁵²

Surprisingly, the Commission observed in this case that, S. 3(1) and S. 3(3)(a) of the Act covers buyers' cartel also. This comes as a surprise as the Commission has observed for the first time observed that the buyers' cartel is covered under the above provisions of the Act. To reach the above conclusion, the Commission considered the words "acquisition" and "purchase" used in S. 3(1) and S. 3(3)(a) of the Act, respectively, raising the prospect that even buyers' cartels can be punished under the existing competition law regime. However, the commission added a cautionary note in the following paragraph, stating that:

"Though the Act covers buyers' cartel under Section 3(1) read with Section 3(3) of the Act, treating buyers'

⁴⁹ 2011 SCC OnLine CCI 64, para 40.

⁵⁰ As mentioned earlier, a consumer will also include buyer. So, any reference to consumer will signify not only end consumers but also immediate consumers i.e., buyers.

⁵¹ XYZ v. Indian Oil Corp. Ltd., 2018 SCC OnLine CCI 55, available at <https://www.cci.gov.in/antitrust/orders/details/1026/0>.

⁵² S. 3(3)(a) of the Competition Act, prohibits agreements that directly or indirectly determines purchase or sale prices.

arrangements or cartel on par with sellers' cartel may not be appropriate, and for assessment of such cases, it is imperative to first look at potential theories of harm and then the conditions necessary for infliction of competitive harm." (emphasis added)

Thus, with this observation, the Commission effectively ruled that buyers' cartels cannot be assumed to have an AAEC i.e., they are not *per se* illegal and instead they have to be seen by the rule of reasoning approach.

IV. TWO DIFFERING OPINIONS BY CCI IN THE CASE OF BUYERS' CARTEL: A CRITICAL ANALYSIS OF CCI'S DECISION IN PANDROL AND XYZ CASE

The primary rule of construction for any laws passed by the parliament is that it should be construed in accordance with the intention expressed in the Act itself.³³ A statute is an edict³⁴ of the Legislature, and in *Hiralal Rattanlal v. State of U.P.*³⁵, the Hon'ble Supreme Court that "*the primary source for inferring the legislative intent rests in the bare text of the statute.*" The author believes that the CCI was wrong in ruling out the applicability of Section 3(3) on consumers, i.e., buyers, in the Pandrol Case.

It's a settled law that whenever a dispute about the interpretation of a certain statute's provision arises, then the statute must be read in its context i.e., the court must take into account "*the statute as a whole, the previous state of the law, other statutes in pari materia, the general scope of the statute, and the mischief that it was intended to remedy.*"³⁶ The Competition Act was created in order to combat anti-competitive practises and foster and promote market competition,³⁷ and thus if an action of a buyer affects competition in the market, then it must be addressed at the earliest. Further, the intention of the Act is also clear from the objective of the Act³⁸ which is to prevent the activities that have an AAEC. Thus, as it's clear from the previous chapters, the Buyers Cartel can also distort the competition in the market, so the Commission's observation in the Pandrol case was wrong in assuming that buyers cannot produce a harmful effect on competition.

³³ CRAIG ON STATUTE LAW (7th ed.) pp. 65-66.

³⁴ *Vishnu Pratap Sugar Works (P) Ltd. v. Chief Inspector of Stamp*, 1967 SCC OnLine SC 287 : AIR 1968 SC 102 p 104, (1967) 3 SCR 920; *ICAI v. Price Waterhouse*, (1997) 6 SCC 312 : AIR 1998 SC 74, p 90; *Padma Sundari Rao v. State of T.N.*, (2002) 3 SCC 533 : AIR 2002 SC 1334, p 1346, (2002) 255 ITR 147.

³⁵ (1973) 1 SCC 216 : AIR 1973 SC 1034.

³⁶ See *R.S. Raghunath v. State of Karnataka*, (1992) 1 SCC 335 : AIR 1992 SC 81, p 89.

³⁷ Competition Act, 2002, §18, No. 12, Acts of Parliament, 2003 (India).

³⁸ Competition Act, 2002, Statement of Objects and Reasons of Amendment Act, No. 39, Acts of Parliament, 2007 (India).

Further, in *Khoday Distilleries Ltd. v. State of Karnataka*,⁵⁹ it has held that the term "trade" generally means "exchange of goods for money." And the definition of "trade"⁶⁰ under the Act is not an exclusive definition, and the Commission, while interpreting similar or identical trade of goods mentioned in Section 3(3) of the Act, should have given it a wider meaning. However, the Commission was completely wrong in ruling out the applicability of S. 3(3) of the Act, on the ground that the term "trade" under the Act doesn't include "acquisition." Thus, the Commission, through this case, scored a self-goal and also injured themselves while attempting the goal.

The CCI, after a considerable gap of eight years in the XYZ Case rightly observed that Section 3(1) and Section 3(3)(a) cover even buyers' cartel and thus corrected its earlier position of not punishing the anti-competitive agreements by buyer's cartel. The CCI in this case, by making reference to the words "acquisition" in S. 3(1) and "purchase" in S. 3(3)(a) of the Act as a ground to recognize the buyers' cartel in a way has given the "true meaning" of the statutory provision. Thus, the Pandrol case was to a certain extent overruled by the Commission in this XYZ case.

However, the author believes that the Commission's observation in the very next paragraph of the XYZ case that the buyers' cartel may not be treated on par with the sellers' cartel as it may affect the buyers' bargaining power⁶¹ is again wrong. In some ways, this observation has ruled that the buyers' cartel is not a "hard-core" cartel and thus does not require per se treatment. However, the author believes that the observation is erroneous, and as discussed in the above-mentioned chapters, buyer cartels should also be treated as "hard-core" cartels, and their actions can also have an AAEC in the market.

Further, S. 3(3)(a) of the Act clearly stipulates that any agreement that determines purchase price shall be presumed to have AAEC and thus the observation of CCI that buyers' cartel cannot be treated in par with sellers' cartel is flawed, especially when the Commission has referred to this very section in this case to recognize the concept of buyers' cartel. This observation is similar to its earlier observation in the Pandrol case, in which it observed that the consumers cannot cause any competitive harm.

Thus, in the present scenario, we have two very different opinions from CCI with respect to the buyers' cartel and though the opinion in the XYZ case in a way cleared some doubts, it's still not enough. The observations of CCI in these two cases have been distinctly varied, and thus these two cases call upon the legislators to address this issue.

⁵⁹ (1995) 1 SCC 374.

⁶⁰ Competition Act, 2002, §2(x), No. 12, Acts of Parliament, 2003 (India).

⁶¹ XYZ v. Indian Oil Corpn. Ltd., 2018 SCC OnLine CCI 55, para 40.

V. THE PRESENT SCENARIO OF BUYER'S CARTEL UNDER THE INDIAN COMPETITION LAW REGIME

The Government of India in the year 2018 formed the Competition Law Review Committee⁶² ("the CLRC") to see if the present provisions are in sync with the present need or not (i.e., in view of the evolving market condition). The CLRC, which was meant to produce its findings three months after its first meeting,⁶³ did so in August 2019.⁶⁴ The CLRC was aware of the observations of the Commission in Pandrol case, and keeping in mind the hard times faced by the CCI in recognizing the buyers' cartel under the Act, the CLRC suggested in its Report⁶⁵ that the word "buyers" be included in the Act's definition of "cartel".⁶⁶ As per the CLRC, this express inclusion will not only draw attention to the cartelization practises on the buyer's side of the market but will also serve as the express recognition of such buyers' cartel within the ambit of the Competition Act.⁶⁷

The CLRC also reflected on the recognition of buyers' cartel in the US and EU jurisdictions and further recommended that, for explicit recognition of buyers' cartel certain amendments be made to the provision of S. 27(b) and S. 46 of the Act.⁶⁸ Thus, the CLRC in its report recommended the addition of "buyer" to every provision of the Act, that concerns cartel. So, the CLRC, through its recommendations, tried its best to remove the ambiguity in the Act related to the buyers' cartel. Subsequently, the Ministry of Corporate Affairs (MCA), based on the CLRC Report, published the Draft Competition Law (Amendment) Bill, 2020 ("Draft Bill")⁶⁹ and invited public suggestions.⁷⁰ The Draft Bill suggested significant changes to the legislation and also incorporated changes with respect to buyers' cartel in the provision as recommended by the CLRC Report. The Draft Bill provided for the substitution of the earlier

⁶² MINISTRY OF CORPORATE AFFAIRS, PRESS INFORMATION BUREAU, GOVERNMENT CONSTITUTES COMPETITION LAW REVIEW COMMITTEE TO REVIEW THE COMPETITION ACT, Sept. 30, 2018, available at <https://piib.gov.in/news/PrintRelease.aspx?relid=183835> (accessed Jan. 11, 2023).

⁶³ *Id.*

⁶⁴ MINISTRY OF CORPORATE AFFAIRS, PRESS INFORMATION BUREAU, REPORT OF THE COMPETITION LAW REVIEW COMMITTEE SUBMITTED TO UNION FINANCE AND CORPORATE AFFAIRS MINISTER, Aug. 14, 2019, available at <https://piib.gov.in/news/PrintRelease.aspx?relid=192629> (accessed Jan. 17, 2023).

⁶⁵ COMPETITION LAW REVIEW COMMITTEE REPORT (2019), available at <https://www.jes.gov.in/pdfs/Report-Competition-CLRC.pdf> (accessed Jan. 11, 2023).

⁶⁶ COMPETITION LAW REVIEW COMMITTEE REPORT, ch. 3: Definitions, 2, Cartel, para 2.1.

⁶⁷ COMPETITION LAW REVIEW COMMITTEE REPORT, ch. 3: Definitions, 2, Cartel, para 2.3.

⁶⁸ COMPETITION LAW REVIEW COMMITTEE REPORT, ch. 3: Definitions, 2, Cartel, para 2.4.

⁶⁹ MINISTRY OF CORPORATE AFFAIRS, DRAFT COMPETITION LAW (AMENDMENT) BILL, 2020, Feb. 12, 2020, available at https://www.taxmanagementindia.com/file_folder/folder_5/Draft_Competition_Amendment_Bill_2020.pdf.

⁷⁰ MINISTRY OF CORPORATE AFFAIRS (COMPETITION SECTION), GOVERNMENT OF INDIA, EXTENSION OF DATES FOR PUBLIC COMMENTS ON THE DRAFT COMPETITION (AMENDMENT) BILL, 2020, available at https://www.mca.gov.in/Ministry/pdf/Amendment_06032020.pdf (accessed Jan. 22, 2023).

definition of the cartel⁷¹ with a new definition that specifically includes the term 'buyers'⁷², thereby recognizing the buyers' cartel. Further in line with this substitution, the Draft Bill also provided for amendments to Sections 27⁷³ and 46⁷⁴ and included the term "buyer" in both sections, wherever required. Thus, the Draft Bill in a way tried its best to recognize the issue posed by the buyers' cartel by specifically adding the word 'buyer' in every provision related to "cartels" under the Act.⁷⁵ Thus, through this Act, it was sincerely hoped that the Draft Bill, as far as it addresses 'buyers' cartel' would become the law of the land.

⁷¹ Competition Act, 2002, §2(c), No. 12, Acts of Parliament, 2003 (India).

⁷² Draft Competition (Amendment) Bill, 2020, "(b) for cl. (c), the following clause shall be substituted, namely:— (c) 'cartel' includes an association of producers, buyers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit or control or attempt to limit or control the production, distribution, sale or price of, or, trade in goods or provision of services;" (emphasis added).

⁷³ Draft Competition (Amendment) Bill, 2020, "In s. 27 of the principal Act, —

"(b) in clause (b), in the proviso, after the words 'seller, distributor', the words 'buyer' shall be inserted, and, after the words 'of its turnover', the words 'or income, as the case maybe,' shall be inserted." (emphasis added)

⁷⁴ Draft Competition (Amendment) Bill, 2020, "In s. 46 of the principal Act —

In sub-s. (1) after the word "trader", at both places where it occurs, the word, "buyer" shall be inserted; and for the words "it may deem fit", the words "may be specified in regulations" shall be substituted.

In the second proviso to sub-s. (1), after the word "trader", the word, "buyer" shall be inserted.

In the fourth proviso to sub-s. (1), after the word "trader", in both places where it occurs, the word, "buyer" shall be inserted, and, for the word "offence", the word "contravention" shall be substituted.

(d) after sub-s. (1) of the principal Act, the following sub-sections shall be inserted namely: —

(2) The Commission may allow a producer, seller, distributor, trader, buyer or service provider included in the cartel, to withdraw its application for lesser penalty under this section, in such manner and prior to such time as may be specified:

Provided that notwithstanding the withdrawal, the Director General and the Commission shall be entitled to use for the purposes of this Act, any evidence submitted by a producer, seller, distributor, trader, buyer or service provider in its application for lesser penalty, save and except its admission.

(3) Where during the course of the investigation, a producer, seller, distributor, trader, buyer or service provider who has disclosed a cartel under sub-s. (1), makes a full, true and vital disclosure under sub-s. (1) with respect to another cartel in which it is alleged to have violated s. 3, which enables the Commission to form a prima facie opinion under sub-s. (1) of s. 26 that there exists another cartel, then the Commission may impose upon such producer, seller, distributor, trader, buyer or service provider a lesser penalty as may be specified in regulations, in respect of the cartel already being investigated, without prejudice to the producer, seller, distributor, trader, buyer or service provider obtaining lesser penalty under sub-s. (1) regarding the newly disclosed cartel." (emphasis added).

⁷⁵ The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India).

However, to everyone's surprise, the Competition (Amendment) Bill 2022⁷⁶, ("Amendment Bill 2022") which was tabled in the Lok Sabha on August 5, 2022, dropped all those provisions of Draft Bill which dealt with the issues of buyers' cartel. The Amendment Bill 2022 was further referred to the Standing Committee on Finance, and based on the recommendations made by the parliamentary panel in its report⁷⁷, the government has tweaked its proposed amendments to India's competition law and is set to introduce the Competition Amendment Bill (2023 Bill) in parliament.⁷⁸ Furthermore, neither the Standing Committee nor the Competition Amendment Bill 2023 attempted to address the issue of buyers' cartel and now again we're again back to the situation of XYZ Case. There was no reason given by the government as to what made the government suddenly drop the provisions from the Amendment Bill 2022, even when the amendment was proposed by the CLRC Committee. Further, even the Standing Committee did not deliberate upon this issue.

Hence again, the Commission has taken a step backward in terms of buyers' cartel and thus the XYZ Case is the law of the land for now. Also, the buyers' cartel cannot be treated on the same footing as the sellers' cartel, as has been observed by the Commission⁷⁹, so there are very limited odds that the Commission will change its stance towards the buyers' cartel. Further, it's also important to note that the CLRC, in its report while referring to this XYZ case, observed that the "Commission has recognized buyers' cartel in its decisional practice"⁸⁰, however the Commission is yet to punish a buyers' cartel. Thus, it would not be wrong to say that the Commission, over the years, has not only missed the chance to punish the buyers' cartel but has also not clearly clarified what its approach is with regards to the buyers cartel.

⁷⁶ Competition (Amendment) Bill, 2022, Lok Sabha, Bill No. 185 of 2022, (India), available at http://164.100.47.4/BillsTexts/LSBillsTexts/Asintroduced/185_2022_LS_Eng.pdf (accessed January 2023).

⁷⁷ STANDING COMMITTEE ON FINANCE, SEVENTEENTH LOK SABHA, REPORT ON THE COMPETITION (AMENDMENT) BILL, 2022 (MINISTRY OF CORPORATE AFFAIRS, 52ND REPORT), available at [https://prsindia.org/files/bills_acts/bills_parliament/2022/SC%20Report_Competition%20\(A\)%20Bill%202022.pdf](https://prsindia.org/files/bills_acts/bills_parliament/2022/SC%20Report_Competition%20(A)%20Bill%202022.pdf) (accessed Feb. 18, 2023).

⁷⁸ Agarwal, V., *Competition Law Amendments: of Penalties and Misses, Mkt.*, available at <https://www.livemint.com/opinion/columns/competition-law-amendments-of-penalties-and-misses-11676313277888.html> (accessed Feb. 18, 2023).

⁷⁹ XYZ v. Indian Oil Corpn. Ltd., 2018 SCC OnLine CC1 55.

⁸⁰ Raghavan Committee Report, para 2.1.

VI. POSITION OF EUROPEAN UNION AND THE UNITED STATES OF AMERICA WITH RESPECT TO THE BUYER'S CARTEL

A. European Union

As discussed above, the Competition Law of the European Union ("Commission")⁸¹ treats the buyers' cartel on the same footing as the sellers' cartel.⁸² Thus, like sellers' cartel, buyers' cartel are also given *by object* treatment i.e., they are illegal.⁸³ This means that the Commission is not required to show an effect on competition, either upstream or downstream. Therefore, practically speaking, the Commission need not establish any relevant markets in such circumstances, nor need they take into account the market shares of the purchasers or sellers who are involved. And since the buyer cartels "*involve inherent restrictions on competition in the internal market*,"⁸⁴ it is established law under Article 101 of the TFEU that it exhibits a considerable level of harm by itself, and thus it is not necessary to affect its effect. Therefore, practically speaking, the commission need not identify any *relevant market* in such circumstances or take into account the *market shares* of the concerned buyers or sellers.⁸⁵ Further, the Commission also punishes a buyer for abuse of its dominant position⁸⁶ under Article 102 of the TFEU.⁸⁷

The concept of 'buyers' cartel' is not new under the EU Law, and the Commission has already punished a number of buyers' cartel in Spain and France, some two decades ago, for limiting maximum tobacco purchase prices given to growers or packers. In the *Spanish raw tobacco*⁸⁸ case, the Commission punished five Spanish raw tobacco processing companies a total of 20 million euros for conspiring on the prices paid to and quantities purchased from tobacco growers in Spain. In a subsequent appeal, the General Court of the European Commission (the "General Court") confirmed the Commission's ruling but lessened some of the fines.⁸⁹ Further they appealed

⁸¹ *Consolidated Version of the Treaty on the Functioning of the European Union* [hereinafter TFEU], *Common Rules on Competition, Taxation and Approximation of Laws*, ch. 1: Rules on Competition, §1: Rules Applying to Undertakings, 2007 O.J. (C 326), 47 2010 O.J. (C83), 2012 O.J. (C326), available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002E/TXT&format=PDF> (accessed Jan. 22, 2023).

⁸² TFEU, ch. 1, §1, art. 101(1)(a), 2012, (European Union).

⁸³ TFEU, ch. 1, §1, art. 101(1), 2012, (European Union).

⁸⁴ TFEU, ch. 1, §1, art. 101(2), 2012, (European Union).

⁸⁵ TFEU, ch. 1, §1, art. 101(1), 2012, (European Union).

⁸⁶ *British Airways Plc v. Commission of the European Communities*, Case C-95/04 P, Judgment of the Court (Third Chamber) of Mar. 15, 2007, ECLI:EU:C:2007:166, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?url=CELEX%3A62004CJ0095>.

⁸⁷ TFEU, ch. 1, §1, art. 102.

⁸⁸ *Raw Tobacco Spain*, AT. 38238, Commission decision dt. October 20, 2004, available at https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_38238.

⁸⁹ *Deltafina v. Commission*, Case T-29/05, ECLI:EU:T:2010:355, Judgment dt. Sept. 8, 2010; *Alliance One International v. Commission*, Case T-24/05, ECLI:EU:T:2010:453, Judgment dt.

against the decision to the Court of Justice, which upheld all the decisions of the General Court.⁹⁰ In the Italy Case,⁹¹ the Commission fined a raw tobacco purchasing cartel in Italy while condemning the buyer cartel as detrimental to consumer welfare. In this case, too the decision of the Commission was upheld by the General Court. It should be noted that the Commission dealt with these two cases nearly two decades ago, implying that the Commission punished the buyers' cartel from the start.

The approach of the European Commission over the years has not changed much with regard to the buyers' cartel, and this approach can be more clearly seen in the two recent cases in which the commission has again punished the buyers' cartel. The first instance is that of the Car Battery Recycling⁹² cartel, in which the Commission barred a buyer cartel among four battery-recycling companies which fixed prices that were to be paid to the scrap dealers and collectors in return of used car batteries from 2009 to 2012. The Commission punished three companies accused of fixing purchase prices a total of 68 million euros, while the fourth company which disclosed the existence of the cartel was not fined.⁹³ Further, on appeal by the companies, the General Court fully upheld the Commission's decision⁹⁴, observing that *"the coordination of purchase price reveals a sufficient degree of harm to competition and there is no need to investigate its effect."*⁹⁵

The Commission then punished another buyer cartel, in 2020, that was engaged in purchase price coordination in procuring the ethylene.⁹⁶ In this case, all four of the businesses admitted to engaging in collusion and the

Oct. 27, 2010; *Cetarsa v. Commission*, Case T-33/05, ECLI:EU:T:2011:24, Judgment dt. Feb. 3, 2011; *World Wide Tobacco España v. Commission*, Case T-37/05, ECLI:EU:T:2011:76, Judgment dt. Mar. 8, 2011; *Agroexpansion v. Commission*, Case T-38/05, ECLI:EU:T:2011:585, Judgment dt. Oct. 12, 2011.

⁹⁰ *Deltafina v. Commission*, Case C-537/10 P, ECLI:EU:C:2011:475, Order dt. July 12, 2011; *Cetarsa v. Commission*, Case C-181/11 P, ECLI:EU:C:2012:455, Order dt. July 12, 2011; *World Wide Tobacco España v. Commission*, Case C-240/11 P, ECLI:EU:C:2012:269, Order dt. May 3, 2012; *Alliance One International v. Commission*, Case C-668/11 P, ECLI:EU:C:2013:614, Order dt. Sept. 26, 2013.

⁹¹ *Raw Tobacco Italy*, AT.38281, Commission decision dt. Oct. 20, 2005, available at https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_38281.

⁹² *Car Battery Recycling*, AT.40018, C(2017) 900 final, Commission decision dt. Feb. 8, 2017, available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/40018/40018_2011_3.pdf.

⁹³ ICI, the fourth company was not fined, as it applied for immunity from fines under the Commission's Leniency Programme and subsequently submitted several corporate statements and documentary evidence. AT.40018, C (2017) 900 final, para 29, p. 11.

⁹⁴ *Recylex v. Commission*, Case T-222/17, ECLI:EU:T:2019:356, Order dt. May 13, 2019; *Campine and Campine Recycling v. Commission*, Case T-240/17, ECLI:EU:T:2019:778, Order dt. Nov. 7, 2019.

⁹⁵ *Campine and Campine Recycling v. Commission*, Case T-240/17, ECLI:EU:T:2019:778, Order dt. Nov. 7, 2019, para 297, 305.

⁹⁶ *Ethylene*, AT.40401, Order dt. July 14, 2020.

exchange of price-related information to get ethylene at the lowest cost and consented to a resolution of the dispute.⁹⁷

These cases clearly show that the buyers' cartel is treated with the same strictness as the much-enforced sellers' cartel, and as the explicit example in *Article 101(1)(a)* TFEU affirms, the buyers' cartel has been prohibited from the very start in the same way as the sellers' cartel. However, the Commission doesn't restrict every buyer's agreement and instead provides for certain exceptions under *Article 101(3)* of TFEU, which can be claimed by proving that the agreement brought efficiencies to the market and has not affected the competition in the market. However, it must be noted that in case the buyers' group claims that their actions have not led to cartel behaviour, then the onus is on such buyer groups to prove that their actions has led to the economic benefits in the market and also have the other requirements under *Article 101(3)* of the TFEU have been met.

B. U.S.

The Contemporary Anti-trust Policy under the U.S. law treats buyer cartels as "*per se*" illegal and these cartelization by buyers are often treated as criminal offences.⁹⁸ *Section 1 of Sherman Antitrust Act*⁹⁹ which in broader term prohibits all agreement that restraints trade and like EU'S TFEU doesn't distinguish between seller and buyer as of such. In *Mandeville Island Farms v. American Crystal Sugar Co.*,¹⁰⁰ the sugar refiners' buyer cartel, which enjoyed monopoly power, were found guilty of forming a cartel and were subjected to *per se* treatment.

VII. A WAY FORWARD FOR THE COMPETITION COMMISSION OF INDIA

Through the above chapters, it's now clear that the buyers' cartel is no different than the sellers' cartel and they both can harm the competition in the market. Now the question arises as to what should be the approach of the Competition Commission of India with regards to the buyer cartel. As discussed above, some provisions of the Competition Act do recognize the

⁹⁷ However, Clariant (one of the parties involved in the cartel behaviour), which received the largest fine (attributed in part to a 50% increase in recidivism), has appealed the settlement decision to the General Court, where the matter is presently underway. T-590/20. Pending appeal.

⁹⁸ See *Vogel v. American Society of Appraisers*, 744 F.2d 598, 601 (7th Cir 1984) ("Buyer cartels, the object of which is to force the prices that suppliers charge the members of the cartel below the competitive level, are illegal *per se*").

⁹⁹ Sherman Anti-Trust Act, 15 U.S.C., §1, Resolution of Congress, 1890.

¹⁰⁰ 1948 SCC OnLine US SC 64 : 92 L. Ed 1328 : 334 US 219 (1948), available at <https://supreme.justia.com/cases/federal/us/334/219/>.

existence of the buyers' cartel; however, the author believes that these are not enough and there should be some amendments to the existing Competition Act.

The author believes that the CLRC, in its report, rightly proposed the amendment to the definition of "cartel" and also to the provisions related to the Commission's order to impose penalty¹⁰¹ and the leniency program.¹⁰² And the lawmakers were prudent enough to realize that these buyers' cartel will impose a similar kind of challenge as that posed by the sellers' cartel, so it was very wise of them to propose amendments to the leniency tools as well as the provisions related to imposition of penalties where they specifically added the word "buyer" in all these provisions¹⁰³ to the Draft Bill 2020. Thus, the first recommendation of the author is that the legislature must add all those dropped provisions of the Draft Bill 2020, which in a way tried to recognize the buyers' cartel under the Indian Competition Law.

Though the Draft Bill 2020, in a way, covered the lacunae in the Competition Act, related to the buyers' cartel, the author believes that there should be an amendment to the definition of "trade"¹⁰⁴ under the Act, and the word "acquisition" should be added to it, which will be in line with the CCI's observation,¹⁰⁵ and this will be enough to state that the purchasing activity of the consumer qualifies as trade and thus the buyers' cartel cannot escape the Section 3(3) of the Act. Thus, through the above recommended amendments to the Act, the CCI can not only recognize the buyers' cartel, but will also have the power to impose a penalty on the buyer who is included in the cartel. Further, those buyers' who are involved in a cartel will also have the option to claim the benefit of the Commission's leniency program by making a full and true disclosure of the alleged violation related to the case.¹⁰⁶ Based upon the nature of the disclosure the Commission will have the option to impose a lesser penalty on such buyers which is in line with practices around the world.¹⁰⁷

The position of a single buyer in a monopsony market is quite established. Thus, if the buyer has a dominant position in the relevant market and abuses its position in the market, such abuse falls under the purview of Abuse of

¹⁰¹ Competition Act, 2002, §27(b), No. 12, Acts of Parliament, 2003 (India).

¹⁰² Competition Act, 2002, §46, No. 12, Acts of Parliament, 2003 (India).

¹⁰³ Competition Act, 2002, §§2(c), 27(b) and 46, No. 12, Acts of Parliament, 2003 (India).

¹⁰⁴ Competition Act, 2002, §2(c), No. 12, Acts of Parliament, 2003 (India).

¹⁰⁵ *Pandrol Rabee Technologies (P) Ltd. v. DMRC Ltd.*, 2011 SCC OnLine CCI 64.

¹⁰⁶ MINISTRY OF CORPORATE AFFAIRS, DRAFT COMPETITION (AMENDMENT) BILL, 2020, Feb. 12, 2020, available at https://www.taxmanagementindia.com/file_folder/folder_5/Draft_Competition_Amendment_Bill_2020.pdf.

¹⁰⁷ See *Ethylene* AT40401 and *Car Recycling Battery* case, AT40018, C(2017) 900 final in European Union; *Mandeville Island Farms v. American Crystal Sugar Co.*, 1948 SCC OnLine US SC 64 : 92 L Ed 1328 : 334 US 219 (1948).

Dominance.¹⁰⁸ Section 4 of the Act, clearly states that "There shall be abuse of dominant position, if a group or enterprise imposes unfair or discriminatory conditions in purchase or sale of goods and services or a price in the purchase or sale (including predatory price) of goods or services". Thus, if it's established that a buyer or a buyer group has a dominant position¹⁰⁹ in the relevant market¹¹⁰ and the said group or the person (buyer) abuses its position, then such abuse can be very well covered under the abuse of dominance.

However, the author recommends that the word "purchase" be added to the explanation of "predatory price" under Section 4 of the Act, where the term "predatory price" is explained from the perspective of a predatory pricing by sellers, it is well-recognized that there can be even predatory buying.¹¹¹ This treatment of buyers for abuse of dominance will be on par with the position of other jurisdictions¹¹² and will give the Commission wider power to punish the buyers engaging in anti-competitive agreements or abusing its position which in a way affect the competition in the relevant market. However, it's to be noted that the Commission, in a number of cases¹¹³ has refused an inquiry under Section 4 of the Act, against buyers on the grounds of protection the free exercise of consumers' choice. Thus, it may be possible that the above-mentioned changes in Section 4 will also bring about a change in the approach of the Commission with regards to the abuse of dominant position by buyers.

Now, apart from the amendments, a change is also required in the approach of the CCI. Till now, there has been a kind of hesitancy by the Commission in punishing the buyers' cartel. First, the Commission refused to recognize buyers' cartel¹¹⁴ under the Indian Competition Law regime, and after years when they finally recognized them, they were reluctant to treat the buyers' cartel on par with sellers' cartel.¹¹⁵ So, the author believes that the Commission has, in a way, self-devised a disability in punishing the buyers' cartel and so a change is required in a way, the Commission approaches the buyers' cartel. Till now, the Commission has seen the buyers' and sellers' cartel through different lenses;

¹⁰⁸ Competition Act, 2002, §4, No. 12, Acts of Parliament, 2003 (India).

¹⁰⁹ To determine whether an enterprise or group has a dominant position or not, the CCI refers to factors enumerated under Competition Act, 2002, §19(4), No. 12, Acts of Parliament, 2003 (India).

¹¹⁰ Competition Act, 2002, §2(r), No. 12, Acts of Parliament, 2003 (India).

¹¹¹ Blair, Roger & Lopatka, John, *Predatory Buying and the Antitrust Lines*, 2 UTAH LAW REVIEW 415 (2008).

¹¹² TFEU, ch. 1, §1, art. 102.

¹¹³ See *K.N. Choudhary v. DMRC Ltd.*, 2014 SCC OnLine CCI 101, available at <https://www.cci.gov.in/antitrust/orders/details/711/0>; *Sumes Energy Systems v. National Dairy Development Board*, 2016 SCC OnLine CCI 78, available at <https://www.cci.gov.in/antitrust/orders/details/381/1>.

¹¹⁴ See *Pandrol Rahee Technologies (P) Ltd. v. DMRC Ltd.*, 2011 SCC OnLine CCI 64.

¹¹⁵ See *XYZ v. Indian Oil Corpn.*, 2018 SCC OnLine CCI 55.

however, the author believes that the Commission needs to see them through the same lens, i.e., that of the cartel, be it a seller's or buyers' cartel.

A buyers' cartel also has the potential to harm the competition in the market in the same way a sellers' cartel can, so the Commission must recognize the buyers' cartel on the same footing as the sellers' cartel i.e., they should be given *per se* treatment. The author believes that the whole purpose of keeping the buyer's anti-competitive agreement in Section 3(3) of the Act will be defeated if we start treating buyer cartels with the reason of analysis and seller cartels as *per se* wrong. Though the author believes that the Commission has rightly observed that 'buyer group' through its joint purchasing agreement can also bring some benefit to the consumer,¹¹⁶ however that cannot be a ground to treat them differently from sellers' cartel.

Further, it's true that not all buyer groups can harm the competition, and there may be some who can actually benefit the customer and will be exercising their legitimate bargaining power, something which the author has also mentioned in the previous chapters. So now the question arises as to how the Commission should differentiate between the buyers' group and the buyers' cartel. Though there is no clear definition as to what distinguishes a buyers' group from a buyers' cartel,¹¹⁷ an expert report published on the website of the European Commission attempted to provide a basic difference between a buyers' group and a buyers' cartel.¹¹⁸ According to the report *"A buyer group formed through a joint purchasing agreement generally involves a common organisation that represents the purchasers and acts as an interface with the suppliers."*¹¹⁹

In a buyers' cartel, on the other hand, *"enterprises agree with each other on how they will individually deal with suppliers, or they exchange commercially sensitive information about how they will individually deal with suppliers or decide the price that they will be offering to the suppliers, removing the uncertainty that would have existed between them otherwise in terms of competition."*¹²⁰

¹¹⁶ XYZ v. Indian Oil Corps., 2018 SCC OnLine CCI 55.

¹¹⁷ *Communication from the Commission – Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-Operation Agreements*, European Commission, Publications Office of the European Union, OJ C 11, Jan. 14, 2011, paras 205-206, p. 46, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114\(04\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN). (accessed Jan. 26, 2023).

¹¹⁸ See Whish, R. and Bailey, D., *HORIZONTAL GUIDELINES ON PURCHASING AGREEMENTS: DELINEATION BETWEEN BY OBJECT AND BY EFFECT RESTRICTIONS*, EUROPEAN COMMISSION, Publications Office of the European Union (2022), available at https://ec.europa.eu/competition-policy/system/files/2022-03/kd0722013enn_purchasing_agreements.pdf (accessed Feb. 1, 2023).

¹¹⁹ *Id.*

¹²⁰ *Id.*

Thus, the main factor that distinguishes the buyers' group from the buyers' cartel is the negotiating factor, i.e., do the buyers, be it together or through an intermediary or through any other type or form, collectively try to negotiate or bargain with a supplier or not? If the answer to this question is "yes" then it's a buyers' group; however, if each buyer attempts to interact with suppliers individually while passing sensitive information about the negotiation to other buyers, this amounts to a buyers' cartel.

So, if a buyer's group's joint purchasing agreement makes it clear or public that they plan to negotiate together on behalf of other buyers and binds its members to the terms and conditions of any purchases they make, whether they do so individually or as a group, then this will not be considered cartel activity. However, the group negotiating jointly on behalf of their members should directly inform the suppliers of the purchasing agreement, as indirect knowledge of the purchasing agreement through third parties, press reports, or any other form cannot be considered as sufficient disclosure. Therefore, it is crucial to distinguish between the concepts of "buyers' group" and "buyers' cartel" in order to ensure that neither the legitimate buyers' group's bargaining power through purchasing agreements nor the cartel formed by buyers go unnoticed.

Thus, the Commission can also take cues from the Horizontal Cooperation Agreements 2011 of the European Union, and issue certain guidelines to the person or group entering into a joint purchasing agreement. These group will then self-access that the agreements which they are entering into is not in contravention of Section 3 of the Act. Thus, the Commission can issue a set of guidelines that may act as an exception to Section 3 of the Act, where a buyer group can enter into a joint purchasing agreement and can make the most use of its bargaining power, and these exceptions will not be presumed to have an AAEC. Furthermore, the buyers who enter into such agreements will be required to self-access these guidelines, and the onus will be on the respective buyer to comply with the set of guidelines.

However, as previously discussed, there is a possibility that these buyers' group will eventually transform into a cartel, thereby restricting market competition; in such a case, those purchasing agreements will have to be given a reason for analysis, and it will be determined whether the said agreements cause AAEC under the Act or not.¹²¹ Thus, in the cases of allegation of cartel formation by buyers', the onus will be upon the buyers to prove that their activity did not result in cartel formation. Thus, in this way, the commission can achieve three-fold purpose: First the Hard-Core buyers Cartel will be presumed to have an AAEC, then the buyers' legitimate power can be recognized, and in case if these buyer groups start engaging in anti-competitive

¹²¹ Competition Act, 2002, §2(r), No. 12, Acts of Parliament, 2003 (India).

agreements, then their activity can be examined, and if found guilty, even they can be punished after assessing the harm caused by such groups on the competition in the market.

VIII. CONCLUSION

While the jurisprudence of punishing cartelization by buyers, around the world is quite established, countries like India continually fail to confront this issue with the urgency it deserves. Till now, the Commission has, in a way, rescued itself from punishing the buyers' cartel. The buyers' cartel, like a seller's cartel, presents equally serious challenges in maintaining competition in the market and thus requires the same enforcement priority as the seller's cartel. Further, though there has not been a single instance where the competition enforcement authorities have punished the purchasing agreements entered by the buyers' group, there still needs to be constant surveillance on the workings of the buyers group. The author believes that even legitimate buying groups can take the form of a buyers' cartel, and the exceptions granted to them to recognize their bargaining powers will instead would allow them to form tacit collusion and attract larger groups of buyers. Thus, the competition enforcement authority must keep an eye on the workings of the buyer group and review the exceptions granted to these buyers' group from time to time, so that these buyer groups don't take the form of buyers' cartel over a course of time.

The recognition of buyers' cartel in the Indian Competition Law is a need in the present scenario. Today, with the advent of technology and the increasing numbers of internet users in the country, market consumption has increased significantly. Now there is a market of both buyers and sellers. The current market structure has allowed for the creation of some big market players in the domain of second-hand mobile phones and cars purchasers. These big players purchase used phones and cars directly from consumers and then use it as per their needs. Now big players like Flipkart and Amazon are also in the purchasing business, where they procure second-hand mobile phones from the customers and then sell them as refurbished phones. Now just imagine if these players started entering into an agreement or cartelization and fixed the purchase price; Wouldn't that affect the competition in the relevant market, and further, could these actions ever yield a benefit to the consumers? Thus, the CCI must address the issues raised by the buyers' cartel at the earliest.

The government of India last year rolled back the three controversial farm laws¹²² which aimed at deregulating the market. These laws were rolled back after a series of protests in the states of Uttar Pradesh, Punjab, and Haryana.

¹²² Binwas, S., *Farm Laws: Why India PM Narendra Modi Rolled Back Vexed Reforms*, BBC News (2021), available at <https://www.bbc.com/news/world-asia-india-59306356> (accessed: Feb. 5, 2023).

One of the contentions of the farmers was that these deregulations would result in the private players getting an upper hand in procuring the products from the farmers. They anticipated that as these players might be the strong buyers in the market, and they may collude together and determine the purchase price before themselves, which would in a way leave them at the mercy of these buyers. Though many experts and government officials attempted to persuade farmers of the potential benefits of these farm laws, they were unsuccessful due to farmers' concerns about possible buyer cartelization. This incident further highlights the need for addressing this issue raised by the buyers' cartel.

The final but important point raised by this study is that the policymakers have in a way underestimated the harms that can be posed by these buyers by indulging in cartelization behaviour, and thus an urgent course correction is required both in the policy and the decisional approaches. Further, the obsession of the CCI with "consumer" interests/protection, has resulted in an over-emphasis on the selling side of the market, thereby completely ignoring the threats posed by the buyer cartels to the competition in the market. The CCI must not try to fit itself into the shoes of the "consumer courts" with the aim of protecting consumers at any costs but rather work for the preservation of market structure and the elimination of practises having an adverse impact on competition in the market. Thus, the time has come when the policymakers and the CCI must find a way to rebalance the scales and underline the importance of scrutinising buyer behaviour more thoroughly.

THE INTERFACE BETWEEN COMPETITION LAW AND INTELLECTUAL PROPERTY RIGHTS: A TUSSELE OF CONTROLLING ABUSE AND ABUSING CONTROL

—Nabilah Rahman & Rishav Raj*

ABSTRACT

The interplay between the Competition/anti-trust laws and Intellectual Property Rights (IPRs) has been a widely debated one as these two policies correspond to two diametrically opposite realms creating a relationship of balances abridging certain competing and complimentary principles pertaining to these laws thereby demonstrating a significant interplay for market regulations as well. Competition law and IPRs are linked due to the prevalence of dismal science driving innovation and a need to balance its scope and effect. IPRs act as a catalyst in encouraging innovation which is advantageous to both the consumers and the economy as it fosters the development of new and improved goods and services. IPRs seek to confer upon the innovator the exclusive legal right for the economic exploitation of his innovation for a period of time which besides acting as a reward to the innovator also induces others to undertake such inventions in the near future. Thus, IPR holders are rewarded with a provisional monopoly over their inventions for retrieving the cost sustained during research and development. Competition law, on the contrary, engenders a mechanism for repressing anti-competitive practices by preventing cartelization and restricting businesses from gaining control over the market powers through ways that are illegal thereby ensuring optimum allocation of resources, reasonable prices, and wider choices. Consequently, competition law ensures that the monopolistic capability of IPRs is not leveraged to cast a detrimental effect on fair competition in the market. Therefore, this paper seeks to analytically portray the interface between the

* Student, UG Programme, KIIT School of Law,

essential mechanism of competition law and the need to protect IPRs in view of the obstacles faced by both these legislations in ascertaining an adequate balance of competition and innovation through a series of precedents in the light of domestic and international legal provisions.

I. INTRODUCTION

It has been a topic of an age-old debate that the competition law and the laws pertaining to intellectual property rights are complementary to each other thereby meaning that both of them seek to achieve the same goal and work towards the same principle of encouraging innovation and safeguarding consumer welfare despite the fact that the two laws belong to two completely different legal arenas where one policy grants what the other seeks to control or reduce¹. The competition law in this country lays out an economic mechanism where it strongly supports the ideology that competitive markets engender better results and are healthier than monopolistic markets whereas intellectual property laws inherently work on the notion of establishing legal monopolies while providing incentives and rewards to the author/inventor/IP holder for the innovation carried out with respect to the products or processes which in the long-run increases the dynamic efficiencies of the market and the production process.

Intellectual Property Rights (IPRs) and Competition law are both founded with the ultimate aim of attaining economic development, technological advancement, and consumer welfare. IPRs are legal rights that govern innovative creations and despite being a relatively small term include a bundle of rights such as patents, trademarks, copyrights, and geographical indications each governing a different field and formulated for a specific purpose and effect. According to the World Trade Organization (WTO), "*Intellectual property rights are the rights given to persons over the creations of their minds where they usually give the creator an exclusive right over the use of his/her creation for a certain period of time*".² In simple terms intellectual property rights (IPRs) refer to those legal rights which are conferred upon the inventor or creator to safeguard his invention or creation for a specific tenure however,

¹ Schmidt, D.H., *Competition Law and IP Rights: Not So Complementary — Time for Re-Alignment of the Goals?*, available at https://eprints.soton.ac.uk/433386/1/1Schmidt_Competition_Law_and_IPR_Interface_July_2019_Pure.pdf (accessed Mar. 4, 2023).

² WORLD TRADE ORGANIZATION, *WHAT ARE INTELLECTUAL PROPERTY RIGHTS?*, available at https://www.wto.org/english/tratop_c/trips_c/intell_c.htm (accessed Mar. 4, 2023).

these legal rights have an exclusive mandate to allow the inventor/creator or his assignee to fully utilize his invention/creation for a given period of time.³

Competition law, on the other hand, seeks to curtail certain market behaviors which restrict or minimize competition and are detrimental to consumer welfare. The term 'competition' although seems to possess a simple literal meaning has been defined differently in different corners of the world. The Competition Act of 2002 itself has not defined the term competition however, the Parliamentary Standing Committee in its 93rd report on the Competition Bill, 2001 defined competition as "*economic rivalry against enterprises to control greater market powers*"⁴ In the words of Fali S. Nariman, competition law is about "*economics and economic behavior which aims for regulating market conduct through minimizing and eradicating anti-competitive means*".⁵

IPRs and anti-trust laws have a common aim of improving consumer welfare by permitting innovation and bringing into the markets new products and services while maintaining and regulating the quality along with the price in the market. Thus, both are complementary to each other with respect to the idea of furthering invention, technical advancement, and economic upliftment in light of the benefit attained by the end consumers and the economy as a whole. But on the contrary, IPRs and competition law are also regarded as areas of law possessing conflicting objectives and the pertinent reason for the same is that IPRs designate boundaries where the inventor/author may exercise his monopolies over their innovation which is inherently against the objectives of competitive market and level playing fields sought by the competition law policy specifically with respect to the restriction on horizontal and vertical restraints or the abuse of dominant positions in the market.⁶

In order to crystallize the idea behind the working of both the laws is the golden ideology of maximizing wealth by producing what consumers need/want at the lowest price possible nevertheless, the relationship between the competition law and intellectual property needs detailed consideration of how to offset the rights of innovators, competitors, licensees, and follow-on

³ SINGH, D.R., *LAW RELATING TO INTELLECTUAL PROPERTY: A COMPLETE COMPREHENSIVE MATERIAL ON INTELLECTUAL PROPERTY COVERING ACTS, RULES, CONVENTIONS, TREATIES, AGREEMENTS, DIGEST OF CASES AND MUCH MORE* (Universal Law Publishing Company 2008).

⁴ STANDING COMMITTEE REPORT ON COMPETITION BILL, 2001, available at https://prsindia.org/files/bills_acts/bills_parliament/2006/bill173_2007050873_Standing_Committee_Report_on_Competition_Bill_2001.pdf (accessed Mar. 4, 2023).

⁵ LI, R.Y.M. and LI, Y.L., *The Role of Competition Law: An Asian Perspective*, SSRN (2013), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2281756 (accessed Mar. 4, 2023).

⁶ Patel, A. et. al., *Intellectual Property Law & Competition Law*, 6(2) *JOURNAL OF INTERNATIONAL COMMERCIAL LAW AND TECHNOLOGY* 120-130, available at <https://media.neliti.com/media/publications/28811-EN-intellectual-property-law-competition-law.pdf>.

innovators while at the same time enhancing overall economic welfare⁵. The legal monopoly granted to the inventor may in view of the unavailability of substitutes in the relevant market lead to the abuse of market powers and even monopoly as defined under competition law. Even though such an advantage is given to the creator as a reward for his creation but when this dominant position over the industry is abused it leads to a conflict between IPR and competition law. Therefore, there needs to be a common ground to understand when and at what categories need to be prioritized while prioritizing other safeguards for overall economic welfare.

II. HISTORY AND EVOLUTION OF INTELLECTUAL PROPERTY LAWS

The past of Intellectual Property is complicated but interesting. The earliest documents referring to intellectual property date from Sybaris, a Greek State in the sixth century BCE. It allowed bakers a year of exclusivity to develop their culinary creations. In a sense, the ascent of intellectual property started with the rise of the bread⁶.

The intention behind intellectual property laws has not changed over the years, despite their increasing complexity. These are established by nations to encourage innovation and allow inventors to profit from their creativity. The first systematic effort to safeguard inventions in the form of a patent was made in a Venetian Statute in 1474, which granted patent rights to the first individual⁷. Since Venice was the first place in the world to create laws and institutions governing intellectual property, it can be said that Venice is the birthplace of the intellectual property system which was followed by other nations.⁸

The notion of universal protection for intellectual property rights was discussed by legislative bodies in the early 1800s and it was in the year 1883 that the Paris Convention brought forth international jurisdictional clarity and collaboration on IPR. The same protection was extended to written expressions, i.e. copyright by the 1886 Berne Convention which was subsequently followed by the Madrid Protocol, in which trademarks received international protection too. Since its founding in 1970, World Intellectual Property Organization (WIPO) has been in charge of 20 international conventions pertaining to the

⁵ *Id.* at 2.

⁶ Kashyap, S., *History and Development of Intellectual Property*, 3(1) INTERNATIONAL JOURNAL OF EDUCATION, MODERN MANAGEMENT, APPLIED SCIENCE & SOCIAL SCIENCE 193-196 (2021), available at <https://www.inspirajournals.com/uploads/Issues/1192479670.pdf> (accessed Mar. 10, 2023).

⁷ Thakkar, B.C., *All You Need to Know About the IPR Laws in India*, IPLEADERS (2017), available at <https://blog.ipleadere.in/need-know-ipr-laws-india/> (accessed Mar. 10, 2023).

⁸ Bhattacharya, S. and Saha, C.N., *Intellectual Property Rights: An Overview and Implications in Pharmaceutical Industry*, 2(2) JOURNAL OF ADVANCED PHARMACEUTICAL TECHNOLOGY & RESEARCH 88-93 (2011), available at <https://doi.org/10.4103/2231-4040.82952>.

protection of intellectual property rights. The World Trade Organization (WTO) adopted these international treaties in 1993, and in 1994 Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement succeeded in tying intellectual property rights to international trade, offering a higher platform that was more unified.¹¹

The Act VI of 1856 was the first law in India to mention licensing. The intention behind the application of this law was to spur inventions and inspire innovators. The Indian Patents and Designs Act, 1911 had been in effect for more than 50 years and was eventually amended and altered. Later on when India gained independence from the British, a comprehensive patent rights bill known as "The Patents Act, 1970" was passed and is currently utilized in the country. Similarly, the "United Kingdom Copyright Act, 1911" came into effect in India during the British Raj and was amended many times to comply with the provisions of the Berne Convention, and currently, copyrights in India are regulated under the Copyright Act, 1957.¹²

With the creation of the WTO and India being a signatory to the agreement of TRIPS, several new laws have been passed by the legislature to protect intellectual property rights in order to comply with international commitments¹³, and currently in India trademarks are regulated under Trade Mark Act, 1999; designs under Designs Act, 2000; copyright under Copyright Act, 1957; patents under Patents Act, 1970; geographical indications under Geographical Indications of Goods (Registration and Protection) Act, 1999; plant varieties under Protection of Plant Varieties and Farmer's Rights Act, 2001; and biodiversity under Biological Diversity Act, 2002.

III. HISTORY AND EVOLUTION OF COMPETITION LAW

The "Lex Julia de Annona," which was passed more than 2000 years ago in the Roman Empire, is thought to be the origin of the competition law. Diocletian, the former Roman emperor instituted the death penalty for anyone found guilty of deceptive business tactics or when inflation in the prices was revealed. It has been discovered that rules that set a cap on prices have existed since 310 A.D. The Zeno Constitution of 483 A.D. contained the harshest laws, which included property confiscation and exile for any business alliances.¹⁴

¹¹ Patel, *supra* note 6.

¹² Kashyap, *supra* note 9.

¹³ Shrivastava, S., *Development of IPR Laws In India*, MORDAQ, KHURANA AND KHURANA, (2021), available at <https://www.mordaq.com/india/trademark/1084536/development-of-ipr-laws-in-india> (accessed Mar. 10, 2023).

¹⁴ Mishra, A., *Evolution of Competition Law in India*, ACADEMIAJURU (2014), available at https://www.academia.edu/61688320/Evolution_of_Competition_Law_in_India (accessed Mar. 10, 2023).

Under the administration of King Edward, legislation was implemented in England during the middle ages to limit monopolies and restrict specific commercial practices, such as the excessive purchase of products to artificially raise market prices. Under his successor, King Edward III an Act to ensure fair prices of food items and fixed wages for workmen across the realm was passed, the Statute of Laborers 1349.¹⁵

The American Sherman Act, which was passed in 1890, and the Clayton Act, which was passed in 1914 to complement it, are credited with pioneering modern advancements in competition laws. The phrase "anti-trust" originated in the United States because major American firms under the garb of trusts hid the details of their business agreements, thus to stop trusts from acting maliciously, anti-trust legislation was enacted. The implementation of competition laws strode significantly during the 20th century, despite all of its wars and conflicts. Australia and England both adopted the Restrictive Trade Practices Act in 1974. Several nations have also ratified other significant accords, such as General Agreement on Tariffs and Trade (GATT) and General Agreement on Trade in Services (GATS), and the World Trade Organization (WTO) was founded in 1994 to oversee these agreements and guarantee free commerce throughout the world.¹⁶

In 1969, India passed the Monopolies and Restrictive Trade Practices Act, which was the country's first competition law (MRTP)¹⁷. Three committees, one led by Mr. Hazari, another by Professor Mahalanobis, and the third by Mr. Das Gupta, who chaired the "Monopolies Investigation Commission," concluded that a small number of persons had an excessive amount of wealth in the 1960s and to counter this the Monopolies Investigation Committee drafted a law that subsequently became the Monopolies and Restrictive Trade Practices Act, 1969 which have its roots in the Directive Principles of State Policy embodied under Constitution of India.¹⁸

The MRTP Act had become out of date in light of international economic developments, and there was a need to shift the focus from limiting monopolies to promoting competition. In 1997, the GoI (Union Ministry of Commerce) established an expert group for studying the impact of issues relating to anti-competitive practices and the effect of mergers and amalgamations on the

¹⁵ Tarafdar, A., *Development of Competition Law and Powers of the CCI*, NE LAW JOURNAL (2021), available at <https://www.northeastlawjournal.com/post/development-of-competition-laws> (accessed Mar. 10, 2023).

¹⁶ Mishra, *supra* note 15.

¹⁷ Chandra, N., *Evolution of Competition Law*, LEXISPS (2020), available at <https://lexisps.in/evolution-of-competition-law/> (accessed Mar. 10, 2023).

¹⁸ EVOLUTION OF COMPETITION LAW AND POLICY IN INDIA, INFLIBNET CENTRE, available at http://eppg.inflibnet.ac.in/eppgdata/uploads/eppg_content/law/03_competition_law/05_evolution_of_competition_law_and_policy_in_india/et/5648_et_05et.pdf (accessed Mar. 10, 2023).

competition. In light of the aforementioned data, the Parliament in 2002 passed the Competition Act but the Act came into effect in 2007, as Competition (Amendment) Act, 2007.¹⁹

IV. THE CONFLICTING INTERFACE BETWEEN INTELLECTUAL PROPERTY RIGHTS AND COMPETITION LAW

Intellectual property rights are popularly viewed as 'just' a reward or an incentive for the innovation or the creation undertaken by the author/inventor instead it plays an appreciable and noteworthy role in the present society where it governs many of the central businesses and the innovation undertaken by them and is most importantly observed to contribute a great deal towards the economic growth where it would hegemonize the movements of the markets from lower to higher price competition. The sudden upsurge and a faster leap toward the advancement of technology and products have created immense pressure on intellectual property laws to provide appropriate protection for the latest innovation or creation. Intellectual property rights exist in a multifaceted environment where it consists of both international and domestic legislations where both of which have witnessed a significant expansion of intellectual property ambit with regards to territorial protection, functional coverage, and an increase in the variety of new technologies in the areas of biotechnology, information technology, and databases²⁰. Researchers argue that the upsurge in technological advancement and digital economy operate quite in contrast to the traditional markets as it is more focused on dynamic competition or popularly viewed as 'creative destruction'. The entire idea of dynamic competition is inclined upon the notion that the most nascent or advanced product/technology turns out victorious in the market until the new race for innovation begins. The pertinent reason behind this is that the monopolies in this sector are fragile and ever-shifting based on the product or the technology which wins the race. Nevertheless, this is nothing but a single-dimensional picture of these markets as there are other key driving forces such as IP rights and direct and indirect network which also heavily influences the competitive structure and represses the process of creative destruction thereby resulting in static competition.²¹ As a result, it can be concluded that competition and innovation do not flourish optimally.

Therefore, in the presence of such an ever-shifting competition in these prevalent markets this is where the competition law seeps in while working

¹⁹ *Competition Law and Its Evolution*, S.S. RANA & Co. (2022), available at <https://ssrana.in/corporate-laws/competition-law/competition-law-and-its-evolution/> (accessed Mar. 10, 2023).

²⁰ Schmidt, *supra* note 2, at 3.

²¹ Anderman, S.D., *The Competition Law/IP Interface: An Introductory Note in THE INTERFACE BETWEEN INTELLECTUAL PROPERTY RIGHTS AND COMPETITION POLICY* 10-11 (Cambridge University Press 2007), available at <https://doi.org/10.1017/cbo9780511495205.002>.

as a second layer of regulation after the intellectual property laws. The competition laws have been bestowed with the power of encroaching on and governing several areas such as trade, corporate laws as well as data protection. The competition law stands at such a pedestal where it also acts as a tool to achieve more politically oriented goals in a larger socio-political framework in comparison to those of the economic efficacy and consumer welfare aims. The competition law inherently does not restrict or intervene in the process of granting IP rights and its functionality rather it is more focused upon the exercise of the bestowed rights because there is always a possibility that the given rights granting legal monopoly may be used as an 'instrument of abuse'. In simpler terms, it can be concluded that IP rights enshrine upon the inventor a right to establish a legal monopoly while creating certain barriers to entry for a given period of time whereas the competition laws through their presence aim to keep an effective competitive environment by restricting the companies to not abuse their dominant position and misuse their powers to cause an adverse economic effect on competition.

The legislation with regards to the safeguard of Intellectual Property Rights (IPRs) does not categorically mention the term 'competition' whilst the Competition law of the country explicitly excludes from its ambit the 'reasonable conditions' imposed by a legitimate IPR holder for protecting his IPR. The legislative intent behind the formulation of the Competition Act, 2002 was not to inherently interfere with the idea of IP protection however, if the Competition Commission of India (CCI) has reasons to believe that such legal monopolistic privileges are being abused thereby resulting in an Appreciable Adverse Effect on Competition (AAEC) in India, then the provisions of the Competition Act, 2002 would be attracted²². The Act in Section 3(5)²³ preserves the rights of the intellectual property holders thereby assisting them in preventing the infringement of their invention as long as the restrictions imposed by them are deemed to be 'reasonable'. The Act itself fails to

²² Sanjaya, K., *Competition Law and IPRs: Friends or Foes?*, 3(6) INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES (ISSN 2581-5369), 573-574 (2020).

²³ S. 3(5) of the Competition Act, 2002: Nothing contained in this section shall restrict—
 (i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under—
 (a) the Copyright Act, 1957 (14 of 1957);
 (b) the Patents Act, 1970 (39 of 1970);
 (c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);
 (d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);
 (e) the Designs Act, 2000 (16 of 2000);
 (f) the Semi-Conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);
 (ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

define the term 'reasonable conditions' but aims for its liberal understanding as it does not seem to interfere with the reasonable use of the rights granted by the IP laws.

Even though the exceptions mentioned in the Competition Act under the above-mentioned section do not interfere in the area pertaining to intellectual property but it also does not permit unreasonable conditions to be passed off under the guise of protecting intellectual property²⁴. Since IPR is essentially based on licensing agreements/arrangements that might have an adverse effect on the price, quantity, quality, and even the varieties of goods and services prevailing in the market therefore, the licensing agreements and the imposed conditions are tested against the ideal of reasonableness. Certain arrangements such as patent pooling, tie-in arrangements, royalty issues, research and development prohibitions, price fixation, etc. are completely prohibited as these are deemed to be anti-competitive practices recognized under several jurisdictions.²⁵

Moreover, it is pertinent to note that IP protection which acts as an exception under the Competition Act, 2002 is only with regards to specific legislations which includes the Copyright Act, 1957, Patents Act, 1970, Trade Marks Act, 1999, Geographical Indications of Goods (Registration and Protection) Act, 1999, Designs Act, 2000, Semi-conductor Integrated Circuits Layout-Design Act, 2000 whereas IPRs not explicitly recognized under the Competition Act are not eligible for protection. The legislature has empowered the Competition Commission of India (CCI) to inquire into the anti-competitive agreements which are imposed under the guise of licensing agreements or otherwise and penalize such right holders or organizations who are party to the said agreements and such penalty shall not exceed 10% of the average turnover for the last three preceding financial years.²⁶

Through this, it can be understood that the functionality of both the competition and intellectual property laws can be viewed to be an unhappy marriage where both the legislations are tolerating each other's means. As Hovenkamp has opined, "If IP system does what it should be doing...consumer loss is not an inherent part of the design. New innovation typically competes with existing technology, which largely stays in place. Consumers obtain the benefit of the new products or processes that IP rights make possible and these should yield a surplus even at monopoly prices."²⁷ Moreover, the European Court of Justice

²⁴ Jain, S., *Competition and Intellectual Property Rights: Interface and Interdependence in Indian Context*, SSRN ELECTRONIC JOURNAL 3-5 (2020).

²⁵ *Id.* at 4.

²⁶ Jain, *supra* note 25, at 4.

²⁷ Hovenkamp, H.J., *Consumer Welfare in Competition and Intellectual Property Law*, Faculty Scholarship at Penn Carey Law, 3830, Preprint (2014), available at <https://doi.org/10.2139/ssrn.2329150>.

in the *AstraZeneca* case highlighted that the ‘...free exercise of an exclusive right, being a right which rewards investment or innovation, may be limited in the interest of undistorted competition on the common market.’²⁸

V. INTELLECTUAL PROPERTY RIGHTS AND COMPETITION LAW: THE ROLE OF JUDICIARY

The Hon'ble courts in India have in many instances taken the opportunity to discuss the conflicting interface between Intellectual Property Rights and Competition law. The primary question of whether the Competition Commission of India (CCI) has the required jurisdiction to deal with IPR cases was judged as affirmative in the significant case of *Aamir Khan Productions (P) Ltd. v. Union of India*²⁹ moreover, a similar stance was undertaken by the Competition Appellate Tribunal (COMPAT) in *Kingfisher Airlines Ltd. v. CCP*³⁰ wherein it was determined that the Competition Commission of India has the appropriate jurisdiction to deal with all the cases that come before the Copyright Board.

In the landmark case of *Telefonaktiebolaget LM Ericsson (PUBL) v. CCP*³¹, a petition was filed by the petitioner 'Ericsson' where it was challenged before the Hon'ble Delhi High Court that the Competition Commission of India (CCI) does not have jurisdiction to pass an order in cases pertaining to patents especially when it involves 'standard essential patents' as it contended that the Patents Act, 1970 and the Competition Act, 2002 operate distinctly and independently without any repugnancy. Therefore, the powers of the CCI in matters related to the investigation in cases of violation of Sections 3 and 4 remain aloof of the powers of the Controller under the Patents Act. However, it was opined by the Court that there is no irreconcilable difference between the Competition Act and the Patents Act and if there are any to be found in so far as anti-abuse provisions are concerned then the Patents Act being a special Act shall prevail regardless of Section 60 of the said Act. The court iterated the fact that while reasonable conditions are permitted there is a strict rule against the anti-competitive agreement which imposes reasonable restrictions and it would not be granted the safe harbor of Section 3 of the Act. As far as the question pertaining to the jurisdiction of CCI was concerned, it was decided by the Court that neither the Controller of Patents under the Patents Act nor the Civil Court has the jurisdiction in the matter falling foul of section 3 of the Competition Act as only the CCI has the exclusive jurisdiction in such matters.

²⁸ *AstraZeneca AB and AstraZeneca Plc v. Commission*, Case T-321/05, ECLI:EU:T:2010:266, [2010] ECR II-2805.

²⁹ 2010 SCC OnLine Bom 1226 : (2010) 112 Bom LR 3378.

³⁰ 2012 SCC OnLine Comp AT 162.

³¹ 2016 SCC OnLine Del 1951 : (2016) 66 PTC 58.

The above-stated decision was again reiterated in *Monsanto Holdings (P) Ltd. v. CCI*²² where it was held that an inventor under the Patents Act has the exclusive right to exercise legal monopoly through the creation of entry barriers however it is pertinent to note that such agreements must have reasonable conditions that protect the inherent rights of the patentee but this should not cast an impression that the patentee is free to include onerous conditions under the guise of protecting its rights.

In *Toyota Kirloskar Motor (P) Ltd. v. CCI*²³, the appellant companies namely Toyota, Ford, and Nissan filed an appeal before the Competition Appellate Tribunal (COMPAT) contending that the Competition Commission of India (CCI) has wrongly determined its distributions/ sales agreement and practices as violative of Section 3(4) and Section 4 of the Competition Act. They claimed that their intellectual property rights were embedded in their acts of manufacturing spare parts and the restrictions imposed by them were necessary and reasonable in light of Section 3(5) of the Act. It was held by the court that since the appellant companies are unable to establish whether the spare parts being manufactured are patented or not thus, the restriction claimed by them were under the guise of 'reasonable conditions'. The court highlighted that the mere act of protecting intellectual property cannot itself be regarded as a reasonable condition hence, the condition imposed is not valid. The restriction imposed for the purpose of protecting intellectual property could be achieved through other means such as contractual means or common law remedies.

The apex court of the country in the landmark case of *Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd.*²⁴ observed that even though the copyright holder is granted a monopoly but such monopoly when becomes an obstacle in the smooth functioning of the market and causes an adverse effect on the competitive nature of the market then the said monopolistic right would be in violation of the competition law. This implies the fact that despite the fact that the intellectual property holder has been given the right to protect his invention/creation from being copied but the said right is not absolute in nature rather it has to be 'reasonable' in the eyes of the Competition Commission of India.

In *Union of India v. Cynamide India Ltd.*²⁵, the court opined that the matters related to overpricing of life-saving drugs is a matter which falls within the ambit of the Competition Commission of India. The said decision was reasoned on the ground that in the absence of alternatives/substitutes in the market, the

²² 2020 SCC OnLine Del 598.

²³ 2016 SCC OnLine Comp AT 452,7.

²⁴ (2008) 13 SCC 30 ; (2008) 27 PTC 153.

²⁵ (1987) 2 SCC 720 ; AIR 1987 SC 1802.

competitiveness within the market players is adversely affected thereby leading to the creation of monopolies. This decision also finds its relevance in the present-day scenario where the Covid-19 vaccines have saved lives. If these vaccines would have been unregulated in the market in the name of patent rights restricting other players from entering the domain then the vaccine would have remained completely out of reach of a large section of society moreover, no alternatives or substitutes at a cheaper rate for the same would have been created. Hence, the grant of jurisdiction to CCI in the matter pertaining to overpricing of life-saving drugs is a step worth appreciation.

Lastly, in *FICCI — Multiplex Assn. of India v. United Producers/Distributors Forum*³⁶, FICCI filed a case alleging that the respondent UDPF had issued a notice instructing all its members to not release any films to the members of FICCI whereas the respondent claimed that a feature film is the subject matter of copyright under the Copyright Act, 1957 which allows the owner of the copyright to exploit their subject matter in whatever way they deem fit. However, the court stated that, *"It may be mentioned that the intellectual property laws do not have any absolute overriding effect on the competition law. The extent of the non-obstante clause in Section 3(5) of the Act is not absolute as is clear from the language used therein and it exempts the right holder from the rigors of competition law only to protect his rights from infringement. It further enables the right holder to impose reasonable conditions, as may be necessary for protecting such rights."*

The Indian judiciary in this context has played a significant role in repressing the friction between the two legislations thereby, reducing the wide gap between them. The decision of permitting the Competition Commission of India to enquire into matters pertaining to the use of IPRs has led to the courts keeping the societal interest at a higher pedestal in comparison to the private interest of the market players and the same is noteworthy.

VI. ECONOMIC JUSTIFICATION OF IPRS AND COMPETITION

In this era of rapid technological advancement, intellectual property rights are crucial to economic existence. IPR was enacted because it was believed that it was crucial for the continual growth of the industrial and economic sectors. The exclusive monopolistic nature of intellectual property rights is complemented by the fact that they are marketable and transferrable as they may be sold as individual items. IPRs offer the IPR holder a monopoly, but that monopoly is not absolute, is only valid for a certain period of time, and is also susceptible to competition from similar goods and services already existing in

³⁶ 2011 SCC OnLine CCI 33, available at http://www.cci.gov.in/sites/default/files/FICCIOrder260511_0.pdf.

the market. Intellectual property rights are primarily inclined towards demand and do not automatically generate profits for their owners. The amount of money they offer for innovative behavior relies on the level of competition prevailing in the market. The owner will not be compensated and incur a profit until the market gives recognition to the innovation for what it is. Exclusive rights are granted by intellectual property laws but they rarely result in a true monopoly, where the monopolist is free to behave as he or she pleases without being constrained by rivals.³⁷

Additionally, if IPRs are not granted a temporary monopoly, competitors will hold off on investing in the development of new items until someone else does. Competitors will take pleasure in the process without taking on the risk of uncertain investment. The price of sharing knowledge is minimal.³⁸

As innovation and creativity are crucial components of a freely competitive market economy, it is believed that without them, the economy would not run smoothly. According to this viewpoint, prosperity and economic growth depend on invention and innovation. If commodities and services are to be produced and used as effectively as feasible in such an economy, intellectual property rights (IPRs) should be developed³⁹. The creator and inventor are given the rights since it is anticipated that they will be driven by the goal of wealth maximization, either by using the invention or creation themselves or by allowing a third party to use it.

VII. STEPS TOWARDS HARMONIZATION AND CONVERGENCE OF COMPETITION LAW AND INTELLECTUAL PROPERTY LAWS IN INDIA

The conflicting issues between the competition law and the anti-trust law in India have always been the bone of contention however, it must be understood that the legislative intent behind the formulation of both laws was never to create repugnancy between the two. The interaction between the two laws should be viewed as neither conflicting nor being aimed at replacing the other instead the two legislations in several aspects are supplementary and complementary to each other. Even the judiciary has settled down the principle that the 'interest of the end consumers and the competitiveness in the market' is of

³⁷ Mishra, A., *The Role of Intellectual Property Rights in Economic Development*, KHURANA AND KHURANA ADVOCATES AND IP ATTORNEYS (2021), available at <https://www.khuranaandkhurana.com/2021/03/10/the-role-of-intellectual-property-rights-in-economic-development/#:~:text=The%20role%20of%20intellectual%20property%20in%20the%20economy%20are%3A,permission%20of%20the%20creator%38%20and> (accessed Mar. 10, 2023).

³⁸ Patel, *supra* note 7.

³⁹ Hle, L., *Intellectual Property Rights: An Economic Approach*, 36 *PROCEDIA ECONOMICS AND FINANCE* 548-552 (2014), available at <http://www.sciencedirect.com/science/article/pii/S2212567114008375> (accessed Mar. 10, 2023).

supreme importance and must not be sacrificed or repressed at the cost of the right holder.⁴⁰ However, there are certain measures that can be undertaken in order to ensure that the conflicting issues between the two laws are resolved so that they can eventually attain the common objective of consumer welfare. Even though abuse of IPR has not been specifically defined in any legislation in the country yet its understanding must not be limited to the narrow scope of case laws related to foreign jurisdictions. The use of licensing as a strategy for the expansion of IPR and restricting competition must also be considered as an 'abuse of IPRs'.

Additionally, it is important that the acquisition of intellectual property with the specific aim of strengthening monopoly power in the market should be completely regulated in the market with clear instructions pertaining to technology transfer. Furthermore, it is also recommended that there must be an implementation of clear guidelines pertaining to mergers and acquisitions so that there is no concentration of undertakings in the hands of IPR-rich companies. Unilateral refusal of granting of licenses or dealing with parties who have violated the standards must be made the subject matter of scrutiny by the CCI and such refusal on unreasonable grounds must be dealt with as anti-competitive by the CCI.⁴¹

In tying-in cases, several other key factors such as purposes of selling, the interrelation between tying and the tied product, and the subsequent effect in the market must be taken into consideration. Excessive pricing has an inherent essence of exploitation thus, fair prices must be ensured by the competition law in the IPR-protected products. Moreover, the Competition Act, 2002 in India does not include charging high prices as a method of abusing the dominant position hence, Section 4 needs to be amended to include unjustifiable high prices as a criterion as well⁴². Lastly, it must be taken into consideration that the pricing policy in developing countries such as India must be based upon the capacity to pay by the average consumers and not the idea of discriminatory prices which must be regarded as anti-competitive in nature.

It must be understood that the relationship between competition law and intellectual property law has been intricately built and it is abundantly clear that these two streams of law would definitely converge and cannot be expected to stay still in water-tight compartments devoid of each other. The overlapping area or the 'grey zone' between the competition law and intellectual property laws is subject to several harsh winds of change and upcoming

⁴⁰ Raju, K.D., *The Inevitable Connection between Intellectual Property and Competition Law: Emerging Jurisprudence and Lessons for India*, 18 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS 111-122 (2013).

⁴¹ *Id.* at 121.

⁴² Raju, *supra* note 41, at 122.

challenges and it is of paramount importance for developing nations like India, who are witnessing the cutting edge technology to protect and safeguard their innovations and inventions and handle the onslaught of economic policies under the guise of healthy competition.⁴¹

VIII. CONCLUSION

Intellectual Property and Competition laws seek to achieve a common aim and also share the very same economic rationale. Both legislations are of paramount importance for the existence of a competitive and innovative market structure where the common objective to be attained by both laws is to facilitate innovation thereby leading to the economic development of the country at large. The two laws ensure that such innovation and economic development do not come at the cost of the detrimental effect being cast upon the common public. The legal authorities must understand that both laws must co-exist together and a balance must be struck between the two for ensuring both economic and consumer welfare.

Competition laws are inherently directed towards diluting monopolistic activities, unfair trade practices, and abuse of dominant position in the market through the formation of cartels whereas IPRs promote monopoly and abuse of dominance of market power in the hands of the innovator with an aim of encouraging investors and inventors to undertake more research and development in different domains thereby fostering economic growth. The conflict which arises between the two laws is due to the monopolistic effect of the intellectual property laws however, it must be observed that the monopolies granted are for a short period of time which acts as an incentive for the innovator, and after the said period expires the intellectual property falls into the public domain. The intellectual property law acts as a driving force behind the creation of effective and new processes, original works of expression, and the formation of new and efficient products as in the absence of the said intellectual property law, imitators could gain easy access to the nascent technology/products and would rapidly exploit the efforts undertaken by the innovators or the investor without any compensation.

It can be concluded that both the Intellectual Property laws and Competition law are complementary and supplementary to each other as certain privileges granted by the IPRs are safeguarded by the restrictions imposed under the Competition law. Thus, it has been rightly quoted that *'no right is absolute instead every right comes at the cost of restrictions, limitations, and liabilities'*.

⁴¹ Raja, *supra* note 41, at 120.

A COMPARATIVE ANALYSIS OF LENIENCY PROGRAMS IN CARTEL INVESTIGATIONS IN & OUTSIDE INDIA

—Payal Singh*

ABSTRACT

The Competition Act of 2002 was enacted to foster and preserve market competition, safeguard consumer interests, and secure market players' freedom of trade. Since the implementation of the Act, Indian marketplaces have expanded tremendously. With the advent of digitalization and new-age markets integrating technology, there have also been changes in the way businesses operate. Elimination of cartels has been a high priority for the overwhelming majority of the world's jurisdictions, and the Commission has not been an exception to this pattern.

Despite the fact that the Indian leniency framework has been in sight for well over a decade, the Commission delivered its first leniency decision in 2017 and a dozen more since then. In 2022, the Indian Commission's competition strategy was overhauled in tandem with "conventional" competition law enforcement. From positively impacting all the sectors to the challenges faced, its journey has been both bewildering and astonishing. "To be or not to be," a famous quote from Hamlet when applied in this context, would answer the question "to disclose or not?" The same sentiment is echoed in the leniency regime, which is borrowed from the Prisoner's Dilemma theory and embraces violations of Section 3 while remaining committed to the root aim of cartel detection, enticing cartel members, thereby creating a "race for confessions" and further creating the confidentiality ring.

A comparison between the systems of the UK, US, and Philippines illustrates how the Indian Leniency System operates and why it is advised to be altered. Nevertheless, the competition policy

* Student, Amity Institute of Law,

pendulum has swung from regulation to enforcement rather swiftly. The victory over business giants and adjustments to the leniency framework, such as those envisaged by the amendment bill of 2022, the subsumed anti-profiteering authority, and the extended validity of de minimis, among other measures, will definitely be remembered fondly.

Keywords:

1. The Indian Leniency Regime: A Snail's Walk;
2. Prisoner's dilemma theory.
3. Comparative Analysis;
4. CCI (Lesser Penalty) Amendment Regulations, 2017;
5. Competition (Amendment) Bill 2022;
6. Marker status – Joint Leniency & Doctrine of Single Economic Entity
7. Merger of NAA-CCI.

INTRODUCTION

Public policy's animosity to cartels is entrenched in the stance, presented by eighteenth-century economist Adam Smith, that people of the same trade seldom meet together, even for merriment and diversion, but the discourse ends in a conspiracy against the public or some scheme to raise prices.¹

Collusion among independent firms in the same industry to coordinate pricing, production, or marketing strategies in order to dampen competition, maximise market power, and influence market prices is referred to as a "cartel."² The principle component of a cartel is the presence of consensus ad idem between contending enterprises.

Conjointly, to establish a cartel, three significant models are required:

1. The cartel should be able to raise prices above the non-cartel level without significantly increasing non-member firm competition.

¹ ADAM SMITH, *THE WEALTH OF NATIONS* (1776) bk. 1, ch. 10, pt. 2.

² AmosWEB Encycloedic Web*Pedia, http://www.amosweb.com/cgi-bin/awb_nav.pl?s=wp-d&c=dsp&k=collusion (last visited Feb. 28, 2023).

2. The normal punishment for forming a cartel should be unimportant in contrast with the projected advantages.
3. The expense of shaping and upholding a cartel should be unobtrusive in comparison to the normal increases.

To summarize, in the case of inelastic demand, an increase in price caused by cartel formation works because an increase in income is accompanied by a decrease in the absolute cost of production, resulting in an increase in benefit levels.

Over the long haul, an inelastic demand curve requires the assembly of three elements:

1. In a cartelized item market, there are few close substitutes.
2. a sizable market share of the overall industry among cartel members and
3. Significant hindrances to entry into the market for the cartelized product.

The presence of a cartel might be demonstrated by direct proof, indirect proof, or a mix of both. Circumstantial evidence is yet another type of evidence.

The American philosopher Henry David wrote that conditional proof can persuade, as when you track down a trout in the milk. Since businesses engaging in cartel activities hesitate to compete against one another, end users are left with limited options, which then stifle corporate innovation. As a corollary, it is seen as a serious aversion to competitive marketplaces. However, because cartels are formed and operated in secret, prosecuting them may be the most difficult of the jobs earmarked for competition authorities.

As a result, cartel agreements are easier to regulate if members' dishonesty is easy to detect.³ This is reflective of the fact that the modus operandi of successful cartels is their secrecy. Then, at that point, the accompanying four variables help in the identification of cheating:

1. More small number of firms;
2. No autonomous fluctuation of prices;
3. Wide information on prices; and

³ Wils, Wouter P.J., *Leniency in Antitrust Enforcement: Theory and Practice*, 30 *WORLD COMPETITIVE LAW AND ECONOMICS REVIEW* (2007), http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=456087.

4. Product homogeneity among cartel individuals at each point in the circulation chain.

As a result, the focus of the *per se* rule for assessing hard-core cartel behaviour is solely on whether specific conduct occurred. In view of its detrimental effect on competition and lack of redeeming economic value, hard-core cartel formation is *per se* illegal in multiple jurisdictions.

THE INDIAN LENIENCY REGIME: A SNAIL'S WALK?

The Indian Competition Act, 2002, characterises a cartel as "*an association of producers, sellers, distributors, traders, or service providers who, by agreement amongst themselves, limit, control, or attempt to regulate the production, distribution, sale, or pricing of, or trade in, goods or the provision of services.*"⁴

The Act proceeds to forbid arrangements that are anti-competitive and will cause an appreciable adverse effect on competition.⁵ These incorporate agreements that, straightforwardly or in a roundabout way, decide sale prices, allocate a geographical area of production, lead to big rigging, and regulate or limit production, supply, etc.⁶ Section 3(3) of the Act precludes cartelization in almost all circumstances. A comparable regime is followed across numerous jurisdictions, like the United States and the European Union.

Cartels are by definition secret, and due to technicalities, competition authorities around the world must devote their significant resources to locating and dismantling cartels. Competition law cases throughout the world evince that circumstantial evidence cannot be relied on simply for the identification of cartels. It is a well-established principle in the United States that merely analogous behavior that is in tune with fair competition, with no other data to substantiate as much, would be inadequate to sustain even the presumption of conspiracy.⁷ This implies that circumstantial evidence should be substantiated with direct evidence.⁸

Furthermore, so far as the EU is concerned, it acknowledges the right of the economic operators to conform judiciously to the prevailing and anticipated behavior of their competitors and in that aspect, the European Court of Justice opined that "*parallel conduct cannot be regarded as establishing proof*

⁴ Competition Act, 2002, §2(c), No. 12, Acts of Parliament, 2002 (India).

⁵ Competition Act, 2002, §3, No. 12, Acts of Parliament, 2002 (India).

⁶ Competition Act, 2002, §3(3), No. 12, Acts of Parliament, 2002 (India).

⁷ *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.*, 1986 SCC OnLine US SC 61 : 89 L. Ed 2d 538 : 475 US 574 (1986).

⁸ *Blomkest Fertilizer, Inc. v. Potash Saskatchewan*, 203 F.3d 1028 (8th Cir. 2000).

of concertation unless concertation constitutes the only plausible explanation for such conduct”⁹

In India, the CCI was primarily of the ideology that cartels cannot be established without the presence of direct evidence.¹⁰ However, the CCI eventually departed from this position and relied solely on circumstantial evidence, while direct evidence was completely inaccessible.¹¹ That being the case, the CCI opined that *“If direct evidence is not present, but circumstantial evidence if points to market competition harm, the Commission will take cognizance of the same.”*¹² As a result, the position has eroded over time, approaching the “balance of probability” test. Thereby meaning that the CCI is expected to use the “rule of reason” to decide whether or not an agreement is anti-competitive.

Amnesty/leniency programmes are widely regarded as one of the most effective strategies to discover cartels. These schemes are designed to encourage cartel members to confess, thereby creating a “race for confessions” and assisting competition officers, and in exchange, they incentivize one or a few more whistleblowers with considerably reduced fines as compared to other cartel members.¹³

⁹ A. Ahlström Osakeyhtiö v. Commission of the European Communities, ECLI:EU:C:1993:120, [1993] ECR I-1310, 978-979.

¹⁰ Consumer Online Foundation v. Tata Sky Ltd., 2011 SCC OnLine CCI 12.

¹¹ Builders Assn. of India v. Cement Manufacturers' Assn., 2016 SCC OnLine CCI 46 : 2012 Comp LR 629 (CCI).

¹² *Id.*

¹³ MASSIMO MOTTA, COMPETITION POLICY: THEORY AND PRACTICE 193 (Cambridge University Press 2004).

The idea has been extensively borrowed from the **Prisoner's Dilemma** theory.

THE DECISION MATRIX

Prisoner's Dilemma:

Profounder: Merrill M. Flood & Melvin Dresler (Rand Cooperation, 1950)

It was later formalized and named by Canadian mathematician, Albert William Tucker. The prisoner's dilemma basically provides a framework for understanding how to strike a balance between cooperation and competition and is a useful tool for strategic decisionmaking. This model is the background of a successful leniency program. It suits better in an oligopoly market for example, there is a fierce rivalry between Coca-Cola (KO) and PepsiCo (PEP) in soft drinks and Home Depot (HD) versus Lowe's (LOW) in building supplies

Prisoner B Stays Silent

Prisoner B Betrays

Prisoner A Stays Silent

Both serve 6 months

Prisoner A serves 10yrs

Prisoner B goes free

Prisoner A Betrays

Prisoner B serves 10yrs

Prisoner A goes free

Both serve 5 yrs

Source: Ulrich Blum, Nicole Steinat, Michael Veltins, On the Rationale of Leniency Programs: A Game Theoretical Analysis, European Journal of Law & Economics (2008)

Betrayal becomes the dominant strategy as a rational player will choose to betray owing to smaller risk (i.e., 5 yrs instead of 10 yrs in prison) and greater reward (i.e., gets out of jail free than serving 6 months).

These programmes, which were first implemented in the United States in 1978, allow corporations or people implicated in illicit cartel activity to reap amnesty in exchange for coming forward and denouncing the cartel.¹⁴ The US amnesty program was revised in 1993 to provide firms with more initiatives and greater incentives to associate with the Antitrust Division: the "first informant" rule today assures amnesty to the first reporting firm, whereas the "post investigation amnesty" regime enables the first informant to remain

¹⁴ Ghosal, Vivek and Sokol, D. Daniel, *Policy Innovations, Political Preferences, and Cartel Prosecutions*, CESifo Working Paper No. 5543 (2015), https://www.econstor.eu/bitstream/19419/123176/1/cesifo_wp5543.pdf.

eligible even after an investigation has started in earnest.¹⁵ This achievement has prompted a number of middle- and low-income countries to implement their own leniency schemes. However, the mere presence of legislation does not imply that a country would profit from increased competition unless it has been properly executed with clear rules and enforcement capabilities. Mr. Fernando de Magalhães Furlan, Commissioner and Acting Chair of Conselho de Defesa Econômica (CADE), Brazil, echoed these sentiments, stating that an effective leniency programme requires

- a. predictability of procedures,
- b. protection of leniency applicants' identities and data, and
- c. a high risk of cartel detection and punishment.¹⁶

INSTITUTION OF INDIAN LENIENCY REGIME

The Indian leniency programme is specified in the Competition Act, 2002 (§ 46), which must be read in conjunction with the Competition Commission of India (Lesser Penalty) Regulations, 2009. In India, cartels have flourished primarily because there existed no effective watchdog until the CCI was constituted and tasked to get behind such cartels. It raised a clarion plea to institute a leniency regime after the cement cartel case was discovered and 11 cement companies were ticketed for a whopping monetary penalty of INR 6307 crore.¹⁷ Any of the instances listed in Section 3(3) of the Act are embraced by the leniency programme. In essence, the Lesser Penalty Regulations outline:

- Eligibility requisites for a leniency application;
- A sliding scale of leniency for administrative penalties; and
- The procedure for securing marker status.
- The details of a leniency application
- Confidentiality-related provisions

The leniency programme is accessible to enterprises and/or individuals that assert their involvement in a cartel to the CCI and assist with subsequent examination. For cartel conduct, there is no criminal charge in India. The leniency regime solely applies to the administrative liability levied on cartel participants.

¹⁵ Zhijun Chen and Patrick Rey, *On the Design of Leniency Programs*, IDEI Working Papers No. 452 (2007), http://idei.fr/sites/default/files/medias/doc/by/rey/leniency_v2.pdf.

¹⁶ UNITED NATIONS DIGITAL LIBRARY, <https://digitallibrary.un.org/record/703241?ln=en> (last visited Feb. 28, 2023).

¹⁷ *Ambuja Cements Ltd. v. CCI, TA/AT* (Compt No.22 of 2017).

The CCI amended the Lesser Penalty Regulations in August 2017 to strengthen and streamline its leniency programme by attracting better-quality evidence through leniency, and this had far-reaching consequences for the Indian leniency regime. The amended regulations addressed some of the substantive issues faced by the industry.

CCI (LESSER PENALTY) AMENDMENT REGULATIONS, 2017- HIGHLIGHTS

- An inclusive definition of "applicant" and "party", to include individuals.
- Timelines: leniency applicants are now given a 15-day window from the date of receipt of communication from the CCI to mark their priority status.
- Marker system changed: subsequent applicants are now granted a reduction of 30%. In the Pune Municipal Corporation case¹⁸, the CCI awarded the fourth applicant the privilege of a penalty reduction, but the fifth and sixth applicants were denied the benefit since their disclosures offered no substance to the CCI's inquiry (Suo Motu Case No. 04 of 2016).
- Confidentiality regarding the identity of the applicant and the confidential information submitted under Regulation 6 of the Lesser Penalty Regulations, diluted, grants the Director General the flexibility to disclose such information to other parties on an additional ground.
- Limiting the information requirement in respect of the volume of business affected by the alleged cartel to India.

As of April 1, 2022, only 15 cases had been decided under the leniency provisions of the Competition Act. In 2022, the Indian Commission's competition strategy was overhauled in tandem with "conventional" competition law enforcement. Additional clarification on the following competition law components, namely vertical, social, and digital, is now available, with further fine-tuning expected in 2023. The year 2022 demonstrated that Indian Prime Minister Shri Narendra Modi was correct when he claimed, *"India is continuously marching ahead with holistic efforts focused on all-round and inclusive development. We have strived constantly for governance that is professional and process-driven."* Remarkably, the competition policy pendulum has swung from regulation to enforcement rather swiftly.

¹⁸ Cartelization in Tender Nos. 21 and 28 of 2013 of Pune Municipal Corpn. for Solid Waste Processing, In re, 2018 SCC OnLine CCI 44.

Indeed, this year has been full of action. February was witness to this fitting case that showcased a lack of enforcement mechanism for the cease-and-desist orders of the commission. In terms of Section 27(a) of the Act, the Commission directed the Dumper Truck Union and Mr. Kunwar Raj Singh, who was held liable under Section 48 of the Act to cease and desist in the future from indulging in practices which have been found in the present order to be in contravention of the provisions of Section 3 of the Act.¹⁹

Separately, in another major shift for India's merger control regime, the Government of India extended the validity of the *de minimis* (also known as *small target*) exemption for another 5 years, i.e., until March 29, 2027, via a notification published on March 16, 2022.²⁰ Then, on April 8, 2022, the Commission notified the public of amendments to the process of reviewing **confidentiality under Regulation 35** of the Competition Commission of India (General) Regulations, 2009.²¹ The amendments aim to streamline the procedure of asserting confidentiality over information provided to the CCI. In a welcome move, the Commission has published the revised format of Form II (long form) to notify reportable transactions.

For decades, tax evasion and avoidance have robbed our governments of valuable resources. And the situation has gotten worse over time as people and companies have become more adept at exploiting tax loopholes and inconsistencies across borders. Taxation is important to the contemporary democratic state. Keeping this in mind, by way of a notification dated November 23, 2022, the GOI has empowered the CCI, under **section 7 of the Act of 2002**, to take charge of matters relating to the **anti-profiteering provisions** of the Central Goods and Services Tax Act, 2017. Empowering CCI to examine cases for adherence to anti-profiteering provisions is likely to bring in more transparency in the proceedings, considering its expertise in handling consumer interest-related matters and the proper litigation mechanism. The NAA was constituted as a statutory authority under Section 171 of the CGST Act to track and combat any unfair profiteering by GST-registered sellers and to ease the seamless passing on of any GST rate reductions to consumers.

August 2022 is also crucial for evolution of jurisprudence of Indian competition law regime, as it not only witnessed the publication of the Amendment Bill but also uncovered certain significant developments. As a result, the victory against Big Tech and the modifications to the competition law system will surely stick out in the memory of this year.

¹⁹ *CJ Dard Logistics Ltd. v. All Members of Dumper and Dumper Truck Union*, 2022 SCC OnLine CCI 6.

²⁰ COMPETITION COMMISSION OF INDIA, <https://cci.gov.in/combination/legal-framework/notifications> (last visited Feb. 28, 2023).

²¹ COMPETITION COMMISSION OF INDIA, <https://www.cci.gov.in/images/legalframeworkregulation/en/g-notification1652516858.pdf> (last visited Feb. 28, 2023).

In 2022, in a notable development, the CCI amended the **CCI (General) Regulations 2009** and introduced the provision for setting up a confidentiality ring. Subject to the parties submitting the necessary undertakings, the CCI can establish a confidentiality ring comprised of authorised representatives of the parties who can access the confidential case records, including the confidential version of the DG investigation report. This development is in line with the practice followed in jurisdictions like the EU and the UK. During the past year, in addition to the bill and confidentiality ring there have been some key decisions pertaining to cartel enforcement in India.

In February 2022, the Commission found tyre manufacturers and their trade association, the Automotive Tyre Manufacturers' Association (ATMA), including their office bearers, guilty of cartelization for increasing the price of cross-ply and bias tyre variants sold by each of them in the replacement market and for limiting and controlling production and supply in that market in 2011-12, in violation of Section 3(3) of the Act.²²

Cartel jurisprudence in India has also seen the CCI address the idea of the **"single economic entity"** in various instances. This idea is particularly poignant considering the presence of various conglomerates in India: a number of businesses may potentially be part of the same "group" as mentioned in Section 5 explanation (b).

The Single Economic Entity theory therefore determines whether related entities (such as a parent and subsidiary or a number of subsidiaries of the same parent) should be regarded a single entity for the purposes of Section 3 and can thus claim joint leniency, or whether they should be deemed independent entities with the potential to collude in breach of Section 3, necessitating the submission of separate leniency claims.

Initially, the CCI's consideration of the Single Economic Entity theory was superficial and had minimal precedent relevance. The CCI seems to have deemed entities that were part of the same "group" to be a Single Economic Entity without considering the necessity to prove factual control.

For the first time, the CCI dealt with the notion of a **"single economic entity"** while investigating the presence of an anticompetitive vertical agreement in *Lamborghini case*.²³

²² *Re: Ministry of Corporate Affairs and Apollo Tyres*, Reference Case No. 08 of 2013.

²³ *Exclusive Motors (P) Ltd. v. Automobili Lamborghini S.P.A.*, 2012 SCC OnLine CCI 69.

In an intriguing twist, the CCI abandoned its earlier approach in *Insurance Companies case*.²⁴ The CCI fined four public sector insurance companies for bid-rigging, all of which were completely owned subsidiaries of the central government managed by the Ministry of Finance (MOF). The Commission held that the insurance companies did not constitute a 'single economic entity'.

The Competition commission ruled in January 2022 that four maritime transport companies had cartelized the provision of maritime motor vehicle transport services to automobile original equipment manufacturers along distinct routes (Suo Motu Case No 10 of 2014). The above stance was strengthened in April 2022 in a matter involving cartelisation in the bidding process for the purchase of certain high-performance polyamide bushes and self-lubricating polyester resin bushes by the North Western Railway (Reference Case No 3 of 2018), in which the CCI assigned distinct market status to two firms despite the fact that they belonged to the same group.

The single entity doctrine in the United States shields business units from antitrust fines. The 1984 ruling in *Copperweld case*²⁵ by the U.S. Supreme Court best illustrates the idea of a single entity. The Supreme Court ruled that a parent corporation and its wholly owned subsidiary were a single entity.

The U.S. Supreme Court reconsidered and clarified its approach in the significant 2010 *American Needle case*²⁶ after conflicting jurisprudential interpretations on the definition of a single entity. American Needle did not reject Copperweld expressly, but revised its position to offer a rule of reason test rather than a per se approach to associated corporations.

In EU law, single entity analysis is embedded within a broader 'undertaking' framework.

It is worth noting that

On February 8, 2023, the Ministry of Corporate Affairs, Government of India (MCA) recommended revisions to the **Competition (Amendment) Bill, 2022 (CAB22)**, which was presented in the Indian Parliament in August 2022 to provide incremental improvements to the Competition Act, 2002. After

²⁴ Cartelization by Public Sector Insurance Companies in Rigging the Bids Submitted in Response to Tenders Floated by the Government of Kerala for Selecting Insurance Service Provider for Rashtriya Swasthya Bima Yojna, In re, 2015 SCC OnLine CCI 213. The COMFAT upheld the finding of bid-rigging on appeal but the penalty was modified (Appeal No. 94/2015).

²⁵ *Copperweld Corp. v. Independence Tube Corp.*, 1984 SCC OnLine US SC 147; 81 L Ed 2d 628; 467 US 752 (1984); 104 S Ct 2731.

²⁶ *American Needle, Inc. v. National Football League*, 2010 SCC OnLine US SC 52; 560 US 183 (2010); 130 S Ct 2206.

consideration of the Standing Committee's suggestions, the MCA has now introduced further revisions to CAB22 in order to bring out the Competition (Amendment) Bill, 2023. (CAB23). CAB23 is scheduled for debate during the Indian Parliament's current Budget Session.

LENIENCY EXPERIENCE OF DIFFERENT JURISDICTIONS

The majority of nations across the globe have implemented a leniency programme, albeit it differs in several ways. Each country has created its own leniency policy, which is influenced by wealthy countries such as the United States and the European Union. A few countries with their respective cartel sanctions and leniency programmes to dismantle cartels are listed below:

Leniency Program in USA

The Sherman Act of 1890, as amended by the Clayton Act, establishes the fundamental concepts of antitrust in the United States. The Leniency Program is the cornerstone of the Antitrust Division's cartel enforcement regime. The Department of Justice (DoJ) is the primary body responsible for carrying out investigations of cartel activities following the principles of Sherman Antitrust Act, 1890 (the Act) as its base of investigation. It defines cartel as both a criminal and a civil offence under section 1 and section 4 respectively. The US leniency programmes consists of two policies:

1. The Corporate Leniency Policy or Amnesty Programme, which was first, introduced in 1978 and revised in 1993.
2. The Individual Leniency Policy or Leniency Policy, which was introduced in 1994.

Under U.S. federal antitrust laws, corporations and individuals may incur severe civil and criminal penalties. Section 1 of the Sherman Act provides that, "every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations." Section 4 of the Clayton Act enables private parties to bring civil action for damages caused because of Sherman act violations. However, section 1 of the Act does not anywhere express as to which violations are criminal in nature and which are civil in nature. For this the Anti-trust division has a well drafted policy regarding the criminal indictment for the cases of per se violations of section 1. The Antitrust Division's Corporate Leniency Policy offers two types of leniency:

1. **TYPE A:** Applicable only when DoJ has not procured the relevant information from an outside source before the commencement of

investigation, or when the company terminates its participation before the investigation etc

2. **TYPE B:** Applicable when investigation has begun and DOJ already possess the relevant information

Recent updates to the Division's Frequently Asked Questions emphasized that these individuals will not be protected if they do not fully cooperate with the Division's investigation.²⁷ In that event, these parties will be "struck out" of the letter of conditional leniency. Paragraph 4 of the model corporate conditional leniency letter²⁸ details the specific conditions for leniency protection for directors, officers and employees.

Former directors, officials, and employees of a corporation that acquires leniency *'are presumptively barred from any grant of corporate leniency,'* the Antitrust Division declared in January 2017.²⁹ Previous to this declaration, the Division maintained that it was under no responsibility to offer relaxation to former directors, officers, or employees.

The **Leniency Plus Program**, also recognized as the **Amnesty Plus Program**, has been a significant component of investigative leads for the Division.³⁰ Leniency Plus is accessible to a corporation that cannot plead leniency for a conspiracy now under investigation (the A conspiracy) but discovers proof of a second conspiracy (the B conspiracy) that the Division is unaware of during its own internal inquiry. The Division will nonetheless propose to the sentencing court that the corporation get a significant reduction for its participation in the A conspiracy on account of its cooperation in the B investigation, even though the final decision for the sentence rests with the court.

Penalty Plus is the converse of Leniency Plus. If the Division later learns of a conspiracy in a new market and the corporation was either ignorant of the second conspiracy or failed to notify the Division, then Penalty Plus results in enhanced sentencing for the corporation for the conspiracy in the original market.

In *United States v. Bridgestone*, the Division evaluated an enhanced fine for the defendant's failure to reveal a parallel conspiracy while pleading guilty to a previous conspiracy. In this matter, the Division observed that Bridgestone's

²⁷ DOJ, *Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters* (Nov. 19, 2008, updated Jan. 26, 2017) at Question 22.

²⁸ The Model Corporate Conditional Leniency Letter, www.justice.gov/atr/page/file/1112911/download (last visited Feb. 28, 2023).

²⁹ DOJ, *Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters* (Nov. 19, 2008, updated Jan. 26, 2017) at Question 24.

³⁰ DOJ, *Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters* (Nov. 19, 2008, updated Jan. 26, 2017) at Question 8.

failure to report its involvement in a second cartel at the time it pleaded guilty to a prior conspiracy concerning marine hoses was an aggravating element in the US\$425 million fine imposed.³¹

In 2020, the DOJ announced that the Procurement Collusion Strike Force would focus on identifying any collusive practices of organisations and individuals.³²

The Division grants only one leniency application per conspiracy, and while the marker is in effect, no other company can "leapfrog" the applicant that has the marker. The Antitrust Division's policy has always been to treat this information as confidential without agreement with the applicant, prior disclosure by the applicant, or by order of a court.³³

Leniency Regime of Philippine

Section 35 of the Philippine Competition Act, otherwise known as the Republic Act No. 10667, empowers the Competition Commission of Philippine ("PCC") to develop a Leniency Program for a party to an anti-competitive agreement as specified in Section 14(a) and 14(b) of the PCA.³⁴ On 27 December 2018, the PCC published the "Rules of the Leniency Program of the Philippine Competition Commission".

The PCA and its Rules permit any entity that takes an interest or took part in an infringement of Section 14(a) or 14(b) thereof i.e., price-fixing, bid-rigging, output limitation, and market allocation, to benefit from "leniency" in the pattern of either:

- a. Immunity from prosecution; or
- b. Exemption, waiver, or reduction of fines in return for the consensual disclosure of information concerning such violation, subject to certain requirements.³⁵

³¹ THE UNITED STATES DEPARTMENT OF JUSTICE, BRIDGESTONE CORP. AGREES TO PLEAD GUILTY TO PRICE FIXING ON AUTOMOBILE PARTS INSTALLED IN US CARS <https://www.justice.gov/opa/pr/bridgestone-corp-agrees-plead-guilty-price-fixing-automobile-parts-installed-us-cars?text=Bridgestone%20Corp.%2C%20a%20Tokyo%2C,Department%20of%20Justice%20announced%20>

³² William Hughes & Craig Carpenito, *Statement Before the Committee on the Judiciary United States Senate* (2020), <https://www.judiciary.senate.gov/imo/media/doc/Hughes-Carpenito%20Testimony.pdf>.

³³ DOJ, Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters (Nov. 19, 2008, updated Jan. 26, 2017) at Question 33.

³⁴ PHILIPPINE COMPETITION COMMISSION, LENIENCY PROGRAM, <http://www.phcc.gov.ph/leniency-application/> (last visited Feb. 28, 2023).

³⁵ Rules of the Leniency Program of the Philippine Competition Commission, §1, Republic Act No. 10667.

For each reported infraction, the PCC will only allow one person to benefit from immunity from suit and a reduction in fines. If the first eligible enterprise is only given a reduction in fines, the subsequent entity may also be accorded immunity from prosecution provided the Marker Request Form was submitted prior to the initiation of the fact-finding or Preliminary Inquiry, or at the PCC's prerogative if the Marker Request Form was presented just after start of the fact-finding or Preliminary Inquiry.³⁶ Likewise, an entity that is not qualified for exemption from lawsuit may be evaluated for administrative fine reduction. The PCC may even extend Conditional Leniency provided that the entity continued to work in concert with the PCC until the conclusion of any and all administrative and civil lawsuits filed by the PCC.³⁷

By seeking a "Marker" from the PCC, any entity, or any present or former director, officer, trustee, partner, employee, or agent of a juridical entity, who may be accountable for violations of Sections 14(a) and 14(b) of the PCA, may petition for leniency. This Marker safeguards the entity's position in the Program's applicant queue. There is no charge for such a request. Following that, the subject entity is given a 30-day period to gather and submit information and proof. The aggrieved entity may submit an appeal with the Leniency Appeals Committee if the Leniency Committee denies an application for leniency or revokes a conditional leniency grant.³⁸

The success of the PCC's Leniency Program will inhibit the formation of new cartels while also assisting in the detection and prosecution of current ones.

Leniency Regime of Uk

The Competition Act 1998 and the Enterprise Act 2002 are the two major pieces of statutory legislation in the United Kingdom that regulates cartel activity (both as amended). The civil offence for enterprises is established out in Section 2 of the Competition Act of 1998, while the criminal penalty for individuals is spelled out in Section 188 of the Enterprise Act of 2002.

When administering the Chapter 1 prohibition to behaviour that may affect commerce between EU member states until the conclusion of the transitional period under the Brexit arrangement, the Competition and Markets Authority ("CMA") had to apply Article 101 of the Treaty on the Functioning of the

³⁶ Rules of the Leniency Program of the Philippine Competition Commission, §3, Republic Act No. 10667.

³⁷ Rules of the Leniency Program of the Philippine Competition Commission, §5(c), Republic Act No. 10667.

³⁸ Rules of the Leniency Program of the Philippine Competition Commission, §6, Republic Act No. 10667.

European Union.³⁹ The CMA will no longer employ Article 101 TFEU and it will no longer be obligated to Regulation 1/2003 now, as the transitional period has expired. The Chapter 1 prohibition seems to be the only legal foundation for the CMA to initiate cartel proceedings.

The civil prohibition is enforced by the CMA, along with other sectoral regulators such as the Office of Communications and the Gas and Electricity Market Authority.⁴⁰ Joining competition authorities in the United States, New Zealand, and other countries, the CMA is a signatory to a Multilateral Mutual Assistance and Cooperation Framework. So unless the leniency applicant has agreed to a waiver of confidentiality, information provided as part of a leniency application will not be exchanged with a foreign agency.

Certain agreements connected to the production or trading of agricultural products are exempt from the limits of the Chapter 1 prohibition under the Competition Act. Ticketing schemes for public transportation are likewise exempted. If the Secretary of State is satisfied, additional categories of agreement may be excluded. For example, certain sections of the competition rules were suspended in 2021 due to fuel and CO2 supply problems.⁴¹

The Office of Fair Trading (OFT) publication, 'Applications for leniency and no-action in cartel cases,' released in July 2013 (adopted by the CMA), and the addendum to this publication, 'Addendum to OFT1495,' dated 24 September 2020, which pertains to new leniency applications submitted on or after this date, provide for multiple kinds of protection schemes⁴²:

1. **Type A:** The applicant must be the inaugural applicant, and the CMA must not have undertaken a previous inquiry. The evidence revealed must be sufficient for the CMA to complete a credible inquiry, and the company/individuals engaged need to provide all relevant details, accept cartel participation, cooperate with the CMA, and renounce cartel participation. Applicants that meet this standard will be accorded corporate immunity (no fine), blanket exemption from criminal prosecution for assisting current or former individual employees/officers, and protection from director disqualification. Applicants who coerced competing enterprises to enter the cartel are not eligible for Type A immunity.

³⁹ Council Regulation (EC) No. 1/2003 of Dec. 16, 2002 on the implementation of the rules on competition laid down in arts. 81 and 82 of the EC Treaty.

⁴⁰ CMA Information Note, *Arrangements for the Handling of Leniency Applications in the Regulated Sectors* (2017).

⁴¹ *UK Gives Short-Term Competition Exemption for Parts of CO2 Industry Amid Supply Crunch*, REUTERS, <https://www.reuters.com/world/uk/uk-gives-short-term-competition-exemption-parts-co2-industry-amid-supply-crunch-2021-10-01/> (last visited Feb. 28, 2023).

⁴² Office of Fair Trading, *Applications for Leniency and No-Action in Cartel Cases: OFT's Detailed Guidance on the Principles and Process* (2013), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf.

2. **Type B:** The applicant must be the first to initiate an application in a previously conducted investigation. The information supplied must be of major significance to the investigation, and the applicant must satisfy all of the other Type A standards. Discretionary corporate immunity from financial penalties or percentage fine reductions will be accessible to the applicant. Individual employees and directors who cooperate with the investigation may be offered discretionary immunity from criminal trial ("blanket" immunity). If corporate immunity or a leniency reduction is approved, directors may be immune from disqualification. Applicants who compelled other enterprises to join the cartel are not eligible for Type B leniency/immunity.
3. **Type C:** Applicants who are coercers and/or weren't the first to seek, regardless of whether there is a prior investigation, are eligible. The information must be meaningful to the investigation. Applicants will receive a potential fine reduction of up to 50% and discretionary immunity from criminal charges for specific participants, which will be bargained upon with the CMA. If a corporate leniency reduction is granted, director disqualification protection is available.

As a corollary, in an attempt to "perfect" a marker for Type A immunity, the claimant must disclose all available details to the CMA, providing a sufficient foundation for a credible investigation. Applicants seeking type B immunity/leniency or type C leniency must furnish all necessary documentation to add considerable value to the CMA investigation and genuinely advance it.

The CMA fined a number of corporations a total of £260 million in July 2021 for competition infractions involving the sale of hydrocortisone tablets, notably excessive pricing and market sharing arrangements.⁴³

Furthermore, the UK government released a consultation on revamping competition and consumer policy in July 2021.⁴⁴ As part of matters under consideration, the government is soliciting feedback on the merits of providing holders with full protection in the public enforcement process (e.g., immunity granted by the CMA), along with an immunity from liability for private claims for damages caused by the cartel.

⁴³ Fountoukakos, K. and Rowland, P., *Competition Law in the Pharma Sector – Developments and What's to Come in 2022* (2022), <https://www.mondaq.com/uk/antitrust-eu-competition/1160128/competition-law-in-the-pharmasector-developments-and-what39s-to-come-in-2022>.

⁴⁴ Gov.UK, *Consultation Outcome: Reforming Competition and Consumer Policy*, <https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy> (last visited Feb. 28, 2023).

CONCLUDING REMARKS

The stated objective of competition law is to not only inhibit activities that are detrimental to competition but also foster and perpetuate competition in markets, safeguard the interests of the public, and secure trade freedom. The same sentiment is echoed in India's leniency regime, which embraces violations of Section 3 of the Act and even infringements of Section 3(3) while remaining committed to the root aim of cartel detection, enticing cartel members, and applicant confidentiality. To accomplish these meticulous ends, this law must not only uphold its theoretical tenets but also realize that it entices cartel members to network with the government by making the procedure applicant-friendly and non-cumbersome.

Nevertheless, readers can argue that today's antitrust law in terms of cartels has transitioned progressively from the days of vaguely defined provisions of the MRTP Act. However, it would be fair to mention that India has a long way to go before it can be claimed to possess a robust and potent cartel detection and enforcement regime.

- Furthermore, areas like the satisfaction of the CCI and what accounts for a significant disclosure are left open to interpretation.
- Likewise, as previously noted, there appears to be a great disparity in the orders sanctioned by the CCI in terms of the proposition employed. Interestingly, there has also been an instance where a cartel allegation was raised in a leniency application, and the CCI disregarded the charge on the grounds that there was no evidence to prove that the activities were executed, resulting in a cartel.

Keeping aside the irregular principles outlined above, what is also worth noting is CCI's model of extending a greater or even total waiver of penalty in cases where the applicants' disclosure either empowers CCI to build a *prima facie* judgment about the cartel or aids CCI in realizing the presence of a cartel.

While the early leniency rulings lacked certainty and regularity, the 2017 Amendment to the Regulation is indeed a major impetus. The Amendment intends to advance the value of the leniency policy to individual employees, who could be found liable for the violation and be sanctioned in their individual capacity under Section 48 of the Act. The abolition of the limited marker system is noteworthy since it could conceivably prevent enterprises from providing information as they would have to encounter the risk of presenting self-incriminating evidence of cartel interaction without the clarity of being one of the first three markers for leniency.

While the 2023 Bill addressed industry concerns about the previous Bill, its inclusion of provisions concerning the **computation of penalty on global turnover** and **mens rea** in cartel cases caught the legal and business communities off guard, as they were incorporated without soliciting input from stakeholders. Industry may now breathe a sigh of relief after the government reportedly agreed to a parliamentary panel's recommendation to enable cartels to choose the **settlement scheme** under the Competition Amendment Bill.

The Parliamentary Committee on Finance proposed placing cartels in the spectrum for settlement *"as a realistic recourse to the entire process."* The Bill would also allow a party to withdraw a marker. The Bill notably envisions a *"leniency plus"* mechanism, which would allow a party to reveal another cartel in exchange for a reduction in penalty for both cartels.

Overall, the Bill is a major development that will modernise Indian competition law regime. Yet, in order for the revisions to be applied appropriately, the Commission will need to provide detailed regulations and guidelines.

In conclusion, the proposed modifications to the leniency regime, as well as the adoption of settlements and commitments, would need well-planned litigation strategy for behavioural disputes. It remains to be seen how the reforms will take shape and develop.

In 1997, the UN Commission on International Trade Law, also known as "the Model Law", was proposed to promote the common interest and harmonize international trade law concerning cross-border insolvency. The main objective of this law is to create a fair and consistent system of insolvency regulations and procedures.

The article analyzes India's current insolvency laws and argues for the need for cross-border insolvency laws. The paper also analyses the difficulties that India may face in adopting the 'Model Law' for cross border insolvency by having a critical analysis of the position of law in US & Europe in comparison to India.

I. CROSS BORDER INSOLVENCY

It is not realistic to assume that assets owned by a company in one country will not be subject to debt recovery in another country if the company goes bankrupt and has assets in multiple countries. This is especially relevant in today's globalized world. Unfortunately, most insolvency laws have territorial limits, making it challenging for the insolvency process in one country to consider assets held by the company in another country. The provisions of Section 234 and Section 235, which allow for the central government to enter into bilateral agreements with foreign nations and for the adjudicating authority to request a foreign court to deal with assets located in that nation. Even in places where they do exist, the sections remain to be notified.³ IBC provide information on the NCLT's orders and cross-border insolvency processes.⁴

India hasn't enacted any model laws yet. If, however, Indian companies with the assets in the foreign country is trying to wind up then, most likely there is no law governing it. As mentioned in the code of CPC 1908 the cross-border insolvency transactions are generally dependent on the mutual recognition of foreign decrees.⁵ Due to the assets being in different jurisdictions different countries the process of insolvency through the method of reciprocal agreements becomes very complex. Also looking deeply into the code, following the process of reciprocal agreement does not give any idea on the procedure that needs to be followed to smoothly operate with the insolvency procedure. Indian law due to lack of provisions for proper procedure it becomes difficult

³ Raaban A., *India's Proposal to Recognise Cross Border Insolvency*, Lakshmikumaran & Sridharan Attorneys (Aug. 13, 2018), <https://www.lakshmisri.com/insights/articles/india-proposal-to-recognise-cross-border-insolvency/> (accessed June 3, 2021, at 5:30 PM).

⁴ Insolvency and Bankruptcy Code, 2016, Ss. 234 and 235.

⁵ *Id.*

for insolvency procedure to be conducted. This makes the law incomplete and there should be proper provisions or recognition for the same.⁶

II. UNCITRAL MODEL LAW

Across the world, with increasing competition in the international, corporate, and commercial market, the sellers and the companies shall conduct their business in more than one country. In addition, Indian companies, and the Indian banks, on their ease of doing business and make in India policy of financial institutions, corporations, and investors to bring their businesses and manufacturing units in India. International experience has shown that the decisions of international investments and their results could be affected by the laws relating to the insolvency and bankruptcy in the country. That is why, in the light of the latest developments in the Government of India in the Insolvency Act, it was very important for the preparation of a report based on the number of recommendations of the Commission on cross-border insolvencies and recognition, as in many other jurisdictions, the acceptance of the "UNCITRAL Model Law".

On June 20, 2018, the government took a positive step forward by taking analysis and taking inputs from the UNCITRAL model law. The MCA initiates a "Draft Chapter on Cross-Border Insolvency" (referred as Draft Law) for the country. To have an Indian essence or to meet the needs of the Indian approach to insolvency matters; modifications were made to the Draft Law. The objective of this Draft Law is to bring uniformity in the legal process for the countries those who have adopted it. This Draft Law will help India to function better with jurisdictions who have adopted or recognized the model law. It is therefore necessary for Ministry of Corporate Affairs to note the "UNCITRAL Model Law" and "Draft Chapter on Cross-Border Insolvency" and release it. During its thirty-first session in Vienna on May 30, 1997, the Model Law was unanimously accepted by UNCITRAL, where the final draft text talks were held.⁷

The "UNCITRAL Model Law" has been designed to tackle the common issues that arise in cases of international insolvency. These issues include jurisdictional norms, choice of law, and intergovernmental cooperation. The main objective is to promote collaboration and coordination by establishing

⁶ Sumant Baira, *Cross Border Insolvency Protocol Fills a Gap, But is Not a Comprehensive Law*, *THE FINANCIAL EXPRESS* (2020), <https://www.financialexpress.com/opinion/cross-border-insolvency-protocol-fills-a-gap-but-is-not-a-comprehensive-law/1751255/> (accessed May 28, 2021 at 6:30 PM).

⁷ Sean E. Story, *Cross-Border Insolvency: A Comparative Analysis*, *ARIZONA JOURNAL* (Feb. 17, 2020), http://arizonajournal.org/wp-content/uploads/2015/11/Story.Final_2.pdf (accessed May 28, 2021 at 7:00 PM).

guidelines that would simplify cross-border insolvency procedures while considering the diverse insolvency laws in different parts of the world.

III. UNCITRAL MODEL IS BROADLY BASED ON 4 PILLARS

Four Pillars of the Model Law are the right of access, recognition, relief, and coordination.⁸

* Rights to Access

First, to fully grant the right of access, it is paramount to highlight that the Model Law fosters the direct access to local courts by foreign representatives; hence, Article 9⁹ clearly states that, "a foreign representative is entitled to apply directly to a court in this State". Although it may seem redundant to emphasize the possibility that a foreign representative may directly participate to local insolvency proceedings that is not the case. Indeed, there are some countries in which, even if they enacted legislation based on the Model Law, the foreign representative is subject to bureaucratic obstacles, and it is prevented to directly apply to local courts. What is more, the lack of provisions promoting such a direct access may hamper the achievement of an efficient cross-border insolvency regulatory framework in so far as it does not encourage international cooperation. The resulting risk is that the foreign representative is not able, at least in the early stages of the insolvency proceeding, to properly safeguard the debtor's interests against creditors' individual actions or to prevent that the debtor undertakes fraudulent behaviours to be in a more favourable legal position.¹⁰

* Acceptance of international procedures

Chapter III¹¹ of the Model Law, from Articles 15 to 18, establishes provisions for the acceptance of international procedures. First feature to highlight, as already discussed, is the fact that the foreign delegates is subject to

⁸ Nidhi Shetye, *International Insolvency: An Indian Perspective on Cross-Border Treatment of Cases*, 39 *FORHAM INT. L. J.* 1046, 1050-52 (2015).

⁹ UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, New York, United Nations (2014). <https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf> (accessed on Apr. 10, 2023 at 2:30 PM).

¹⁰ H.P. Canon, Bill C55 and the "UNCITRAL Model Law on Cross-border Insolvency: The Harmonization of Canadian Insolvency Legislation, McGill University (Feb. 28, 2020, 9:24 PM), http://digitool.library.mcgill.ca/webclient/StreamGate?folder_id=0&dvs=1494601612191-114 (accessed on Feb. 20, 2023 at 5:18 PM).

¹¹ UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, New York, United Nations (2014). <https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf> (accessed on Jan. 13, 2024 at 5:20 PM).

certain requirement in terms of documentary evidence to be submitted to the local court of the enacting State so that such a court might accord recognition to the foreign proceedings. About that, Article 15(2) establishes what is the additional documentation that shall accompany the application for recognition; some of such documentation is a certified copy which shows the decision about the commencement of the foreign proceeding and the appointment of the foreign representative in the case that the aforementioned documentation is not available, any other evidence which demonstrates that the foreign proceeding exists and that the foreign representative has been appointed and a statement that identifies all the foreign proceedings that have been commenced in relation to the same debtor and that are known to the foreign representative

• Relief Effects

The relief is the assistance that the court of the enacting State grants to foreign proceedings with the purpose of fairly handling the cross-border insolvency. The Model Law envisages three types of relief: discretionary relief that may be granted upon application for recognition of a foreign proceeding¹², automatic relief upon the recognition of a foreign proceeding¹³ and discretionary relief that may be granted upon the recognition of a foreign proceeding.¹⁴

Article 19(1) deals with the pre-recognition effects in so far as it allows the court to grant temporary relief before that the decision recognizing the foreign proceeding is taken. The main features of this type of relief are that it is ordered at the discretion of the court, and it is aimed at providing an urgent tool to properly protect the debtor's and creditors' interests, in so far as it may be granted immediately after the application for recognition has been submitted.

As far as the scope of application of Art. 19(1) is concerned, it encloses the relief into a few types of actions, such as the stay of the execution against the debtor's assets, the chance to entrust the administration or realization of the debtor's assets located in the enacting State to the foreign representative with the purpose of preserving the asset's value as well as the suspension of the right to transfer or dispose any debtor's asset whether such a right has not been yet suspended in accordance to Art. 20(1) (c). The relief granted under Article 19 is on a temporary basis; indeed, unless otherwise provided, its effect ceases to exist from the moment that the decision for recognition is decided.

Article 20 refers solely to foreign main proceedings, i.e., those insolvency proceedings commenced in the foreign country where the debtor located the

¹² *Id.* art. 19.

¹³ Art. 20.

¹⁴ Art. 21.

centre of main interests. Secondly, a difference between the reliefs granted under Article 19 and the effects of the recognition of a foreign main proceeding under Article 20 is that the resulting relief of the latter arises automatically. The automatic relief implies that the effects produced by Article 20(1) are still effective even if the effects produced by such an article in the foreign State, where the foreign proceeding was commenced, are different from the effects produced in the enacting State. This is due because the effects of the recognition of a foreign main proceeding under Article 20 produce their own consequences that are independent from the consequences produced in the foreign State. Moreover, the relief granted under Article 20(1) apply also to interim proceedings.

Article 21¹⁵ deals with the discretionary relief as it gives the possibility to the court to grant any appropriate relief with the purpose of properly protecting the debtor's and the creditors' interests. Such a relief shall be request by the foreign representative and may be granted upon the recognition of the foreign proceeding, no matter if it is a foreign main proceeding or a foreign non-main proceeding. The main difference with the relief under Art. 20 is that relief under Article 21 does not flow automatically from the decision of recognition but it is at the discretion of the court. Moreover, the difference between relief under Article 19 and the one under Article 21 is that, even being both discretionary reliefs, the first one is granted on a temporary basis from the moment the application for the recognition is submitted until the decision about the recognition is taken (unless the court of the enacting State decides to extend such a provisional relief pursuant to Article 21(1) (f) which grants the extension of the relief granted under paragraph 1 of Article 19. On the contrary, the relief under Article 21 is granted on a permanent basis upon the recognition of a foreign proceeding.

Another difference is that the scope of application of Article 21 is wider than the scope of application of Article 19 because Article 21(1) envisages additional circumstances for the grant of the relief.¹⁶

To conclude, it should be noted that the relief under Article 21 may be granted in a foreign main proceeding or in a foreign non-main proceeding. Subparagraph 3 requires that the relief granted in a foreign non-main proceeding relates solely to the assets that are administered in the foreign non-main proceeding. This is since the relevance of the foreign non-main proceeding is lower than the one of the foreign main one.

• Collaborating with foreign representatives and courts

¹⁵ *Id.*

¹⁶ Art. 21 of Model Law.

"Chapter IV of the Model Law", from Arts. 25 to 27, deals with the cooperation among courts and foreign representatives of two or more countries.

The aims of cross-border cooperation are mainly to administrate insolvency proceedings with an orderly conduct, to adequately safeguard the debtor's possession, the maximization of their value and the creditors' interests and to guarantee businesses with the most appropriate professional skills. For this reason, the Model Law addresses this need in terms of both inward and outward cooperation, and it fosters cooperation at all the insolvency stages, even prior to the application for recognition. Cooperation may be available towards foreign priority and nonpriority proceedings or in the event of proceedings commenced in the enacting States in which the court seeks assistance in foreign countries.

The best way to guarantee inbound and outbound assistance is the direct communication and cooperation among courts. Article 25 provides a legal tool with the purpose of imposing court to collaborate as much as feasible. It also highlights that courts are entitled to directly communicate with each other or with foreign representatives to obtain information or assistance. This provision is useful especially in insolvency cases that require urgent measures to be taken and when the first prerogative is to save time.

The same objective of Article 25 is pursued by Article 26 which deals with the cooperation and direct communication between persons or bodies who are appointed to manage the debtors' assets in enacting States and "foreign courts or foreign representatives".¹⁷

Regarding forms of cooperation, Article 27 establishes that any means may be appropriate. "Article 27 identifies relevant forms of cooperation. It was included in the Model Law in recognition that the idea of cooperation, might be unfamiliar to many judges and insolvency representatives".¹⁸

IV. UNCITRAL MODEL & INDIA'S DRAFT GUIDELINES

Insolvency proceedings is not a new concept to Indian regime. The legal community was informed about a recent scandal involving Jet Airways' insolvency in relation to concurrent proceedings in Amsterdam, and many

¹⁷ Luciano M. Quattrocchio, *The Cross-Border Insolvency: European and Transnational Provisions*, GIANNICHELLI (Feb. 28, 2020, 11:50 PM), <http://www.dirittoeconomiaimpresa.it/cross-border-insolvency-european-transnational-provisions/inizio> (accessed on Jan. 1, 2024 at 3:00 PM).

¹⁸ Dr T.K. Vishwanathan, *Cross Border Insolvency: Challenges and Opportunities*, TAX GURU (Feb. 28, 2020, 11:55 PM), <https://taxguru.in/corporate-law/cross-border-insolvency-challenges-opportunities.html> (accessed on Feb. 13, 2024 PM).

demanding immediate implementation of the model Law. In the past few years, the banking sector in India, has been through with a shocking amount of non-performing assets. To this end, the IBC 2016, attempts to solve this problem for the creditors to pay back their debts, and to manage loan payments. The "cross-border" is an option which an insolvent debtor's possession to more than one area of the law. However, the Code does not have an extra-territorial application, and this is a major drawback. The opening of insolvency proceedings, who are spread out over multiple jurisdictions, leading to several problems, such as multi-laws, the overlapping of interests, etc., etc. Since it is the foundation, several international companies of Indian origin underwent bankruptcy proceedings under the Code, the foreign assets, and interests in companies in foreign jurisdictions; however, they remain overlooked in the bankruptcy process.

After considering all recommendations, a draft chapter on cross-border insolvency using the Model Law was created by the Indian government. The Draft of the proposed Part was issued for public comments till 30th June 2018.¹⁹

V. IMPORTANT FEATURES OF THE DRAFT CHAPTER

• Applicability

Initially, these regulations will only apply to corporate borrowers. However, they will eventually extend to include non-corporate debtors.

"The draft cross-border insolvency law will apply to a corporate debtor where:

- i) in relation to foreign insolvency proceedings, the foreign courts or foreign representatives seeks assistance in India; or
- ii) in relation to Indian insolvency proceedings, assistance is sought in the foreign State; or
- iii) concurrent proceedings are underway in the foreign State and in India, in respect to the same insolvent corporate debtor; or
- iv) Creditors in a foreign State have an interest in requesting the commencement / participation in Indian insolvency proceedings. The scope

¹⁹ Anand Rajan, *India's Proposal to Recognise Cross Border Insolvency*, *Lakshmi* (2020), <https://www.lakshmi.com/insights/articles/india-proposal-to-recognise-cross-border-insolvency/> (accessed on May 28, 2021 at 2:00 PM).

of the legislation being widely worded allows it to apply to all plausible cross-border insolvency scenarios".²⁰

- **Distinction between non-main proceedings & main proceedings**

"Main proceedings" in insolvency refer to the corporate debtor's primary center of interest, while "non-main proceedings" refer to establishments where the debtor operates. The distinction determines the level of control a foreign jurisdiction may exert instead of domestic bankruptcy procedures, as well as the relief that will be granted.

- **COMI - Centre of Main Interest**

The draft Chapter, Section 14, COMI is addressed to provide the required guidelines. COMI refers to the corporate debtor's registered office unless there is evidence to the contrary.

VI. ADVANTAGES OF FRAMEWORK UNDER DRAFT CHAPTER

Since it acknowledges and attempts to address the loopholes in the IBC regarding the operation of NCLT's rulings outside of India, India's reciprocal obligation to foreign courts and creditors, and Indian creditors' access to foreign assets, the proposed Draft Chapter is a positive step in the right direction. "Incorporating a cross-border insolvency framework into the existent Insolvency and Bankruptcy Code will strengthen the legislation by heightening its impact as a one-stop-shop legislation for all insolvency related matters".²¹ The Proposed Amendment is although not free from doubts or limitations yet its advantages to the Indian cross border insolvency mechanism is varied which are as follows:

- Effectiveness in terms of money and time,
- Consistency of provisions,
- Bilateral agreements, and
- Authority over insolvency practitioners

²⁰ Gantharu, R., Tadala, S. and Sadhu, A., *Cross Border Insolvency: An Analysis under the Code*, [online] EzResolve (2019), available at <https://ezresolve.in/blog/2019/09/cross-border-insolvency-an-analysis-under-the-code> (accessed on June 5, 2021 at 5:12 PM).

²¹ *Cross Border Insolvency: UN Model Allows Automatic Recognition of Foreign Rulings*, *The Indian Express*, <https://indianexpress.com/article/business/economy/cross-border-insolvency-un-model-automatic-recognition-foreign-rulings-764646/> (accessed on Dec. 3, 2021 at 12:21 PM).

VII. GLOBAL RECOGNITION

As far as world-wide recognition is concerned, the "UNCITRAL Model Law" on cross border insolvency is the most globally accepted framework on insolvency. It has been recognised in countries like UK, Singapore, US & South Africa, etc. taking it to a total of 49 countries by now.²²

VIII. SPECIFIC PROBLEMS ENCOUNTERED IN CROSS-BORDER INSOLVENCY

In the earlier cases, the difference in corporate insolvency philosophies in different jurisdictions was also problematic.²³ In the U.S., the debtor remains in control of the bankrupt entity after filing for bankruptcy while in Europe, the debtor is seen as someone who cannot be trusted with running the insolvent entity anymore.²⁴ Reconciling such a difference in underlying philosophies would prove to be a challenge even in coordination between courts if the court in one jurisdiction does not trust the person running the entity in another jurisdiction.²⁵

- **United States:** "Chapter 15" was incorporated into the Bankruptcy Code in 2005 and it largely follows the Model Law. It replaced section 304 of the Bankruptcy Code, which had been enacted as part of the Bankruptcy Reform Act of 1978. Chapter 15 embodies the criteria for granting additional assistance to a foreign proceeding that was laid out in section 304 and moves the granting of comity to the introductory language. This is to emphasise that it is the central concept that must be considered.²⁶

Following the Model Law, "Chapter 15" authorizes the use of protocols by providing for cooperation through "approval or implementation of agreements concerning the coordination of proceedings."

- **European Insolvency Regulations**

²² *Chapter 15 — Bankruptcy Basics Ancillary and Other Cross-Border Cases*, <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-15-bankruptcy-basics> (accessed on Dec. 5, 2022 at 12:40 AM).

²³ *What is Insolvency?*, <https://www.thebalance.com/what-is-insolvency-5190931> (accessed on Dec. 5, 2021 at 12:35AM).

²⁴ <https://www.govinfo.gov/content/pkg/USCODE-2010-title11-chap15-sec1501.pdf> (accessed on Dec. 5, 2021 at 12:40 AM).

²⁵ MARK S. SCARBERRY, *BUSINESS REORGANIZATION IN BANKRUPTCY: CASES AND MATERIALS* 245 (3rd ed., Maxwell 2006).

²⁶ *Developments in the Law: VII. Chapter 15 and Cross-Border Bankruptcy*, *HARV. L. REV.* 124,1292, 1293 (2013).

²⁷The EU Insolvency Regulation (EIR), which entered into force in 2002, it's based on Model Law as it is formed by making changes to it. The EU Bankruptcy Law has had a significant impact on all member states, except Denmark. One of the key features of this law is the mandatory guidelines set by the European Court of Justice, which apply to all member states.²⁷

The EIR does not have the aim of harmonizing the vital law of insolvency and only to the address of which is, in principle, be regarded as a substantive issue. The aim was for the provision of cross-border procedures for the effective coordination of the work of the assets, and the prevention of fraud, in the form of forum shopping.²⁸

IX. ROAD MAP AHEAD FOR INDIA

As the competition of business is growing in the international market with creditors, corporate and individuals continuously making transactions in more than one jurisdiction; the necessity for a uniform law regarding cross-border insolvency is the need of the hour. Also, increasing ease of carrying business for Indian companies and Indian banks and make in India policies have given rise to several investors to set-up their manufacturing and operating offices or factories in India.²⁹ It can be observed globally that cross-border insolvency laws can significantly affect the investments and businesses of a country.

A uniform cross-border insolvency law and regulation lends a helping hand, by providing effective tools and procedures for facing cases of cross-border insolvency. It helps by promoting co-operation among the courts and the competent authorities of other jurisdictions; providing legality of the transactions i.e. trade practices and financial investments; maintaining effective and fair performance of cross-border insolvency which in turn protects the interests of the stakeholders; it helps in the valuation of assets by protecting it and enhancing the value of debtor's assets; and helps the financially unstable business to recover by protecting their investments and preserving the employment.

In its initial efforts the MCA has introduced the draft chapter on cross-border insolvency proceedings, which is based on the "UNCITRAL Model".

²⁷ Fabian Andreas Van de Ven, *The Cross-Border Insolvency Protocol: What is it and What is in it? From a European Union Perspective*, Academia Education (Feb. 20, 2020), https://www.academia.edu/15056737/The_CrossBorder_Insolvency_Protocol_what_is_it_and_what_is_in_it_From_a_European_Union_Perspective (accessed on May 30, 2021 at 20.2.2023).

²⁸ THE IMPACT OF THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY AND THE EUROPEAN INSOLVENCY REGULATION ON DISTRESSED M&A TRANSACTIONS, <https://www.financierworldwide.com/the-impact-of-theuncitral-model-law-on-cross-border-insolvency-and-the-european-insolvency3YoxYdBBxPY> (accessed on Dec. 12, 2021 at 15:29 PM).

²⁹ <https://ibclaw.in/short-note-on-insolvency-and-bankruptcy-code-2016/> (accessed on Dec. 7, 2021 at 14:5 PM).

Howsoever, there remains a lot of unanswered questions when we analyse and compare the laws present in the US and Europe.³⁰

Thus, if India does not put specific law for the protection of foreign creditors, then the aim of India being a desirable investment hub globally would remain unfulfilled. Keeping in view the investment & growth, the government of India should expediently turn up with a detailed law based on the UNCITRAL Model aiming at providing protection to global investors along with surety that there is co-operation in achieving the realized value of runaway debtor's assets.³¹

X. CONCLUSION

Therefore, immediate attention is needed towards making the cross-border insolvency laws under the IBC more effective, elaborate, and self-existing. Some important benefits of recognizing and adopting the "UNCITRAL Model Law" with required changes are as follows:

- **Increasing foreign investment:** Apparently foreign creditors have some minor remedies provided by the existing law. But by adopting Model Law various enhancements can be made like recognition of foreign insolvency proceedings, faster and effective cooperation, co-ordination, and communication between the parties i.e. the courts of the different jurisdictions, domestic court, insolvency specialists, etc. The popularity of the Model Law has been rising over the past couple of years, and the adoption of the law shall be also in India, in line with best international practices in bankruptcy and winding-up procedures.
- **Flexibility:** The Model Law is also recognized for its flexibility and its efforts to respect the differences of insolvency process and procedures in different jurisdictions and to adapt by noting those differences.³² Therefore, is required to make changes in the Model Law so that it keeps a balance between the domestic insolvency law and the insolvency laws of other jurisdictions.³³
- **Protection of domestic interest:** If there is any contradiction between the foreign laws, proceedings, or provisions to that of the domestic laws, proceedings, or provisions then the model law Model Law refuses

³⁰ Chapter 15 of the Title 11 of the United States Code and European Insolvency Regulation.

³¹ Cross Border Insolvency Regime in India, <https://www.mondaq.com/india/insolvency/bankruptcy/1123982/cross-border-insolvency-regime-in-india> (accessed on Dec. 7, 2021 at 14:50 PM).

³² *Id.* at 25.

³³ The moratorium under the model law can be changed to adapt with the moratorium under s. 14 of the IBC.

to recognize it. Therefore, public interest protection is given high importance in the Model Law.

- **Priority to domestic proceedings:** The Model Law prioritizes domestic insolvency over overseas proceedings. Thus, a national insolvency action can still proceed despite a moratorium on its overseas accreditation.
- **Mechanism for cooperation:** The Model Law unequivocally establishes a resilient framework that ensures efficient and effective coordination and collaboration among courts, insolvency professionals, and experts, both on a national and international level. This mechanism would provide more efficiency and effective method to conduct the proceedings.

The UNCITRAL Model Law continues to evolve by observing the trade, practices, business, and laws of different countries and formulating a system which is applicable to the respective countries.¹⁴ At the same time, it is expected from Indian Government to create an effective framework; so that it can resolve all issues related to cross-border insolvency in the country. Without such framework the IBC will remain incomplete and half-baked.

Thus, the aim of achieving a free-market world can be fulfilled only when a proper international framework based on the "UNCITRAL Model Law" is in place.

¹⁴ THE IMPACT OF THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY AND THE EUROPEAN INSOLVENCY REGULATION ON DISBURSED M&A TRANSACTIONS, <https://www.financierworldwide.com/the-impact-of-theuncitral-model-law-on-cross-border-insolvency-and-the-european-insolvency/#YaxYsdBBxPY> (accessed on Dec. 5, 2023 at 18:00 PM).

ALTERNATIVE CONSUMER BEHAVIOUR DURING COVID-19 PANDEMIC: AN ANALYSIS

—Snigdha Sarkar*

ABSTRACT

The pandemic which knocked people's door during early 2020 has been responsible for a change in the purchasing behaviour. The advent of the pandemic situation has changed the behaviour of consumer in many ways like shifting of purchasing forum from physical to virtual i.e. offline to online. The rationale of this article is to present potential trends and point out the impacts of the COVID-19 pandemic on CPB (Consumer Purchasing Behaviour). Indian societies are more prone to offline market than online. This type of attitude basically is the result of the tradition, society, culture, beliefs that Indians normally develop during their childhood. As most of the people are living in poverty and are struggling for basic necessities of their life this is another reason for preference of offline over online. Recently due to advent of pandemic/COVID-19 the people as well as economy suffered a lot. It has resulted in loss of earning source, less consumption, less income generation, less job opportunity etc. People spend only on their basic necessities of life due to uncertainty in future earnings. As the transmission of COVID-19 is also very fast through contaminated droplets so the potential consumers tried to purchase by taking the help of virtual service. Therefore, online marketing forum secured a high degree of acceptance and showed the people a safe way of purchase. The current work is targeting to explore the alteration in CPB in India and its overall impact on the economy as well as on the society.

Keywords: COVID-19 Pandemic, Consumer behaviour, Alternative Consumer Behaviour, offline to online.

* Dr Snigdha Sarkar, Assistant Professor, KIIT School of Law.

INTRODUCTION

The societies and economies of the whole world are seriously affected by the COVID-19 pandemics in various alternative ways¹. Various prior research are deeply concerned with the impact of COVID-19, on twin aspects of health and finance.² The findings of the research are pointing out that purchases are shifting from offline to online and durable to most necessary consumption. To maintain isolation, potential consumers were information technology to connect, learn and entertain etc.³

The world is slowly opening now from the crisis of pandemic and it has had a profound impact on how people live. The period of pandemic the period of contagion, self-isolation, and economic uncertainty has changed the way consumers behave. The recent trends of consumer behaviour cover all areas of life like working culture, shopping trends, entertainment techniques etc.⁴

Incorporated a change in consumer behaviour in all sphere of life:

No doubt the pandemic has brought a negative effect on various sphere of human-life. It has changed the normal life style of the whole world. Recent studies on the changing behaviour of human-being on various sphere of life have categorised under following heads:⁵

- i. Work
- ii. Learning
- iii. Communication and information
- iv. Travel and Mobility
- v. Shopping and Consumption
- vi. Life at home
- vii. Play and Entertainment
- viii. Health and Well-being

¹ Douth, N. and Gustafsson, A., *Effects of COVID-19 on Business and Research*, 117(1) J. Bus. Res. 284-289 2020, <https://doi.org/10.1016/j.jbusres.2020.06.008>.

² Yuen, Kum F., Xueqin Wang, Fei Ma and Kevin X. Li., *The Psychological Causes of Panic Buying Following a Health Crisis*, 17 INTERNATIONAL JOURNAL OF ENVIRONMENTAL RESEARCH AND PUBLIC HEALTH 3513 (2020).

³ Eger, L., Komárková, L., Dima Egerová and Michal Mičká, *The Effect of COVID-19 on Consumer Shopping Behaviour: Generational Cohort Perspective*, JOURNAL OF RETAILING AND CONSUMER SERVICES 102542 (2021), <https://doi.org/10.1016/j.jretconser.2021>.

⁴ Freestone, Owen, Daniel Gaudry, Anthony Obeyesekere and Matthew Sedgwick, *The Rise in Household Saving and its Implication for the Australian Economy*, ECONOMIC ROUND-UP 61-79 (2011), available online <https://www.nber.org/papers/w18465> (accessed on July 29, 2021).

⁵ Clee, Mona, and Robert Wicklund, *Consumer Behaviour and Psychological Reactance*, 6 JOURNAL OF CONSUMER RESEARCH 389-405 (1980).

Indian societies were very backward in comparison to the western societies but in the presence of corona virus pandemic it has covered a decade in days and adopted the digital over physical.⁶ In this way pandemic has resulted in the change of societies past behaviour. People have adopted the mode of online or digital services like;⁷

- i. Online medicine
- ii. Tele-medicine
- iii. Online delivery
- iv. Remote learning
- v. Remote working
- vi. Online entertainment
- vii. Online learning

This change has touched every sphere of human life, starting from work culture to day to day activities of each individual in the world. The current study is concentrating on the alternative consumer behaviour due to the presence of pandemic.⁸ The consumers have gone through a very difficult stage of decision making to maximise their satisfaction with an intention to minimise their expenditure during pandemic. During this process they have been through very tough stage of decision making like;

- i. Choice making between necessary and most necessary
- ii. Indemnifying where to spend and on which item to spend
- iii. Sacrificing the consumption to avail it in future
- iv. Decision making in the presence of uncertainty
- v. Identifying the priorities of life
- vi. Minimising expenditure to increase the liquidity for precautionary purpose

CONCEPTUALISING CONSUMER BEHAVIOUR

This study revolves around some important concepts like consumer, consumer behaviour and Corona virus pandemic.

⁶ *Supra* note 3.

⁷ Loxton, M., Trusken, R., Scarf, B., Sindone, L., Baldry, G. and Zhao, Y., *Consumer Behaviour During Crisis: Preliminary Research on how Coronavirus has Manifested Consumer Panic Buying, Herd Mentality, Changing Discretionary Spending and the Role of the Media in Influencing Behaviour*, 13(8) JOURNAL OF RISK AND FINANCIAL MANAGEMENT 166 (2020).

⁸ *Supra* note 1.

Consumer

The smallest unit in an economy is house-hold and the most important as well as active participants in an economy is consumer. The individual who purchases goods and services to satisfy his/her wants is known as consumer. A consumer always tries to maximise his/her satisfaction with limited money income. They buy products for consumption purpose only. These Consumers are treated as most fundamental unit of an economy. Maximization of satisfaction or utilities is the basic intension of each rational consumer. Each and every one who is a part of an economy belongs to the group of consumers.⁹

Type of Consumer: (i) *Individual buyer/Personal buyer:* if a consumer is purchasing goods and services for his/her family, own consumption or relatives than the person is termed as individual buyer or consumer. (ii) *Organizational buyer/Commercial buyers:* if the purchaser is purchasing the goods and services for manufacturing or reselling than they are categorised under Organizational buyer/Commercial buyers.¹⁰

Consumer behaviour

Consumer behaviour means how the individual buyer or group of buyers or organization choose, buy, use different goods and services to satisfy their wants or needs. It takes into account the motives and actions of the consumer in the marketplace during their selection of goods and services. Consumers are the actors in a market place and this act of consumer differs from place to place and person to person. A buyer plays different role in the market place according to the perspective of role theory. According to this theory consumer plays different roles during the decision-making process like; information provider, user, payer and disposer.¹¹

Meaning and Definition: According to Schiffman "Consumer Behaviour is defined as Behaviour that consumers display in searching for purchasing, using evaluating and disposing of products and services that expect will satisfy their needs".¹² According to Loudon and Bitta, "Consumer Behaviour is the decision process and physical activity, which individuals engage in when evaluating, acquiring, using or disposing of goods and services".¹³

⁹ AHUJA, H.L., MACRO-ECONOMIC THEORY AND POLICY (New Delhi: S. Chand and Company 2013).

¹⁰ *Id.*

¹¹ SHAPIRO, E., MACRO-ECONOMIC ANALYSIS (New Delhi, Galgotia Publication, 2001).

¹² Forbes, Sharon L., *Post-Disaster Consumption: Analysis from the 2011 Christchurch Earthquake*, 77 THE INTERNATIONAL REVIEW OF RETAIL, DISTRIBUTION AND CONSUMER RESEARCH 28-42 (2017).

¹³ *Supra* note 9.

COVID-19 Pandemic

It is a novel disease caused by a newly identified virus, "*Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2)*". This commenced in '*Wuhan, China in December 2019*'. It was affirmed a pandemic by '*World Health Organization on 11 March 2020*'.¹⁴

The COVID-19 Pandemic has been affecting each one's life. It's a threat to human life in the earth and resulted in Loss of human life worldwide, created Unique challenge to public health, Food-system, world of work system as well as produced economic and social disruption.¹⁵ Furthermore it has resulted in extreme poverty and increased the count of undernourished people in the world¹⁶.

This work is concentrating on consumer and their behaviour in the presence of Corona virus Pandemic.

TRENDS IN ALTERNATIVE CONSUMER BEHAVIOUR

The trends in purchasing behaviour have been changed in the presence of pandemic. It will not be wrong to say that the potential consumers are now mostly relying on online to offline. The consumption behaviour of the people has been changed they are now relying on more homemade food items rather than on the outside foods.¹⁷ The recent trends are concentrating on the following areas;

- i. Online and offline
- ii. Selecting among most required and less required
- iii. Identifying the importance of saving than spending
- iv. Giving importance to future security
- v. Adjusting with uncertainty and fear
- vi. Adapting situation friendly habits

¹⁴ WORLD HEALTH ORGANISATION (WHO), IMPACT OF COVID-19 ON PEOPLE'S LIVELIHOODS, THEIR HEALTH AND OUR FOOD SYSTEMS, WHO Coronavirus Disease (COVID-19) Dashboard, Geneva: WHO, (Oct. 13, 2020) available online: <https://www.who.int/news/item/13-10-2020-impact-of-covid-19-on-people's-livelihoods-their-health-and-our-food-systems> (accessed Mar. 13, 2022).

¹⁵ Mannix, Liam, The Perfect Virus: Two Gene Tweaks that Turned COVID-19 into a Killer, Sydney Morning Herald (2020) available online: <https://www.smh.com.au/national/the-perfect-virus-two-gene-tweaks-that-turned-covid-19-into-a-killer-20200327-p54elo.html> (accessed on Mar. 21, 2022).

¹⁶ *Supra* note 14.

¹⁷ *Supra* note 7.

CHARACTERISTICS OF ALTERNATIVE CONSUMER BEHAVIOUR

The behaviour of individuals with respect to consumption has been changed due to various external factors. The most important external factor in these days is the presence of fear of health hazard.¹⁸ Therefore most of them are not intend to spend more on durable items and expensive goods. Middle class people have comprised and now also compromising in these days on consumption ground.¹⁹ They are now focusing on the necessary consumption first.

With the passing of time society is trying to behave normally but some habits are now permanently find their place in peoples life like; fear, uncertainty, low level of confidence with respect to future, less positive hope and many more.²⁰ This change has occurred due to the experience that the people have earned during pandemic. The atmosphere of uncertainty is always there with us. This uncertainty is also there with the consumer purchasing behaviour. This change has been resulted from the experience the society has earned during the prevalence of restrictions due to pandemic.²¹

CAUSES OF ALTERNATIVE CONSUMER BEHAVIOUR

This global pandemic has created market and economic volatility as well as uncertainty in consumer behaviour in many fields. In the initial days of COVID-19 pandemic these effects were more intense due to non existence of vaccine.²² These uncertainties are the result of alteration consumer of consumer purchasing behaviour. According to survival psychology the people undergo behavioural alteration because of the advent of a specific event like natural disaster, health hazards and war situation.²³

Therefore the causes behind these trends and characteristics of consumption behaviour is totally depends on economic condition of the country as well as of the concern individual and society. The most common cause of this alternative consumer behaviour is the presence of COVID -19 in different muted form. People are now also fearful about the future. Therefore they are adopting different consumption behaviour.²⁴

¹⁸ *Supra* note 16.

¹⁹ Forbes, Kristin, *The "Big C": Identifying and Mitigating Contagion*. NBER Working Paper 18465, MIT Management Sloan School Working Paper 1-42 (2012).

²⁰ *Id.*

²¹ *Id.*

²² Li, Guangdi and Erik De Clercq, *Therapeutic Options for the 2019 Novel Coronavirus (2019-nCoV)*, 19 NATURE REVIEWS DRUG DISCOVERY 149-50 (2020).

²³ *Supra* note 19.

²⁴ Lester, David, *Measuring Maslow's Hierarchy of Needs*, 113 PSYCHOLOGICAL REPORTS: MENTAL & PHYSICAL HEALTH 15-17 (2013).

Hence the main causes of this change in purchasing trends or consumption pattern are;

- i. Future uncertainty
- ii. Fear in relation to health
- iii. Saving is a necessity
- iv. Importance to most urgent want
- v. Attainability of online platform
- vi. Development of digital mode

THEORETICAL EXPLANATION

This article is taking into account the consumption theories to analyse the alternative consumer behaviour which has resulted due to pandemic. It is not only checking the applicability of these theories but also trying to relate the established hypothesis to reality. The theories of consumption are given:

Absolute income theory of consumption

According to Keynes, "several subjective and objective factors are responsible to determine consumption behaviour in the society but the most important factor is the current level of income."²⁵ Therefore it is acknowledged as "Absolute Income Theory of Consumption."

This theory of Keynes is based on a psychological law of consumption. This law states that with the increase in income consumption will also increase but not by as much as the increase in the income (Jhingan, 2003). It means the value of Marginal propensity to Consume (MPC) is less than one, i.e. $1 > \Delta C / \Delta Y > 0$ where ΔC = change in consumption, ΔY = change in income and $MPC = \Delta C / \Delta Y$. Therefore $1 > \Delta C / \Delta Y > 0$, can be written as $1 > MPC > 0$.²⁶

Relative Income Theory of Consumption

This theory was put forwarded by an American economist J.S. Duesenberry. Relative income of an individual is more important than his absolute income to determine the concerned individual consumption pattern.²⁷ According to him,

²⁵ *Supra* note 11.

²⁶ JHINGAN, M.L., *MACROECONOMIC THEORY* (Delhi, Vrinda Publication 2003).

²⁷ HAUGE, D.C. & STORER, W.A., *A TEXTBOOK OF ECONOMIC THEORY* (5th ed. Mumbai, Repro India Pvt. Ltd 2012).

*"the consumption of a person does not depend on his current income but on certain previously reached income level."*²⁸

Demonstration Effect: People are always influenced by their surrounding and relatives. Therefore they try to imitate or copy the consumption pattern of their relatives or neighbours' or other families in a particular locality. This is otherwise known as demonstration effect or Dussenberry effect.²⁹

Ratchet Effect: The people or individuals always try to maintain or follow their consumption level which according to them was the highest. This means with the fall in income people do not reduce their consumption level or their consumption expenditure does not fall. This is known as Ratchet effect.³⁰

Life Cycle Theory of Consumption

This theory was put forwarded by Modigliani and Ando. It is famous as life cycle theory.³¹ This theory is based on the fact that consumption is not function of current income but a function of the whole life time expected income.³²

Therefore this hypothesis is assuming that people have to plan a pattern of consumption expenditure by taking into consideration anticipated income in their entire lifetime.³³ Again this hypothesis assumed that people maintain a more or less stable or slightly increased level of consumption pattern.³⁴ Therefore the level of consumption of an individual is limited by his/her expectations of life time income.

Early years of life: Spends either by borrowing or spending the assets bequeath from his parents. **Main working years:** they consume less than their income. It will result in net positive savings. Then they invest these in making assets which they are going to consume in the future years. **Later years of life:** They again dis-save. They consume more than their income.³⁵ Therefore according to life cycle model consumption expenditure is a function of

²⁸ HADGE, D.C. & STONIGL, A.W., A TEXTBOOK OF ECONOMIC THEORY (Longmans, Green 1953).

²⁹ FREEDMAN, M., A THEORY OF THE CONSUMPTION FUNCTION (USA, Princeton University Press 1957).

³⁰ FARMER, R.E.A., MACROECONOMICS (Singapore, Thomas Asia 2002).

³¹ DWIVEDI, D.N., MACROECONOMIC THEORY AND POLICY (New Delhi, Tata McGraw Hill Education 2015).

³² Deaton, A., *Franco Modigliani and the Life Cycle Theory of Consumption* (2005), available at SSRN 686475.

³³ DWIVEDI, D.N., MACROECONOMIC THEORY AND POLICY (New Delhi, Tata McGraw Hill Education 2011).

³⁴ DORNBUCH, R., FISCHER, S. & STARTZ, R., MACROECONOMIC ANALYSIS (New Delhi, Tata McGraw Hill Education 2004).

³⁵ CORBIN, W., & SCHULT, D., MACROECONOMIC IMPERFECTIONS, INSTITUTIONS AND POLICIES (New Delhi, Oxford University Press 2006).

expected life time income and the wealth presently held by the individuals.³⁶ This concept can be written as;

$$C = W + RY/T \dots\dots\dots (i)$$

Where;

C= consumption

W = Wealth

R = Remaining years of work

Y = Income

T= Remaining years of life

The equation (i) can be written as

$$C = W/T + RY/T$$

$$C = 1/T * W + R/T * Y \dots\dots\dots (ii)$$

The above equation (ii) can be written as;

$$C = aW + bY \dots\dots\dots (iii)$$

$$(a = 1/T \text{ and } b = R/T)$$

Where *a* is the MPC or marginal propensity to consume for wealth and *b* is the MPC for income.³⁷

Permanent Income Theory of Consumption

This theory has been put forwarded by an American economist, Milton Friedman. According to him, "*consumption is determined by long-term expected income rather than current level of income.*" This long term expected income which is known as Friedman's permanent income on which people's consumption plan depends.³⁸ According to Friedman, "*an individual who is paid or receives income only once a week, say on Friday, he would*

³⁶ *Supra* note 9.

³⁷ ADIL, A.B., BERNANKE, B.S., RABASCO, E. & TORRES, L., *MACROECONOMIA* (España, Pearson 2009).

³⁸ *Id.*

not concentrate his consumption on one day with zero consumption on all other days of the week".³⁹

This theory believes that people plan their consumption on the basis of the expected average income over a long period which is otherwise known as permanent income. This can be earned from both "*human and non-human wealth*".⁴⁰

ANALYSIS OF ALTERNATIVE CONSUMER BEHAVIOUR

The consumption pattern of individuals is changing in the presence of pandemic. During the normal days people used to behave normally, it was easy to correlate their expenditure pattern with the theories of consumption. In this situation it is practical to relate the current consumption pattern with *lifecycle hypothesis and permanent income theory*. As these two theories are taking into consideration the lifetime income and long term expected income to determine the current consumption pattern.

As COVID -19 has created an atmosphere of uncertainty not only for the house hold but also for the whole economy. So whenever individuals are taking decision with respect to present consumption they are taking into consideration the future assured income and the assets they are having as reserves. Now a day's people are giving more importance towards saving or in other words more judicious spending on only most necessary items.

Due to the gloomy economic condition and uncertainty in future earning source a lot of changes have been seen in the pattern of expenditure among the individuals. Here their current spending is not only depending on the future or life time income but also depends on the economic condition of the country as well. This can be written in a function form like;

$$C_t = f(C_{lt}, E)$$

C_{lt} = life time consumption

$C_{lt} = aW + bY$ [Where 'a' is the MPC or marginal propensity to consume for wealth and b is the MPC for income. C_{lt} is a function of Wealth (W) and Income (Y).]

E: Economic Condition

³⁹ ABEL, A.B., BERNANKE, B.S. & CROUSE, D., *MACROECONOMICS* (Boston, Pearson Education 2008).

⁴⁰ ABEL, A.B. & BERNANKE, B.S., *MACROECONOMICS* (Singapore, Pearson Education 2003).

C_i will be high if C_{LT} is high, C_i will be low if E is unstable. Where ' C_{LT} ' expected life time consumption and ' E ' economic condition are very closely related. If economic condition is stable and normal than C_{LT} will also be stable and normal but with the alteration of economic condition C_{LT} will also fluctuate. Therefore in this current unstable economic condition C_i is totally depending on the variable E . As the economic condition is unstable therefore the C_{LT} is also not stable. Due to this the consumption expenditure of the people will change accordingly. As uncertainty is prevailing everywhere hence the consumption pattern will also follow a different track. People are spending more on necessary items and they are busy in creating more worth of wealth which is showing a rigid behaviour during fluctuation in an economy.

PRACTICAL IMPLICATION OF THE ARTICLE

The current work is stressing on the fact various factors which are associated with the life time income of a person can be responsible for their expenditure trend. In recent days its economic slowdown resulted because of pandemic COVID-19 is resulting in rigid consumption behaviour of people. Therefore similarly other factors or natural emergencies can also alter the life cycle hypothesis of established spending pattern of consumers. It can also applicable for other altering variable which can result in change in consumption pattern of human being. Similar type of function relationship with justification of the same can be established with the help of this article. To strengthen the outcome empirical study can be undertaken by the researchers of interested area.

FUTURE RESEARCH AGENDA

The current study is lacking its strength of establishing the outcome due to lack of empirical analysis of the variables used in the study. This work can be done in a more prominent way by taking into consideration the facts established and variables used in the study through primary data analysis. The generalization of the outcome can also be possible with the support of empirical findings.

CONCLUSION

The current work is concentrating on the changing consumption behaviour of individuals in the presence of COVID -19. Each potential consumer is now aware about the fact of uncertainty which is present in almost every sphere of the economy. They always think about their future before going to make any strong or big purchase. If it is adding wealth to their life they all are ready to take risk but if it is about only expenditure on durable they are taking a little more time to decide its urgency. It will not be wrong to say that now

consumption involves decision making in the presence of uncertain atmosphere in the economy.

The consumers' are spending more on necessary item than the durable one. Consumers are giving more importance in capital formation for their future than on current consumption. They are mainly spending on education, food, fashion, wealth creation etc. This changing behaviour of the potential consumers is again responsible for lesser income generation in the economy.

This judicious spending of the consumer is going to affect the circular flow of income from almost all aspects. Reduction in consumption means reduction in income generation it will ultimately reduce the aggregate demand which will result in formation of gap in between leakage and injection in the circular flow. It will push the economy towards further inflation and stagnation. Therefore to boost consumption the government should introduce policies which can result in further generation of income opportunities which will ultimately resulted in increase in consumption expenditure among the people. To motivate the potential consumer it required to bring stability in the economy by following different changes in monetary and fiscal policies.

EXAMINATION OF INDIA'S CORPORATE LENIENCY PROGRAM ON THE CARTEL OFFENDERS AMID PANDEMIC: AN ERROR OR COVID PASS?

—Soumadip Kundu*

ABSTRACT

Exercise of leniency is one of the discretions of the Competition regulators and Fair trade authorities across the world. The Commission, after being satisfied with the disclosure furnished by cartel conspirators, can provide a lesser penalty. Once the American Supreme Court commented, "cartel is the supreme evil of antitrust". Amid Covid-19 we noticed that enterprises dealing in essential commodities like pharmaceuticals, groceries, milk, etc. were allowed to share their information freely. Sharing information between competitive enterprises is anti-competitive under the purview of the Competition Act 2002. The essential commodities market had been exempted from punishment by nations across the world for the sake of public interest. Thus the public interest turned out to be the valid defense behind the operation of the cartel. However, the Commission ordered leniency (lesser penalty) to cartel conspirators belonging to the railway's procurement and the domestic industrial automotive bearing market. Surprisingly, the duration of operating of the cartels in the railway's procurement market was from 2009 to 2017 and in the domestic industrial automotive bearing manufacturer market was from 2009 to 2014. Although both of them were allowed leniency due to Covid-19. It is difficult to consider any of these two as the essential commodities market. This paper intends to emphasize relevant broader perspectives and their applicability under existing law.

* Soumadip Kundu, Assistant Professor of Law, JIS University, Kolkata, India.

Keywords: Leniency, Cartel, Covid-19, Essential Commodities, Public interest.

1. INTRODUCTION

The Competition Commission of India took very qualitative steps in the pandemic.¹ It created two websites for filing information. One was atdregistry@cci.gov.in and the other was comb.registry@cci.gov.in.² The CCI continued hearing through online mode in this hard situation which was very commendable. The Commission came into power to adjudicate the matter related to competition law in 2009 after repealing the old Monopolistic Restrictive Trade Practices Act, 1969.³

The aim of the Competition Act 2002 is to promote fair competition in the market. The directive principle of state policy prescribes that states should make policies so that the economic system cannot be concentrated. A concentrated economy may cause common detriment. The Competition Act wants to wipe out the economic devil to save not only the competitors in a market but also the consumers as well. Indeed, the objective of this Act is to prevail just and fairness in the competitive market.

The old MRTP Act became obsolete due to a change in the economic system of India.⁴ Since the year 1991, India has stepped towards liberalized economy from a nationalized economic policy. In a changing scenario, the Indian competition regime has shifted its objective. The Competition Act is more concerned to promote competition rather than curbing monopolies. In *Brahm Dutt v. Union of India*⁵ case, the adjudicating authority of the Commission was challenged on the ground of separation of power.

Mostly in this kind of body, which has adjudicatory power, the chairman is appointed from the Supreme Court or the High Court judiciary with the satisfaction of the Chief Justice of India. Though the chairman of the Commission is not appointed by the judiciary. It was the issue of the aforementioned case. However, the Court was of an opinion that to decide competition-related disputes expert is required in that field. The Supreme Court observed that the expert in the economic field is required to solve the economic disputes but one

¹ Competition Commission of India is the competition agency of the country.

² https://www.cci.gov.in/sites/default/files/whats_newdocument/NoticeforCCIwebsite.pdf (last visited July 12, 2021).

³ Competition (Amendment) Act, 2009.

⁴ Monopolies and Restrictive Trade Practices Act, 1969.

⁵ *Brahm Dutt v. Union of India*, (2005) 2 SCC 431 : AIR 2005 SC 730.

appellate tribunal is required which should be chaired by the Judiciary to save the separation of power doctrine.

Competition regulators have given so many relaxations towards the enterprises' reason to a hard time. These relaxations can be granted for a limited time and renewed as needed.⁶ On 19th April 2020, the CCI proclaimed an advisory. It allowed information sharing, which was one of the anticompetitive practices between competitors, associated with pharmaceutical, essential commodities, and services like logistics, tests, etc. market.

Nevertheless, in the railway procurement market, so many zonal departments filed a complaint. The allegation was that some railway vendors created cartels in the railway procure market from 2009 to 2017. Information was that the railway vendors rigged the bid and successfully continued the cartel.⁷

In another case, CCI took suo-motu action in the domestic automotive bearing market. In this case, the cartel was also being continued from 2009 to 2014. The CCI, after receiving a disclosure regarding cartel, reduced the penalty as per Section 46 of the Indian Competition Act 2002. Section 46 denotes that the CCI may provide a lesser penalty to a producer, distributor, seller, trader, or service provider if they furnish full and true disclosure before CCI.⁸

In this pandemic, the CCI issued an advisory towards the medical and health care markets, essential commodities markets, some service provider markets like logistics, testing, etc. to protect the interest of the public at large. However, the cartel took place in the aforementioned markets almost a decade ago. Despite that leniency is given to them by CCI. Is it justifiable? How other nations are handling this cartel dispute amid pandemic? This paper is dedicated to answering these questions.

II. RESEARCH METHODOLOGY

This paper will be formulated from the e-repositories, articles, books, case studies, and available data in the internet source. So that it can be called qualitative, descriptive, and analytical. Mostly, this paper is dedicated to finding out the justifiability of the leniency, given to cartel conspirators, based on doctrinal sources. The gravamen of those studies have helped the researcher to walk on the path of rules of the research methodology. Moreover, this paper gives credit to all the references and the persons who have helped the researcher to accomplish it.

⁶ *Id.*

⁷ Reference Cases No. 3 and 5 of 2016, 1, 4 and 8 of 2018, available at <https://www.cci.gov.in/sites/default/files/03-of-2016.pdf> (last visited July 12, 2021).

⁸ Suo Motu Case No. 5 of 2017, available at <https://www.cci.gov.in/sites/default/files/05-of-2017.pdf> (last visited July 12, 2021).

III. DEFINITION OF CARTEL

Section 3(2) of the Competition Act 2002 denotes agreement becomes void if it is made by "enterprise" or "association of enterprises" or "person" or "association of persons" to cause or likely to harm competition within India.⁹ The Competition Act has also mentioned that cartels can be made in production, supply, distribution, storage, acquisition, or control of goods or provision of services.¹⁰ Section 2(c) of the Competition Act 2002 identifies three objects of cartel and those are limit, control, and attempt to control.¹¹ In *Union of India v. Hindustan Development Corpn.*¹² Supreme Court said "A cartel was a group of producers that agreed to control the production, sale, and prices of a product to gain a monopoly in a specific sector or commodity.

This amounts to a shady business activity that isn't in the public's best interests." According to the Competition Act, an agreement is "any arrangement or understanding, or action in concert, which is formal or writing or legally enforceable".¹³ The enterprises from a combination of one another to control sales and prices of the market. This combination can restrain the market. Cartel is used to have happened in the same form of businesses. The basic objective of the cartel is by combining enterprises restraining the output level of the market, fixing prices, and imposing an adverse effect on competition.

In UK Enterprises Act 2000 cartel is stipulated as a criminal offense.¹⁴ The Act speaks that "it is a criminal offense for individuals those dishonestly take part in any form of a cartel which can fix prices, shares markets, the limit of production of supply and rigs bid".¹⁵ Chapter 1 and Chapter 2 of the Competition Act 1998 in the U.K. prohibits anti-competitive-agreement.¹⁶ Article 81 of the European Community Treaty also prohibits anti-competitive-agreement.¹⁷ After the enactment of the Function of Treaty on European Union (FTEU), the EC Treaty has been repealed. Now, Article 101 of FTEU prohibits anti-competitive-agreement.¹⁸ Cartel is one of the formal or writing or

⁹ Competition Act, 2002, s. 3(2) as amended by Competition (Amendment) Act, 2007.

¹⁰ Competition Act, 2002, s. 3(1).

¹¹ Competition Act, 2002, s. 2(c).

¹² *Union of India v. Hindustan Development Corpn.*, (1993) 3 SCC 499 : AIR 1994 SC 988 : (1993) 3 SCR 128.

¹³ Competition Act, 2002, s. 2(b).

¹⁴ Enterprises Act of United Kingdom enacted in 2000.

¹⁵ Gallop and Roberts, *Firm Interdependence in Oligopolistic Market*, 10 *Journal of Econometrics* 313-331 1979.

¹⁶ Preeti Mehan, A PROJECT REPORT ON CARTELS IN AVIATION INDUSTRY, INTERNSHIP PROJECT REPORT, COMPETITION COMMISSION OF INDIA, New Delhi available at <http://cci.gov.in/images/media/ResearchReports/PreetiInt200711.pdf> (last visited Sept. 13, 2020).

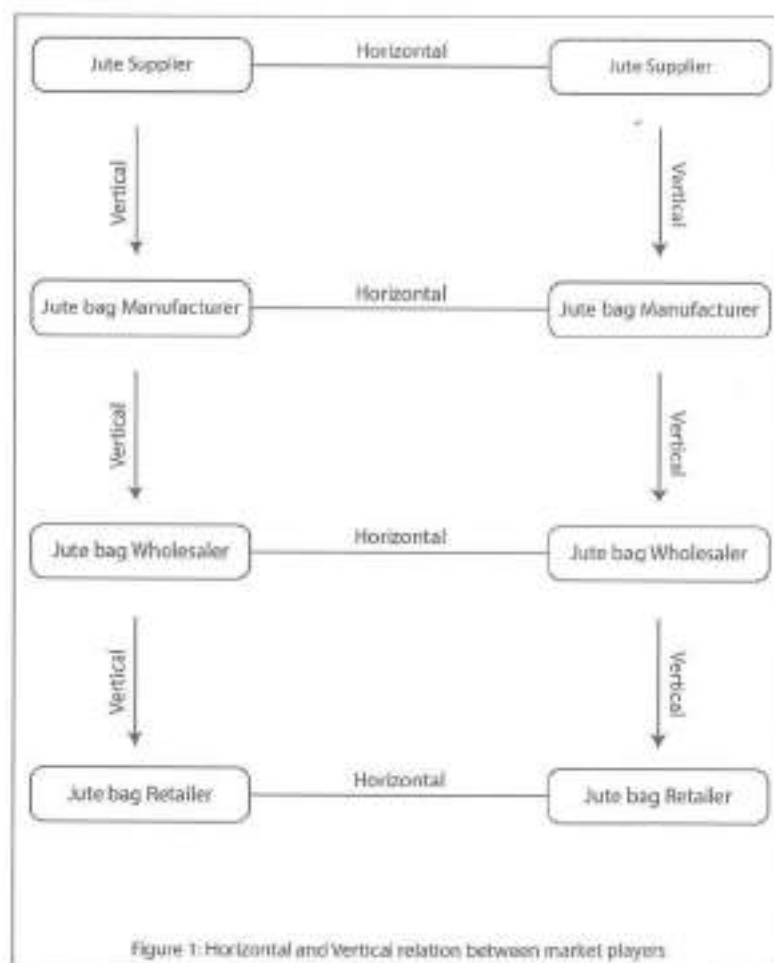
¹⁷ Game theory is a particularly useful tool for understanding why firms and individuals make the decisions they do, and how the decisions made by one individual affects others, available at <http://economics.about.com/cs/studentresources/f/gametheory.htm> (last visited Sept. 17, 2020).

¹⁸ See Economics of Cartel, available at www.tutor2u.net/blog/files/Collusion_Oligopoly.pdf (last visited Sept. 10, 2020).

legally enforceable anti-competitive-agreement that can be divided as horizontal and vertical.

A. Horizontal agreement & Vertical agreement

"Horizontal agreement" is made in the same stage of the production chain and the same market whereas "Vertical" is made at the different stages or levels of the production chain in different markets. It restrains competition through tie arrangement, exclusive supply agreement, exclusive distribution agreements, refusal to deal, and resale price maintenance. The vertical agreement is treated more leniently than the horizontal agreement. Figure 1 depicts the relation between horizontal and vertical agreements. The vertical agreement is made between seller and purchaser though horizontal happens between competitors.



The reason for different treatment between horizontal and vertical agreement is horizontal reduce or likely to reduce competition more than vertical. Horizontal agreements like price-fixing or market sharing have more adverse effects on the competitive market because of their nature. Price fixing is while more than one enterprise jointly with an arrangement, understanding, or action in concert set prices for their joint benefit. On the other hand, market sharing is a formal or informal practice when competitors without competing with each other share market to harm the fair competitive rule. Indeed, both affect the competitors and consumers as well. These two cause concentration in the economy. Competitors suffer because price-fixing and market sharing create a barrier for them to entry. The consumers' rights get infringed because they are compelled to purchase a stagnant product or avail of a low-quality service at a high cost.

B. Procedure to adjudicate cartel disputes

Commission starts adjudication after collecting the information from Director-General (DG). Aggrieved can inform before the Commission if its competing rights or consumers rights get violated. There are three modes in which the competition commission can start adjudicatory function. Based on information lodged by Central Government, State Government, and statutory body or from of any persons or Commission itself can take *suo-motu* action against the alleged firm.¹⁹ Commission provides the charge upon Director-General (DG) to investigate.²⁰ DG mandatorily has to send investigating report before the commission.²¹ If there is no *prima facie* case found, Commission can dismiss the complaint. In a case of a cartel, the Commission can impose the maximum penalty to each conspirator (distributor, seller, producer, trader, or service provider), which shall be equivalent to three times profit made out from cartel or ten percent of the average of the turnover of the cartel for last three preceding financial years.²²

The Commission can also impose cease and desist order or discontinuation of agreement order or compensation order to the offenders. The "lesser penalty" in a case of a cartel can be imposed if any of the conspirators singly or jointly disclose the facts subject to the commission's satisfaction.²³ Even the Supreme Court of America in *Verizon Communication v. Law officers of Circuits V Trinko* case observed hardcore cartels are perceived as the "supreme evil of antitrust".²⁴

¹⁹ Competition Act, 2002, s. 19.

²⁰ Competition Act, 2002, s. 26(1).

²¹ Competition Act, 2002, s. 26(2).

²² Competition Act, 2002, s. 27(5).

²³ Competition Act, 2002, s. 46.

²⁴ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 2004 SCC OnLine US SC 2 : 157 L. Ed 2d 823 : 540 US 398 (2004).

Most of the developed countries have determined cartel as a criminal offense. However, India follows the civil procedure system like European Union. Chart 1 and Table 1 depicts below the years of imprisonment and Acts followed by ten developed nations as to criminalize cartel offenders:

Cartel Imprisonment graph of ten developed countries



Acts followed

USA	USA*	Canada	UK	Brazil	Denmark	Israel	Japan	Korea	Australia
Section 1 of the Sherman Act	Antitrust Criminal Penalty Enhancement and Reform Act *recent development in the U.S	Competition Act, RSC 1985, c. C-34, section 43	Enterprise Act 2002, section 188	Brazil's Economic Crimes Law (Law No. 8,137/90)	The Danish Competition Act (Consolidation Act No. 700 of 18 June 2013), section 22(3)	Restrictive Trade Practices of Law 1988	Antimonopoly Law	Monopoly Regulation and Fair Trade Act	Division 1 of Part IV of the Competition and Consumer Act 2010, formerly the Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009

Source of Chart 1 and Table 1:

<https://www.nortonrosefulbright.com/en/knowledge/publications/3c8cd600/the-criminal-cartel-offence-around-the-world>

This table indicates that most of the developed nation criminalize cartel and provides imprisonments according to their respective Acts. However, the recent trend around the world as to providing imprisonment to cartel offenders is very rare. The U.S is only imposing a heavy penalty upon cartel offenders. Imprisonment in the cartel was a regular occurrence in the U.S in the early 1970s. In Canada, no cartel offenders since 1996 have spent a single day in prison. Several cartel conspirators have been convicted but later their convictions were commuted to community service or home detention.²⁵ Whereas U.K and Israel are the nations who impose imprisonment upon cartel offenders still now. But in Israel, the highest punishments that were given upon cartel offenders were only for nine months. Most of the imprisonment punishments had been suspended later on. India on the other hand follows civil procedure to deal with these anti-competitive issues. Moreover, the European Union also follows the civil procedure to handle anti-competitive issues. The Competition Act of India is mostly modeled from the European Commission Treaty. Article 81 of the European Commission Treaty is more or less the same as Section 3 of the Competition Act 2002. The practices which are determined by the European regime as anti-competitive the same are also considered by India. The practices are (i) directly or indirectly fix purchase or selling of products or services (ii) limit or control production or services or any form of technological development, (iii) apply dissimilar conditions upon other trading members (iv) conclusion of contracts subject to acceptance of other trading parties which is a supplementary obligation in nature.

The U.S also provides leniency to the conspirators. The Department of Justice differentiates cartels from traditional criminal offenses. The antitrust law of the U.S provides leniency if the offense is disclosed. As per the 2011 report by the Government Accountability Office, there were 173 criminal cartel cases were filed by the division, out of which 129 cartel cases (75%) were disposed of by imposing leniency.²⁶ The European Commission through a notice in 2006 has adopted the "lesser penalty" provision. This "lesser penalty" can be given if that offense is disclosed.²⁷ The European Commission can leave the cartel offender not imposing a monetary penalty or it can impose a minimum monetary penalty to the cartel offenders if the offense is disclosed.

²⁵ *The Criminal Cartel Offence Around the World*, <https://www.nortonrosefulbright.com/en/knowledge/publications/1c8cd690/the-criminal-cartel-offence-around-the-world> (last visited on Feb. 21, 2022).

²⁶ UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, CRIMINAL CARTEL ENFORCEMENT: STAKEHOLDER VIEWS ON IMPACT OF 2004 ANTITRUST REFORM ARE MIXED, BUT SUPPORT WHISTLEBLOWER PROTECTION, REPORT TO CONGRESSIONAL COMMITTEES at 59nn. 2-3 (July 2011), www.gao.gov/new.items/d11619.pdf.

²⁷ *Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases*, (2006/C 298/11), published in OFFICIAL JOURNAL OF THE EUROPEAN UNION on 8-12-2006.

IV. CASE COMMENTS

A. Cartel in Railway Procure Market

In the railway procurement market, one piece of information was filed by the Chief Manager of South Eastern Railway Company against Hindustan Limited Company and others. The information was related to bid riggings in the railway procurement market. There was a tender related to Composite Brake Blocks (CBB). It was also stated in the information that the opposite parties are the vendors of brake blocks market approved by Research Design and Standard Organization (RDSO). It was also stated that the alleged parties rigged bids doing prior negotiation between themselves. Prior negotiation is the most important element in the cartel. The Commission considering the facts ordered its investigating person (DG) to find out the gravity of the fact. DG from the various sources collected information. He pointed out through-out its investigation report that so many E-Mail, What's App, SMS, and also Call records were the evidence of the opposite parties that formed cartels from 2009 to 2017. The DG found that opposite parties used to decide the quotation of prices and quantities in the various tenders, floated by Indian Railways and other entities for the procurement of Composite Brake Blocks.

It was also found by DG that one of the employees of Hindustan Limited Company made an excel-sheet and it was being updated as per the negotiations that happened with the other opposition parties. The Commission by considering and adhering to both the parties along with the investigation made by DG held liable the opposite parties. Moreover, the Commission clubbed other four cases, which were also filed from another railway region, on the same allegation, and the same product.²⁸ The Commission did not allow monetary penalty due to the outbreak of Covid-19 and the small annual turnover of the opposite parties. Section 46 of the Act lays down the disclosure has to be furnished before the procedure of investigation starts. However, in this case, the information of the cartel was received by the Commission from the Chief Manager of South Eastern Railway Company, who is not the party associated with the cartel. The Commission despite that left them free by only imposing a "cease and desist" order without imposing the monetary penalty.

²⁸ Those are; Central Railways v. BIC Auto (P) Ltd., 2020 SCC OnLine CCI 28; Eastern Railways v. BIC Auto (P) Ltd., 2020 SCC OnLine CCI 28; North Western Railways v. BIC Auto (P) Ltd., 2020 SCC OnLine CCI 28; and North Western Railways v. Rane Brake Lining Ltd., 2020 SCC OnLine CCI 28.

B. Cartel in Automotive Industrial Original Equipment Manufacturer market

Commission took *suo motu* action in the automotive industrial original equipment manufacturer market. The commission received a disclosure of cartel held during 2009 to 2014 from one of the cartel conspirators namely FAG Bearings India Ltd. The Commission provided mercy on satisfaction. It is called "leniency". Leniency can be given on the following satisfactory grounds: (i) the discloser enterprise must help the Commission to adjudicate (ii) disclosing facts must be true (iii) disclosure must be furnished before the order of the Commission for starting an investigation. However, section 46 of the Act reads with Regulation 5 of the CCI (Lesser Penalty) Regulations 2009 opens the opportunity for cartel creators from getting read off maximum penalty like three times penalty from the profit obtained by cartel or ten percent of the average of the annual income of the last three preceding financial years.

This application was placed by saying these above-mentioned enterprises in automotive industrial original equipment manufacturer market had manifested cartel. Convincingly, Section 46 of the Competition Act provides discretionary power to Commission. It lays down if Commission is satisfied with a disclosure, which is full and true, it can mercifully take the matter and without giving a monetary penalty, it can impose only cease and desist order, or discontinuation order or compensation order upon offenders. The DG pointed out several meetings were held between the opposite parties. The DG also found several e-mails communicated between the conspirators.

The Commission imposed only "cease and desist" orders upon them instead of giving the monetary penalty. However, the Cartel took place from 2009 to 2014. Here this case was taken by the Commission receiving one disclosure from one of the cartel conspirators. Having found the monetary loss faced by the enterprises associated with the cartel, the Commission was not of an opinion to impose a monetary penalty. However, the cartel occurred from 2009 to 2014. The Commission did not ascertain how much profit they gained when the cartel occurred. Without determining it the Commission provided leniency that may be unjustifiable in the eye of law.

V. MEASURES WERE TAKEN BY ANTITRUST AUTHORITIES IN OTHER JURISDICTIONS

The "UK Government" on 1st May 2020 issued "Dairy Produces Order".²⁸ It temporarily relaxed the "UK Competition Act 1998" on the dairy market. It excluded "Chapter 1 of Competition Act 1998", which dealt with

²⁸ <https://www.legislation.gov.uk/ukSI/2020/481/made?view=plain> (last visited Sept. 12, 2020).

anti-competitive-agreement, between dairy market, which was comprised by "dairy product market" and "dairy logistic services". This order was not carried after the second August twenty-twenty.³⁰ The 'UK Groceries order' temporarily relaxed "Chapter 1 of Competition Act 1998" in the Grocery market also.³¹ This might allow merchants to exchange stock-level information, collaborate to keep stores open, and share distribution centers and delivery trucks. Despite that the "Competition Market Authority" (CMA) significantly ordered any unnecessary cartel can't be tolerated. The "European Commission" on May 2020 announced the decision to allow certain types of cooperation between the milk and agro-food industry. In that case, sectors like milk, milk products, potatoes, live plants, and flowers were given support to cooperate.³²

The "Australian Competition and Consumer Commission" granted so many numbers of authorization to promote the market like (i) given chance to coordinate between grocery market,³³ (ii) given the order to shopping center owners to coordinate to develop rent relief measures from small to medium tenants,³⁴ (iii) Banks were asked to coordinate and provide supplementary relief packages to individual or businesses,³⁵ (iv) Gas and electricity were ordered to ensure stable energy supply,³⁶ (v) Medicine wholesaler are given chances to coordinate to ensure the distribution of medicines and other essential pharmaceutical products.³⁷ The "United States Department of Justice" and the "Federal Trade Commission" jointly allowed collaboration among the health sector. Despite that, it proclaimed strict guidelines on collaboration during an emergency.³⁸ Likewise, Canadian and German authorities allowed pro-competitive collaboration if those have proper justifications.³⁹ Germany provided the green light

³⁰ *Id.*

³¹ *Food For thought: Implementation of Competition Law During the Covid-19 Pandemic*, BAR AND BENCH, <https://www.barandbench.com/columns/food-for-thought-implementation-of-competition-law-during-covid-19> (last visited July 12, 2021).

³² *Id.*

³³ *Supermarkets to Work Together to Ensure Grocery Supply*, <https://www.accc.gov.au/media-release/supermarkets-to-work-together-to-ensure-grocery-supply> (last visited July 12, 2021).

³⁴ *Shopping Centres to Cooperate to Support Retail Tenants*, <https://www.accc.gov.au/media-release/shopping-centres-to-co-operate-to-support-retail-tenants> (last visited July 12, 2021).

³⁵ *Banks Authorised to Co-operate on Loan Relief and Services*, <https://www.accc.gov.au/media-release/banks-authorised-to-co-operate-on-loan-relief-and-services> (last visited July 12, 2021).

³⁶ *Cooperation to Support Reliable Energy Sector Authorised*, <https://www.accc.gov.au/media-release/co-operation-to-support-reliable-energy-sector-authorised> (last visited July 12, 2021).

³⁷ *Medicine Manufacturers to Coordinate on Covid-19 Response*, <https://www.accc.gov.au/media-release/medicine-manufacturers-to-coordinate-on-covid-19-response> (last visited July 12, 2021).

³⁸ *Joint FTC-DOJ ANTITRUST STATEMENT REGARDING COVID-19*, <https://www.ftc.gov/public-statements/2020/03/joint-ftc-doj-antitrust-statement-regarding-covid-19> (last visited July 12, 2021).

³⁹ *Defending Competition in the Markets During Covid-19*, <https://unctad.org/news/defending-competition-markets-during-covid-19> (last visited July 12, 2021).

on the retail industry.⁴⁰ Collaboration was authorized by Canada to assist the delivery of low-cost goods and services in the pandemic.⁴¹

VI. DISCUSSION AND SUGGESTION

The impact of the near pandemic situation and the subsequent lockdown was visible in most of the sectors but the gravity of damage in certain sectors like Airline, tourism, hotel, etc. was beyond imagination. To contain the situation under a certain threshold the Government had to ensure some degree of cooperation among the enterprises in the pharmaceutical sector. Therefore, the Commission's advisory of 19th April 2020 fitted perfectly following the demand of the situation. In general practice, leniency should always be considered as an exception and should never overshadow the purpose of the rule.

Meanwhile, in *Union of India v. Hindustan Development Corpn.*⁴² Corporation, the Supreme Court excluded cartels from punishment if it was made for the public interest. The High Court of New Zealand in their decision in *Commerce Commission v. International Racehorse Transport NZ*⁴³ excluded monetary penalty due to the respondent company facing serious monetary injury in the pandemic. If we carefully look into the "Railway Procurement Market" and "Automotive Industrial Original Equipment Manufacturer Market" incident where despite being guilty when exclusion from a monetary penalty was awarded to Hindustan Limited Company & Others and FAG Bearings India Ltd. & Others for the monetary injury, it appears surprising. The Hindustan Limited Company & Others and FAG Bearings India Ltd & Others created cartels neither in the pandemic period nor for the public interest. The general purpose of any cartel as always is earning extra profit through unethical ways and here time frame is an important factor. When leniency was ordered under the context of Covid-19 and poor financial condition due to pandemic, the crime committed one decade ago should not come under its purview.

Perhaps the Competition Commission without any considerable justification allowed leniency upon these two markets. Despite creating a cartel, horizontal in nature, one decade ago and after successfully continuing the same, the Commission on discretion allowed leniency. If this is the norm then after

⁴⁰ <https://www.reuters.com/article/us-health-coronavirus-germany-altmaier-idUSKBN2170NA> (last visited July 12, 2021).

⁴¹ *Defending Competition in the Markets During Covid-19*, <https://unctad.org/news/defending-competition-markets-during-covid-19> (last visited July 12, 2021).

⁴² *Union of India v. Hindustan Development Corpn.*, (1993) 3 SCC 499 : AIR 1994 SC 988 : (1993) 3 SCR 128.

⁴³ *Commerce Commission v. International Racehorse Transport NZ*, 2020 NZHC 1716, available at <https://comcom.govt.nz/case-register/case-register-entries/international-racehorse-transport-new-zealand-partnership> (last visited July 12, 2021).

creating a cartel and violating the common rule of the competitive market, the cartel offenders will be released by disclosing facts before the Competition Commission. Incorporation of the idea of time frame is necessary to secure justified punishment or condonation.

VII. CONCLUSION

Many more developed countries have adopted criminal procedures to deal with cartel matters. On the other hand, India like European Union has adopted the civil procedure system. Although, lenient punishment is one of the most practicable discretion of the competition regulators across the world.⁴³ However, lenient punishment should be given based on truth disclosure. In these aforementioned cases where the Competition Commission of India provided lenient judgment that was appeared like a covid pass. Information sharing, one of the ingredients of the cartel, should be the defense if it is made for the public interest. Though, the matters were neither done for the public interest nor also the monetary loss that the enterprises faced had not been happened during the pandemic. The provision regarding lenient punishment under section 46 of the Competition Act 2002 should be implemented considering the time frame of committing the crime. Otherwise, the remarkable comment, passed by one of the famous economic scholars Scott. D. Hammond, will be true that cartel can be described as "theft by well-dressed thieves".⁴⁵

Replace the Vertical "Table of Acts followed" with the following:

Table 1

Country	Legal Provision
Australia	Division 1 of Part IV of the Competition and Consumer Act, 2010, formerly the Trade Practices Amendment (Cartel Conduct and Other Measures) Act, 2009.
Korea	Monopoly Regulation and Fair Trade Act.
Japan	Antimonopoly Law, 1947.
Israel	Restrictive Trade Practices Law 1988.
Denmark	The Danish Competition Act (Consolidation Act No. 700 of 18 June 2013), section 22(3).
Brazil	Brazil's Economic Crimes Law (Law No. 8,137/90).
U.K.	Enterprise Act 2002, section 188.
Canada	Competition Act, RSC 1985, c. C-34, section 45.
U.S.A* (Recent Development)	Antitrust Criminal Penalty Enhancement and Reform Act, 2004 *recent development in the U.S.
U.S.A	Section 1 of the Sherman Act, 1890.

FORMATION OF CARTELS IN INDIA AND THE LENIENCY PROGRAMME REGIME: AN EFFECTIVE TOOL?

—Zaid Akram Khan & Shreya Mehta*

ABSTRACT

Cartelization reduces the overall level of competition in a market, harming those innocent customers of the goods and competitors who are situated outside the cartel, which has been identified as a major antitrust infringement and is strictly prohibited throughout the world. Cartels, on the other hand, are frequently difficult to detect and, in some cases, even more difficult to establish. The Competition Commission of India has stated that this is due to explicit steps taken to prevent the formation of a cartel. Introducing leniency programme is one of the most effective ways to combat cartels worldwide. However, the programme designed to support effective enforcement of the competition laws for the cartels have emerged as one of the most efficient means of combating cartel activity around the globe. However, this cannot be ascertained with certainty about the Indian leniency system.

The purpose of this essay is to look at India's leniency regime, its problems, and potential solutions. To begin, the Competition Commission of India examined all 14 leniency requests considered in four cartelization cases.

Second, the leniency regime of the competition laws in the foreign countries like USA has been mentioned, and the European Union's leniency schemes has been examined. Both of these jurisdictions have two of the world's most effective and efficient regulating administrative structures for the competition. It is executed so that the Competition Commission existing in India could gain the required knowledge and skills by using a tool that is known to be

* Student at KIIT School of Law, 4th year student.

one of the most effective ways to break up cartels and determine, prevent and mitigate the formation of cartels.

INTRODUCTION

The best definition of cartels is "any anti-competitive concerted conduct (or arrangement), by competitors, to fix prices, make rigged bids (collusive tenders), impose output restrictions or quotas, or share or divide markets by assigning consumers, suppliers, territory, or lines of commerce."

Such agreements or contracts are seen to have a substantial influence on the undergoing competition since they affect consumers and other market competitors. As a result, they are being prohibited by the 2002 Competition Act, of India¹. Section 19(3) of the Act specifies the criteria that must be considered when determining whether such an unfavourable effect arises. Identifying cartels and unequivocally demonstrating their existence, on the other hand, is one of the most difficult aspects of reducing cartelization. Because participation in anti-competitive agreements is illegal and violators may face fines, such actions are typically carried out covertly, meetings are held in secret, and the amount of related paperwork is kept to a minimum.²

As a result, the regulators of the competition laws around the world have implemented various programmes for lineage as an aid in the enforcement of cartels. There are incentives for cartel members to proceed towards the competition commission authority and aid the commission accordingly by providing accurate detailed facts, statistics and data under these programmes. In regions with modern framework with respect to competition laws and administrative frameworks, like the United States, European Union, such leniency schemes have emerged as the best effective method to identify cartels³. They also act as a deterrent to future violations of these frameworks. Between 1996 and 2010, 90% of the fines levied against companies in the United States for antitrust violations were the result of investigations aided by leniency applicants⁴. More than half of the 50 international cartel investigations currently underway in the United States were initiated or are being advanced based on information which are obtained from leniency applicants of the 57 cartels investigated in the European Union and found to exist were investigated using the leniency notice,

¹ Competition Act, 2002, §3, No. 12 of 2003 (hereinafter Competition Act, 2002).

² Builders Assn. of India v. Cement Manufacturers Assn., 2015 SCC OnLine CCI 46.

³ CAROL BEATON-WELLS & CHRISTOPHER TRAN, ANTI-CARTEL ENFORCEMENT IN A CONTEMPORARY AGE: LENIENCY RELIGION, (2015).

⁴ SCOTT D. HAMMOND, THE EVOLUTION OF CRIMINAL ANTITRUST ENFORCEMENT OVER THE LAST TWO DECADES, ADDRESS BEFORE THE 24TH ANNUAL NATIONAL INSTITUTE ON WHITE COLLAR CRIME (Feb. 25, 2010), <https://www.justice.gov/ato/file/518241/download>.

accounting for nearly 93%. Furthermore, 166 corporations (47.16 percent) of the 352 business entities indulged in the cases which are filed for clemency⁵. As a result, the importance of an effective leniency regime in encouraging members of the cartel industry to cooperate with the regulators of competition laws which further cannot be overstated.

Any cartel member who approaches the Competition Commission of India (CCI) in India and offers assistance may be granted relief⁶, up to and including 100% of the penalty that would otherwise be imposed, if certain conditions are met⁷. The Indian leniency programme, on the other hand, did not get off to a good start. This is primarily due to problems with the leniency regulations, such as confidentiality, as well as a lack of cases in which leniency was requested and lingering uncertainty about the CCI's leniency policy. After the Competition Commission of India (Lesser Penalty) Regulations, 2009, were amended in 2017, clarifications on confidentiality were made. Furthermore, the restriction on the number of applicants was removed, expanding the parties who were eligible for a penalty reduction by clarifying that applicants could be both individuals and corporations⁸. The following part of this ongoing article would discuss the important changes that are required for making relevant affirmation as well as the extent to which an applicant may be granted leniency.

ANALYSIS OF COMPETITION COMMISSION OF INDIA (LESSER PENALTY) REGULATIONS, 2009

The Competition Commission of India (Lesser Penalty) Regulations, 2009 (the "Regulations") have outline certain criteria and process for imposing a less penalty under Section 46 of the Act. An applicant must meet the following conditions in order for a lesser penalty to be granted:

- The applicant must stop participating in the cartel's activities as of the date of its admissions, unless the CCI directs otherwise;
- The applicant must make crucial disclosures regarding Act violations;
- The applicant must provide all the required detailed information, documents, and evidence as may be required by the CCI;

⁵ Oana Dominte, D. Serban & A.M. Dimu, *Cartels in EU: Study on the Effectiveness of Leniency Policy*, 8 *MANAGEMENT & MARKETING* 529 (2013), <https://www.semanticscholar.org/paper/Cartels-in-Eu%3A%3A-Study-on-the-Effectiveness-of-Dominte-%C8%98erban/cd1e71967afec03ec959e29625bbe3666e5c6>.

⁶ Competition Act, 2002, §46, No. 13, Acts of Parliament, 2003 (India).

⁷ Competition Commission of India (Lesser Penalty) Regulations, 2009, regn. 4(a), No. 4 of 2009 (hereinafter Lesser Penalty Regulations).

⁸ Lesser Penalty Regulations, 2009, regn. 2(1)(b), (India).

- The applicant must cooperate and coordinate fully throughout the investigation and proceedings before the CCI; and
- the applicant should not conceal crucial facts⁹.

In the case of a business, the applicant must also list the names of any individuals who participated in the cartel on its behalf and for whom a lesser punishment is sought. After reviewing the facts of the case, the CCI may impose any additional restrictions or conditions on the applicant as it sees fit¹⁰.

Typically, penalty reductions are provided on a first-come, first-served basis. If such evidence assists in establishing an opinion based on the first impression about the presence of a cartel and initiating an inspection, and the cartel member who makes the first critical revelation by yielding substantial proof which may be allocating decrease of penalty of up to or equal to hundred percentage of the penalty that is accountable to be charged.¹¹

If subsequent applicants can produce evidence that "substantially adds value" to the evidence the Competition Commission of India or the Director General already has demonstrating the presence of a monopoly, they may be eligible for a penalty reduction. According to the Regulations, "added value" refers to the amount to which the Director General's or CCI's ability to prove the existence of a cartel is enhanced.¹²

Any subsequent application may get a penalty reduction up to 30% of the fine which is charged on them¹³, and any second applicant in chronological order shall receive a decrease in charged value up to 50% of the final charge.¹⁴

The following information regarding cartel activities must be included in the application by the applicant in order to qualify for the lower penalty:¹⁵

- The important details like the data, figures, statistics, disposition of the reported cartel the associated goals and the pursuits which are being accomplished, serving as the means to achieve those goals;
- The products and services associated with it;
- The relevant geographical market covered;

⁹ Lesser Penalty Regulations, 2009, regn. 3(1), (India).

¹⁰ Lesser Penalty Regulations, 2009, regn. 3(3), (India).

¹¹ Lesser Penalty Regulations, 2009, regn. 4(a), (India).

¹² *Supra* note 12.

¹³ Lesser Penalty Regulations, 2009, regn. 4(c)(i), (India).

¹⁴ Lesser Penalty Regulations, 2009, regn. 4(c)(ii), (India).

¹⁵ Lesser Penalty Regulations, regn. at the Schedule.

- The beginning and the whole tenure of the cartel; and
- The approximate capacity of business being calculated and affected by the cartel.”

In addition to other detailed information like data and statistics are required for procedural purposes. The Regulations have changed over time, including the removal of the cap on the number of applicants, the expansion of applicant categories, and the addition of provisions for confidentiality involving applicant identity, data, and supporting documentation. These can only be interpreted as efforts to increase disclosures of cartel existence made by individuals or organisations affiliated with the cartels.

APPLICANTIONS MADE BEFORE THE COMPETITION COMMISSION OF INDIA

Since May 2018, four requests for reduced penalties in various cases had been granted. The 14 applications submitted in the four matters are all discussed below in terms of the stage at which they were submitted, the information they provided as material evidence, the CCT's evaluation of those material evidence, and as a result the decision of the commission was based upon those applications. This work was executed in an attempt to examine the Commissions' methodology, so that it could be corroborated that it is uniform or not.

A. In Re Brushless DC Fans¹⁶

Percentage of Penalty relaxed: 75%

Number of Applicant: 1

Status before Application:

The inspection was ongoing, and the Director General's report was still pending.

Facts provided by the informant:

The Appellant described the operation of the cartel, the various operations of the cartel, its design and mode of operation, its duration, the incentives for its creation, the method and

¹⁶ Cartelization in Respect of Tenders Floated by Indian Railways for Supply of Brushless DC Fans and Other Electrical Items, In re, 2017 SCC OnLine CCI 56.

procedures for determining the cost evaluation of the products to be cited and mentioned in tenders, and the method for identifying the name of the tender winner.

CCI's Observations:

The CCI stated that the Director General was able to detect pricing collusion as a result of information submitted by the applicant, and that the Director General relied on this evidence to substantiate the existence of the cartel. However, when deciding the percentage of the penalty to be reduced, the CCI also considered the stage at which the petitioner supplied such information. This was ascertained and discovered that a self-evident case had already been established before the applicant disclosed anything.

B. In Re: Cartelisation in respect of Zinc Carbon Dry Cell Batteries market in India¹⁷

Percentage of Penalty relaxed: opposing party 3- 100%

Opposing party 1 - 30%

Opposing party, 2 - 20%

Number of Applicants: 3

Status before 1st Application:

Inspections were begun after Opposing Party-3 ("OP3"), acting as an informant, admitted to being a part of the cartel and requested leniency under Section 46 of the Act.

Information Provided by the 1st Applicant,

The OP3 application includes information on the causes which in return resulted in the formation of the cartel how it operates, and the safeguards put in place to prevent both the detection of infractions and a price war among its members. Details on the use of a trade organisation i.e. (OP4 for the proceedings) to facilitate exchange of facts and the resulting cooperation were also revealed.

¹⁷ Anticompetitive Conduct in the Dry-Cell Batteries Market in India v. Panasonic Corpn., 2018 SCC OnLine CCI 81.

CCI's Observations:

The CCI stated that OP3's data and proof were relevant and important in defining the internal market regulatory framework of zinc-carbon dry cell batteries, as well as the distinctive kind and scope of crucial exchange among cartel OPs.

It was also useful in determining the identities, residential addresses, and email addresses of key OPs who were pro-actively indulges in cartel activities. All the credit goes to the relevant data, details and coordinated assistance obtained from OP3, the Director General was then able to operate dawn raids at the other locations of the OPs and capture advanced proves in the form of mails, manuscripts, and a variety of additional documents to further substantiate a powerful evidence.

Information provided by 2nd and 3rd Applicant,

OP1: OP1 disclosed the commodity involved, the commencement and termination of the cartel, its operational manner, proof of AIDCM's role, the trade association participating, and the indulgence of specific people.

OP2: (The final arrangement makes no mention of it.)

Observations made by the CCI;

The CCI claimed that the proves acquired by the first applicant and subsequent investigations was sufficient to indicate the existence of a cartel, and that the submission of material by OP1 and OP2 brought nothing relevant to the investigation. It did, however, remark how thoroughly they participated with the investigation.

C. Nagrik Chetna Manch v. Fortified Security Solutions¹⁸

Number of Applicants: 6

Percentage of Penalty relaxed: OP6 – 50%

OP5 – 40%

OP4 – 50%

¹⁸ Nagrik Chetna Manch v. SAAR IT Resources (P) Ltd., 2019 SCC OnLine CCI 28.

OP2 – 25%

OP7 – Nil

OP1 – Nil

Status before 1st Application:

The Director General had previously obtained information indicating that Act violations had occurred.

Information provided by the 1st Applicant, i.e.; OP6:

OP6 gave crucial information on the cartel's operations. OP6 not only exposed the roles of the cartel members, but also gave supporting documents, such as emails and banking transactions.

CCI's Observations:

The CCI considered that by giving a stronger, cleaner image of the cartel's operations, helping the Director General's enquiries, and closing the sequence of events, the value of the ongoing investigation would be greatly increased. It was highlighted, however, that the application provided was just put forward before the Director General Of the CCI who further had access to the supporting paperwork.

Information provided by the 2nd Applicant, i.e.; OP5:

OP5 submitted emails to back up their claims about the method of operation and the roles of the parties involved.

The CCI believed that exposing the cartel's operational procedures provided value and aided the investigation. Furthermore, statements made in front of the DG aided in the creation of the cartel.

CCI's Observations:

The CCI did, however, take brief note of the application's stage as well as the fact that OP6 had already disclosed the operational mode of operation. The CCI further recognised the applicant's continued, consistent cooperation.

Information provided by the 3rd Applicant, i.e.; OP4:

The third applicant revealed the cartel's strategy for a different set of tenders. Furthermore, OP4 revealed that it had accepted to submit proposals and further provided concerned copies of the relevant emails as proof. OP4 also gave more information about the cartel's functioning and how offered were to be made on his behalf.

Observations by the CCI:

The Commission was confident that the evidence relevant to the challenged tenders in its possession had gained value. It took note of this since the tenders in question were different from those for which OP6 had applied. Given the application's overall lateness, the penalty was decided in accordance with the concept that it would be treated as the first appellant for the bids in which OP4 was indulged.

Information provided by the 4th Applicant, i.e.; OP2:

OP2 admitted to being the cartel's mastermind in every tender. The method of operation was revealed, so validating the disclosures made in the preceding three applications. OP2 acknowledged using proxy bidders and provided documentation to back up this assertion.

Observations made by the CCI:

According to the CCI, a large quantity of evidence had already been obtained by the time OP2 submitted the application, and practically the whole data given by OP2 was already being file with the CCI. The CCI determined that OP2's value contribution was small, consisting of obtaining the digital key required to upload documents from OP2's computer on behalf of other bidders.

Information provided by the 5th Applicant, i.e.; OP7:

There were admissions of assisting the cartel. Despite admissions about the cartel's existence and support, membership in the cartel was rejected.

Observations made by the CCI:

The Commission evaluated every previous disclosure and decided that there was no value enhancement.

Information provided by the 6th Applicant, i.e.; OP1:

There were admissions that the cartel and proxy bidders were directed to ensure that OP2 won the bids. Despite the fact that OP1 submitted paperwork and proof, the CCI already possessed them.

CCI's Observations:

While OP1 had also cooperated, the CCI stated that the evidence it had submitted had added nothing to the investigation.

D. In Re: Cartelization in Tenders v. Sara Private Tenders¹⁹

Number of Appellants: 4

Percentage of Penalty relaxed: OP1 – 50%

OP2 – Nil

OP3 – Nil

OP4 – Nil

Status before 1st Application:

The information utilised to rig the Pune Municipal Corporation's Tender Nos. 21 and 28 of 2013—which were not investigated as part of the aforementioned case—was provided to the CCI. In the earlier case, three of the four parties were also OPs. The 1st application was submitted after the investigation had begun.

Information provided by the 1st Applicant, i.e.; OP1:

The CCI noted that the DG had previously gathered information indicating bid rigging or OP's cooperation when the first Applicant approached it and then Submitted to being a part of the cartel. OP1 did, however, give critical information about how it was solicited to join the cartel, demands for

¹⁹ Cartelization in Tender No. 59 of 2014 of Pune Municipal Corps. for Solid Waste Processing, In re, 2018 SCC OnLine CCI 40.

OP1's documents in order to lodge proxy bids, and the bunch of records for such purposes.

Observations made by the CCI;

The Commission concluded that the data provided by the first applicant added "logical significance" and aided in understanding how the cartel operated. The evidence provided completed the chain of events, validated the information already in the DG's possession, and was utilised to establish the existence of the cartel.

Information provided by the 2nd Applicant, i.e.; OP2:

A OP2 Director admitted to managing the cartel and described its techniques of operation. Because cover and proxy bids were acknowledged, the first round of actual bidding was guaranteed to contain at least three eligible bidders, and OP-2 would eventually win the contract. It was admitted that OP1 provided relevant tender documents in support of the tender proposed.

Observations made by the CCI;

The Commission noted, nearly the whole proof provided by the second applicant was already in its hands; it was already being known of OP1's method of operation; and the only contribution made by OP-2's disclosure was the acquisition of digital keys for uploading documents from OP2's computer to the PMC website on behalf of other bidders. As a result, the CCI found that the value contribution was minimum to its extent.

Furthermore, no penalty reduction was granted based on the stage in which OP2's application was submitted.

Information provided by the 3rd Applicant, i.e.; OP4:

It was revealed that authorization certificates were issued to OP2 to aid it in participating in the aforementioned bids because OP2 did not produce composting machines, which is required to submit a bid. Furthermore, despite acknowledging the presence of a cartel in its application, the appellant rejected the contribution in the cartel.

CCI's Observations:

According to the CCI, OP4 provided no benefit to the process of proving the cartel's existence and so did not justify a reduction in sentence.

Information provided by the 4th Applicant, i.e.: OP3:

The proprietor of OP3, who is also the Director of the fourth applicant, admitted to coordinate the cartel and revealing its workings. It offered documentation and proof. The CCI, on the other hand, already possessed the information provided by OP3.

CCI's Observations:

Despite the fact that OP3 participated with the investigation and supplied evidence, the CCI determined that it was not applicable to give even a single value and, as a result, did not consider any penalty reduction.

**REVIEW OF ORDERS FROM THE COMPETITION
COMMISSION OF INDIA**

The CCI had received fourteen reduced penalty submissions as of May 2018 and was reviewing them. Before there was sufficient substantial proof to support a self-evident determination that a cartel is certainly present, and in the instant case one of the cartel members in the Zinc Battery Manufacturers warned the Commission that a cartel is presented. This is only the case in which the commission has completely waived off the fine. The CCI waived the first informant's penalty by 75% in the case of Brushless DC Fans and 50% in the case of Fortified Security Systems. The disparity could be explained by the parties' separate evidence submissions and the extent to which those contributions supported the existence of a cartel. The first informant in the matter of Brushless DC Fans provided information on how the cartel operated as well as evidence that the Director General provided evidence of pricing collusion. However, in the case of Fortified Security Solutions, the initial applicant's evidence supplemented the Director General's already existing evidence, completing the chain of events leading up to the infractions.

When evaluating requests for waivers of fines received after the first application for a lighter penalty, the CCI has not always taken the same stance. Only individuals whose evidence, as considered by the CCI in Fortified Security Solutions, gave significance to the inquiry and provided an aid in establishing the presence of a cartel received a partial waiver of punishment. Notwithstanding the parties' cooperation, the CCI refused to waive penalties

in the aforementioned case since there was enough evidence to indicate the presence of a cartel as per the Rules and their testimony didn't add much to the case. The CCI, on the other hand, stated in Zinc Battery Manufacturers that "Concerning OP-1 and OP-2's Lesser Penalty Applications, the commission observes that the relevant and concerned documents in the dispute was found and recovered from the premises of the manufacturer of zinc batteries during the search operation conducted on 23rd August 2016 which were further substantially enough to prove that the first and second applicant had violated section 3 of the Act. Consequently, the evidence and information provided by OP-1 and OP-2 about the cartel, including its longevity, did not result in any important addition or significance to the case. Despite this, it has waived 30% and 20% of the imposed fine for two applicants because the commission was pleased with their level of cooperation, which appears to contradict Rule 4 of the Rules.

Furthermore, the "significant extra value" criterion have added to the uncertainty. The CCI resolved on six applications for reduced penalties in Fortified Security Solutions. When the order is examined, it is clear that the CCI did not explain why the penalty was reduced, that is, how the submitted evidence added significance to the prior established proofs which are in the Custody of the commission, while imposing a much less fine for disclosures relating to the same dispute, like the mode of operation or roles of the parties involved, and so on. The CCI broadened the scope of the defining term to involve and indulge "fair value addition" in the case of *Re: Cartelization in Tenders v. Sara Private Tenders*. The Regulations' language, which defines "additional value" while mandating that the added value be adequate to reduce penalties, gives the impression that this is outside the CCI's discretion.

Such a tactic will not assist India's leniency regime advance. Aside from the few applications that were chosen, there is also a lot of confusion due to the CCI's inconsistent process. Furthermore, the so-called Reinforcement Theory of motivation or "Carrot and Stick Theory" which is cited in modern foreign jurisdictions, where disputed participants may receive the carrot in the form of defence or less punishment rather than the stick of hefty imposed punishment (the EC fined a cartel of truck manufacturers 2.93 billion dollars),²⁰ but full privilege and security is allocated and given to businesses that have in return given the corroborative evidence which helps in establishing and validating the presence of a cartel even if, it has already been established. As a result, it is in a party's best interests to be truthful about its participation, even if it is a member of a cartel, because substantial financial penalties could be levied otherwise. The CCI squandered an opportunity in Brushless DC Fans to notify Indian entities that they can also be provided with full sense of security and

²⁰ Case AT. 39824 Trucks, European Commission (Commission Decision of Sept. 27, 2017) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017XC0406%2801%29>.

privilege, if they have furnished corroborative proves after first investigation phase, and till then it aids in firmly showing the presence of a cartel.

A COMPARISON OF REDUCED PENALTIES IN ACCORDANCE WITH EU ANTICOMPETITION LAW

Europe and the United States have the most advanced competition regulatory frameworks in the world.²¹ The following part of this ongoing article will examine the progressive effort of the European Commission, there are few cases of leniency applications adjudicated in Europe, a forum that has always been assisted in the development of a highly successful leniency regime, in order to determine the steps, the CCI may take to advance the Indian leniency regime. Despite the fact that, as previously stated, the leniency regime in the United States is too effective, as well as being aware of the country which is having the first instant in which full immunity was furnished in a case of cartelization, it has not yet, explored in depth regarding this, in the article basically for two main reasons:

- i. In the United States, cartelization is a felony²², but it is a civil offence in many other countries. Offenders in the United States face prison sentences and vigorous enforcement, and
- ii. the first applicant to show proof definitively proving the existence of a cartel is awarded leniency.²³

None of these components is present in the Indian leniency scheme.

A comparison of EU regulations to those of India will be useful because the leniency laws in both jurisdictions are equivalent.

As seen in the cases of Methylglucamine²⁴, Fine art auction houses²⁵, and Methacrylate's, the European Commission ("EC") has been far too lenient towards cartel members who have either submitted leniency requests, allowing

²¹ William E. Kovacic, *COMPETITION POLICY IN THE EUROPEAN UNION AND THE UNITED STATES: CONVERGENCE OR DIVERGENCE?* (2008), https://www.ftc.gov/sites/default/files/documents/public_statements/competition-policy-european-union-and-united-states-convergence-or-divergence/080602bateswhite.pdf.

²² Sherman Antitrust Act, 1890, §1, No. 26 Stat. 209, 15 USC (US).

²³ UNITED STATES DEPARTMENT OF JUSTICE, *CORPORATE LENIENCY POLICY*, pts. A and B, <https://www.justice.gov/atr/file/816281/download>.

²⁴ Methylglucamine, European Commission (Commission Decision of Nov. 27, 2002), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32004D0104#:-:text=2004%2F104%2FEC%3A%20Commission%20Decision%20of%2027%20November%202002%20relating,FR%2C%20IT%2C%20NL%2C%20PT%2C%20FI%2C%20SV%29%20in%20force.>

²⁵ Fine Art Auction Houses, European Commission (Oct. 30, 2002), https://competition-policy.ec.europa.eu/cartels/cases_en.

EU determined that the member was eligible for leniency, only after receiving further submissions. The precise quality of detail in these submission builds an even more stronger, EC's ability to support the alleged facts. Most crucially, even if the member's initial submission considerably bolstered the EC's case and the timing had worked in its favour, the member's contribution to the case has remained minor throughout the proceedings. Also, there has been minimal change in the amount of value created by member collaboration. Notwithstanding this, the EC waived 40% of the penalties that had been imposed. A second Part III application was also submitted, and thanks to the applicant's evidence, the EC was able to extend the cartel's term by approximately 1.5 years. The European Commission declared that the extra 1.5 years would not be considered for assessing the severity of the charges to be fined on the subsequent applicant under Part III. The aforementioned another petitioner likewise won a 30% penalty relief due to the great value provided by its substantially established proof and active coordination.

The question of judging "significant added value" has created a few justifiable strain and further debates because of the prior analytical abstract in nature. Yet, there have been measures to limit this subjectivity. According to the ruling, "the Commission (EC) must ascertain the time when the pledge in reality has been given with substantial proof which renders a significant added value over the prior substantial proof in its dominion for the aim and scope of implying the diminishing value which has been provided in point 23(b) of the Leniency Notice." This permits the development of a framework for judging whether the evidence provided in circumstances when multiple enterprises are requesting leniency offers meaningful value.

The CCI has not clearly justified the reduction in penalty in any of the three orders described above, as it did in Methacrylate's and the majority of earlier EU rulings. Despite the fact that it is comprehensible that the Commission should act in a certain way that supports India's leniency regime and that doing otherwise would harm its cause, it has acted arbitrarily, if not completely at random, in determining the established value addition and the percentage of declined fines to be imposed. This method is ineffective, and unless the CCI adopts a more organised strategy, the leniency regime will not change. In order to deter cartelization, the CCI has issued high fines in cases of cartelization. However, in order to effectively dismantle cartels, the CCI must revise its policy of encouraging cartel members to provide evidence.

CONCLUSION

Effective leniency programmes have been shown to aid in the fight against cartels, and they must be implemented. Nonetheless, The Indian system of leniency needs more upgradation and advancement for an efficient implementation.

For such programmes to be effective, members of the cartel must be convinced that giving information about cartel activities is in their best interests and that doing otherwise could result in serious consequences. This goal has been fulfilled in the European Union and the United States of America, where cartel members who have cooperate with investigations or act as informants are awarded with reduced penalties and, in some cases, full immunity. The CCI has severely punished cartels (the Cement cartel was fined roughly Rupees Sixty-seven thousand crores. It is critical that the competition authority establish a more consistent method for handling leniency applications in order to generate the amount of predictability required to induce cartel members to engage with it. Second, the CCI must definitely elaborate the term "significant extra value" and restrict the concerned parties to whom it may provide leniency in a given case. It would encourage people to become tipster or to file leniency petitions with as much supporting documentation as possible, rather than waiting to see how the investigation progresses, confident that some level of leniency will be given in any case. This would have the added benefit of reducing the potential resource requirements for an investigation, resources that could be deployed elsewhere.

The CCI has regularly reviewed EU legal precedent, taking note of widely accepted norms and procedures in order to obtain a reasonable and equitable resolution by taking relevant information, etc. In the Cement Cartel case, for example, the CCI took the EU's approach to information exchanges into account when making its judgement.³¹ The CCI would be best served by implementing a consistent strategy that supports its own purpose. It should not be reluctant to base its appraisal of the effectiveness of the adopted measures on earlier regulatory attempts.

³¹ Builders Assn. of India v. Cement Manufacturers Assn., 2016 SCC OnLine CCI 46.

UNHEARD VOICES: A STUDY OF STREET CHILDREN IN ODISHA

—Dr Manoj Kumar Sadual*

Mr Tarini Prasad Sahoo** & Dr Tul Ishree Pradhan***

ABSTRACT

This paper examines the situation of "Street Children" in the state of Odisha by taking into account the five major cities of Odisha i.e. Bhubaneswar, Berhampur, Cuttack, Rourkela and Sambalpur, which are the Urban Municipal Corporations and considered as most developed and urban. The study's purpose was to explore the socioeconomic reality of "Street Children" through casual conversations with up to 100 "Street Children" in the above-mentioned locations on a random basis keeping some variables as common denominator. Bhubaneswar, Cuttack, Berhampur, Rourkela and Sambalpur are the fast-growing Cities in the state of Odisha. The Researchers selected these Cities to access an overview of the situation of Street Children in the State of Odisha and for which, they collected data on the Socioeconomic and living conditions of Street Children using the targeted sampling method by selecting 20 Children from each of these Cities. According to the study, the average age of the respondents was around 14 years old, and over half of the "Street Children" are illiterate and have never gone to school. The main job they do for their sustenance is begging in crowded places, cleaning works in food joints, rag picking, street vending etc. This Study suggests that Street Children should receive thoughtful care, emotional support and proper nutrition, educational facilities and permanent Shelter and toilets facilities as well. The concept of Street Education must be developed for the Street Children by which they could be easily integrated into other Public Schools later on as a means of mainstreaming them into Society. This study also suggests that since Street Children live in the unhealthiest and unhygienic way

* Associate Professor, P.G. Department of Law, Utkal University.

** Research Scholar, P.G. Department of Law, Utkal University.

*** Assistant Professor-II, KIIT School of Law, KIIT Deemed University.

as well as use the public toilets of railway stations, bus stands and the facility centers operated by the Municipal Authorities, they are prone to different diseases. NGOs with the help of the Government should also come forward for educating these Street Children about basic hygiene and healthy habits by organizing Street Awareness Programmes from time to time.

Keywords: Street Children, Urbanization, Street Situation, Abuse, Protection, Welfare, Development, Health, Education, Hygiene.

INTRODUCTION

United Nations Children's Fund and the Indian Government have estimated that there are approximately 4,00,000 "Street Children" in the cities of Mumbai, Kolkata, Delhi, Hyderabad, and Bangalore as well as in the rest parts of India (UNICEF, 2005)¹. UNICEF defines a "Street Child" as any male or female child for whom the street has been their usual abode and source of livelihood and they are extremely vulnerable since they are not adequately protected or supervised by responsible adults. Labour conditions for "Street Children" are commonly abhorrent due to their being confined to the unorganised field. Due to low earnings, "Street Children" found on the Streets of India usually prefer to be independent or to work multiple jobs. Street Children, particularly those who have been residing on the Streets for a substantial period, sometimes get involved in activities like theft, pickpocketing, drug trafficking and prostitution. The majority of Street Children do work for an average of 8 to 10 hours per day in different activities for earning their livelihood. Since urbanization is gradually picking up, the Street Children phenomenon which is essentially an urban phenomenon is increasing in many places of Odisha, especially the Railway Platforms, Bus terminals, under flyovers where they easily get Shelter, since most of them are destitute, neglected, deprived of family care.

LITERATURE REVIEW

They seldom have time or means to go to school and obtain an education, since they rely on the money they make themselves. The fact that they are illiterate is a major obstacle for them to getting adequately paid employment as adults which ultimately forces them to spend the rest of their lives

¹ UNICEF (2003), *THE SITUATION OF FAMILIES AND CHILDREN AFFECTED BY HIV/AIDS IN VIETNAM: A NATIONAL OVERVIEW*, cited in UNICEF (2005).

on the streets (A Report of Ashraya Initiative)². This UDHR paved the path for this major socio-legal issue and for which most countries throughout the globe accepted policies, rules, and regulations. The United Nations' efforts to bring attention to the plight of underprivileged, helpless, and innocent "Street Children" in India as well as in the world are laudable and commendable. It is pertinent to cite here the case of *Olga Tellis*³, where the Hon'ble Supreme Court of India reprimanded Bombay Municipal Corporation for the callous approach to the venerable section of the population, whereas in the case of *Bandhua Mukti Morcha*, the Apex Court praised the efforts of the Voluntary Organization who had filed the case against the employer for forcing "Street Children" to become bonded labours.⁴ For many years, the phrase "Street Children" has been used to represent a group of especially deprived children that are peripheral and frequently alienated from their communities in society. The phrase "Street Children" refers to 'girls' and 'boys' under the age of 18 years who have made the street (including vacant buildings and wasteland) their home and source of income and also are not sufficiently safeguarded or supervised (UNICEF)⁵. According to a Legal Services India article titled "Street Children-Human Rights A Socio-Legal Issue In India"⁶, the problem of "Street Children" such as rag pickers, street vendors, beggars, shoe shiners etc. is somewhat different from that of "Child Labour" working in factories and workshops because the latter has some sort of home to go back in the evening or night whereas the "Street Children" are completely at the mercy of their employers or urban predators or police and usually live under pavements, bus stations, railway stations. They don't have a stable abode and are always keep on moving from one place to another and mostly take shelter on the streets, as a result of which their condition is more serious than that of children working in factories and living at home. The Indian Constitution guarantees several rights to children, starting from Article 21 A, Article 24, Article 45 and apart from these, the provisions enshrined under Articles 14, 15, 21, 23, and 46 also ensure rights for children in general and "Street Children" in specific at par with adult citizens. Since the seventh five-year plan, the Indian Judiciary and the Supreme Court have taken an active role in protecting children's rights. In India, Social Action Litigation i.e. Public Interest Litigation is an attempt to use the legal system to ensure that constitutionally promised rights are realised. The effective role of the Judiciary can be seen in the landmark judgements passed by the Hon'ble Apex Court in *M.C. Mehta v. State*

² ASHRAYA INITIATIVE FOR CHILDREN, retrieved from www.ashrayainitiative.org/what-we-do/context/street-children/.

³ *Olga Tellis v. Bombay Municipal Corpn.*, (1985) 3 SCC 545.

⁴ UNICEF (2003), THE SITUATION OF FAMILIES AND CHILDREN AFFECTED BY HIV/AIDS IN VIETNAM: A NATIONAL OVERVIEW, cited in UNICEF (2005).

⁵ *Street Children-Human Rights a Socio Legal Issue in India*, retrieved from www.legalservice-india.com/article/2378/Street-Children-Human-Rights-A-Socio-Legal-Issue-In-India.html.

of T.N.⁶, *Sheela Barse v. Union of India*⁷, *Vishal Jeet v. Union of India*⁸, *Unni Krishnan v. State of A.P.*⁹ and *Gaurav Jain v. Union of India*¹⁰ where the very crucial issues of children were dealt with such as 'child labour', 'child trafficking', 'child prostitution', 'children forced into prostitution etc. Getting a piece of accurate information regarding "Street Children" is a burned task as they have developed an extraordinary tendency to lie and keep on moving from one place to another at regular intervals. Two very basic causes behind the problem of "Street Children" are two-fold, at the first place, it is the financial hardship and bad living conditions that people face as a result of urbanisation and industrialisation and in the second place, it is the changes in traditional family patterns, particularly as women have become household breadwinners (Patel, 1990¹¹). Drug dealing, crime, theft, and gang practices are all harmful and unlawful behaviours that "Street Children" are often exposed to (UNCHS, 2000)¹². Child street(ism) on a large scale and in many forms is perhaps one of the most major societal challenges in developing cities worldwide. Various experts advised that children are exposed to risky socioeconomic influences that promote street(ism) in various ways. The difficulties that "Street Children" experience are numerous and in reality, they face significant risk as a result of their growing up in a typically hazardous situation that exposes them to significant risks. As a result, several of its safeguards are frequently breached. They frequently lack access to nutritious food and an adequate diet. Because they live on the streets, they don't have food, don't cook it, and don't have the money to buy it. They do not have access to sanitary facilities and are frequently found unclean and plagued with fleas (*Street Child - Humanium*)¹³. Due to a lack of grooming, "Street Children" are also vulnerable to several infections and as such, their well-being is usually of concern. These young folks are on their own without a family to look after them. Furthermore, to escape their situation, "Street Children" frequently use cannabis, alcohol, or natural gas. Unfortunately, their economical stability, as well as their physical and psychological development, are harmed by these difficult living conditions. They are visibly uninformed since they do not have the same opportunities as other children (*Street Child - Humanium*)¹⁴. Many are unable to find a job due to a lack of vocational skills and finally leave the streets. Adults have

⁶ M.C. Mehta v. State of T.N., (1996) 6 SCC 756.

⁷ Sheela Barse v. Union of India, (1986) 3 SCC 632.

⁸ Vishal Jeet v. Union of India, (1990) 3 SCC 318.

⁹ Unni Krishnan v. State of A.P., (1993) 1 SCC 645.

¹⁰ Gaurav Jain v. Union of India, (1997) 8 SCC 114.

¹¹ Patel, S., *Street Children, Hotel Boys and Children of Pavement Dwellers and Construction Workers in Bombay - How They Meet Their Daily Needs*, 2(2) ENVIRONMENT AND URBANIZATION 9-26 (1990).

¹² UNCHS (Habitat), *STRATEGIES TO COMBAT HOMELESSNESS* (2000).

¹³ *Street-Connected and Homeless Children*, retrieved from <https://www.humanium.org/en/street-children/>.

¹⁴ *Street-Connected and Homeless Children*, retrieved from <https://www.humanium.org/en/street-children/>.

assumptions about them that designate them as "Street Children," and they are frequently discriminated against. "Street Children" therefore, are usually associated with the risks associated with the streets, making their reintegration into society much more difficult (**Street Child - Humanium**)¹⁵. Street children's predicament is dictated by their circumstances rather than their social status. In actuality, each Child has a unique experience with the Street that cannot be generalised; as a result, effective Street Child care must be based on the distinctions among Children. According to UNICEF, India's "Street Children" reached around 18 million in 2000. It is believed that around 2,50,000 children live in train stations or on the streets in the city of Bombay alone. Begging, rag picking, sex work, robbery, small crimes, shoe shining, luggage hauling, mechanic work, flower, snack, or trinket sales etc. are all common ways for "Street Children" in India to make a livelihood. They are unable to seek well-paying employment as adults due to their illiteracy as children, locking them in a vicious cycle that permits them to spend the rest of their lives on the streets (**A Report of Ashraya Initiative**)¹⁶. "Street Children" suffer from poor health regularly, and while half of all children in India are malnourished, the proportion of "Street Children" is significantly greater. These infants are not only underweight but their growth is also stunted. "Street Children" work and survive amid litter and exposed sewers. They are not only susceptible to infections, but they are also unable to be immunised or get medical treatment. The odds are stacked against youths who are homeless. They are exposed to the elements, have a limited food supply, are in danger of malnutrition and medical treatment, and are at an increased risk of acquiring addictions, abusing others, and getting ill (**i-India**)¹⁷.

RESEARCH METHODOLOGY

The geography of the study was decided considering the urbanization and prevalence of "Street Children" in the cities of Bhubaneswar, Berhampur, Cuttack, Rourkela and Sambalpur. These are Odisha's major urban pockets with a significant potential for "Street Children" due to administrative, commercial, and pilgrimage significance, as well as adequate connectivity. According to several NGOs and newspaper articles, many "Street Children" dwell and walk along with train platforms and they could not stay in one place for a long period. In the present study, the Researcher identified 20 Street Children each from the Cities of Bhubaneswar, Berhampur, Cuttack, Rourkela and Sambalpur on a random basis for assessing the plight of "Street Children". The following definition of "Street Children" has been used in this study:

¹⁵ *Street-Connected and Homeless Children*, retrieved from <https://www.humanium.org/en/street-children/>.

¹⁶ Retrieved from www.ashrayainitiative.org/what-we-do/context/street-children/.

¹⁷ *The Problems of Street Children*, retrieved from www.i-indiaonline.com/sc_crisis_theproblem.htm.

A "Street Child" is a child whose normal habitation or source of livelihood is the street (in the broadest sense, including vacant dwellings, wastelands, etc.) and who is not sufficiently safeguarded, supervised, or directed by responsible adults. The study looked at three types of children; (a) those under the age of 18 who live and work on the streets, i.e. Children of the Street; (b) those under the age of 18 who live in slums but work on the streets, i.e. Children on the Street; and (c) those under the age of 18 who do not have parental protection or supervision and spend time on the streets, i.e. mostly delinquent children.

Sampling Method

To identify a population of interest and construct a systematic manner of picking instances that are not based on advanced knowledge of how the outcome will emerge rather the Study used the Purposive Random Sampling method. The goal was to increase rather than promote representativeness. The sample of the study consisted of 20 children from each of the cities, resulting in a total of 100 sample cases being analysed as a cohort.

Scope of the study

The Rapid Assessment attempted to cover the following areas to analyze the degree of vulnerability of the Street Children by directly interviewing them against a set of questionnaires. The intention was to capture their voices and perception focusing on assessing the socio-economic condition of the Street Children, access to health services, food availability, and engagement in economic activities for earning, educational status, protection issues, shelter facilities etc.

Limitation of the study

During the COVID-19 pandemic, particularly during its second wave (referred to as COVID-II), many vulnerable populations faced heightened challenges, and among them were street children. Street children are often a marginalized and underserved group, and the pandemic exacerbated their already difficult circumstances. Engaging with and gathering information from street children during this period posed several unique challenges.

DATA ANALYSIS & INTERPRETATION

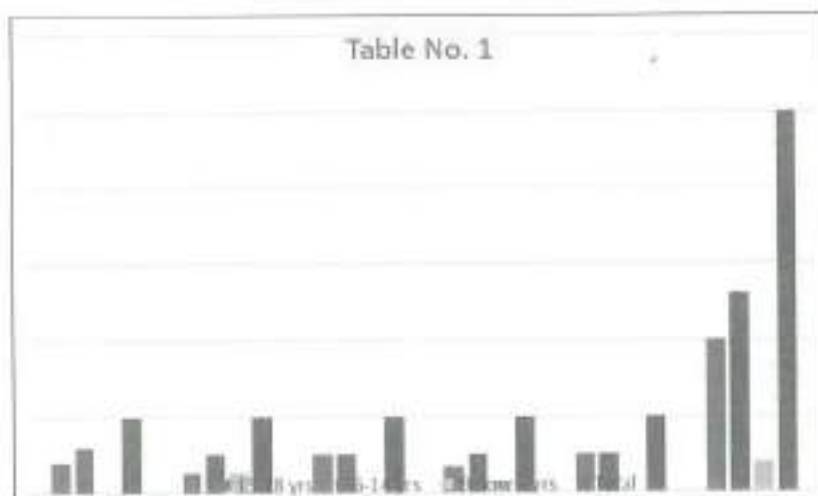
The Study covered as many as 100 "Street Children" of different age groups, out of which 12 were female and 88 were male and all were below the age of 18 years old. Age group distribution of these randomly selected children has been depicted as follows in (Table No. 1) which shows that almost 52% of

the "Street Children" are within the age bracket of 6-14 years, who remained outside the coverage of the Right to Compulsory Elementary Education Act. Similarly, almost 8% of the sample children are within the age bracket of below 6 years who are deprived of their right to Anganwadi services including early childhood care and education and the remaining 40% are adolescents who are yet struggling on the Street to meet their basic needs.

Table No. 1

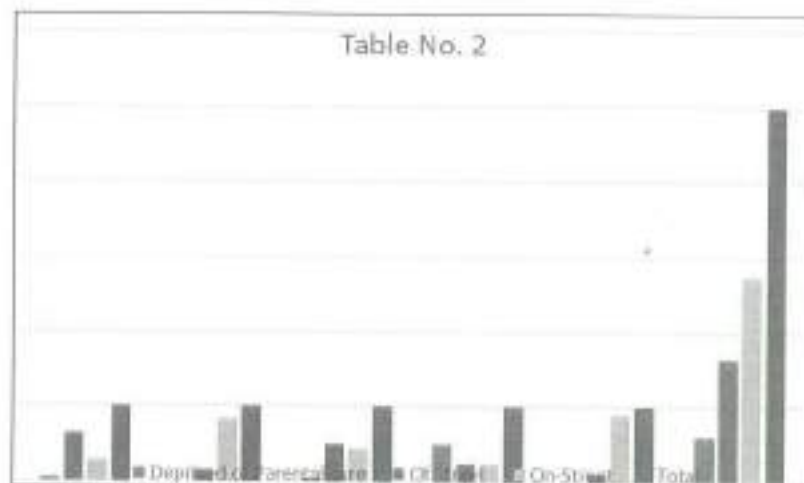
Age Group	Bhubaneswar	Berhampur	Cuttack	Rourkela	Sambalpur	Total
15-18 yrs	08	05	10	07	10	40
6-14 yrs	12	10	10	10	10	52
Below 6 yrs	00	05	00	03	00	08
Total	20	20	20	20	20	100

Table No. 1



As mentioned in (Table No. 2) which shows, out of the total numbers of the sample so observed, almost 12% of children do not get Parental care and protection and out of which around 83% are from Rourkela city only. The Sample children in the cities of Berhampur and Sambalpur are staying in nearby Slums with their Parents though few are residing on the street as well. Coming to the city of Bhubaneswar and Cuttack, there is an almost equal proportion of children from the category of "of the street" and "on street".

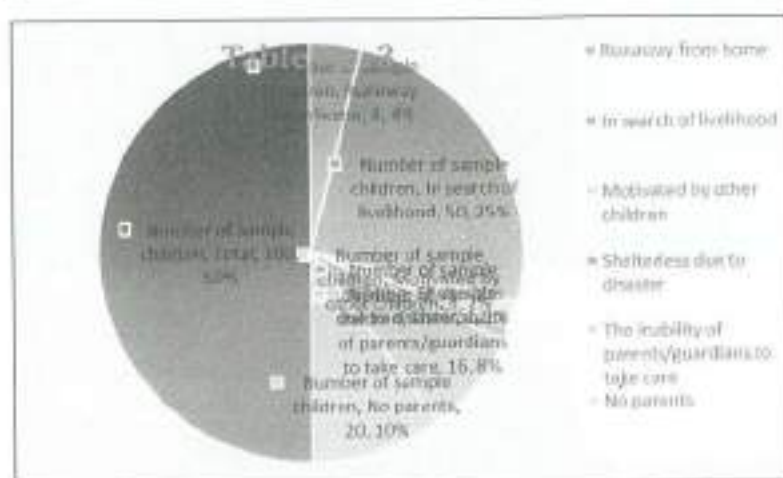
Table No. 2						
Category of child	Bhubaneswar	Berhampur	Cuttack	Rourkela	Sambalpur	Total
Deprived of Parental care	01	00	01	10	00	12
Of Street	13	03	10	05	02	33
On-Street	06	17	09	05	18	55
Total	20	20	20	20	20	100



Thereafter, the question comes as to why these children live on the Streets. The Study reveals that poverty is coming out dominant factor for children to be on the Street. (Table No. 3) shows that almost 50% of the sample "Street Children" live on the Street to earn livelihood whereas 20% are not having or do not have known about their parentage, 16% recognize their Parent's inability to take care. However, around 8% of the sample children have confessed to having run away from home and 4% stated that they have been motivated by other children whereas 2% stated that they have been shelterless due to natural disaster. From this, it can be inferred that the major reason which has compelled almost 50% of the sample children is 'search for livelihood'.

Table No. 3	
Reason for living on Street	Number of sample children
Runaway from home	08
In search of livelihood	50
Motivated by other children	04

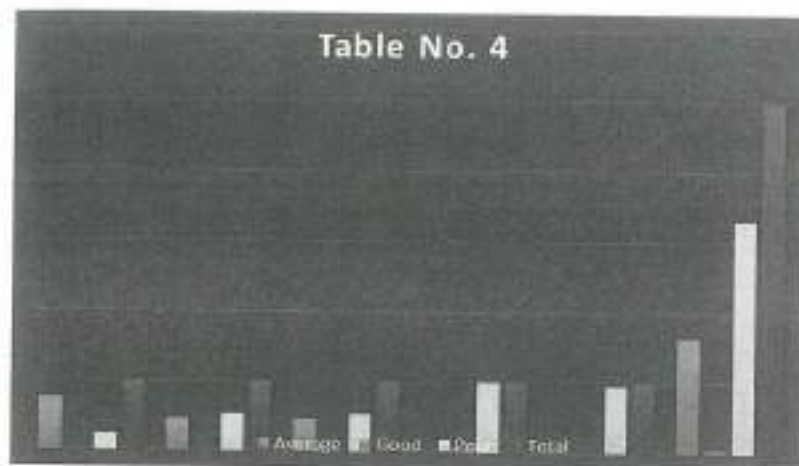
Shelterless due to disaster	02
The inability of parents/guardians to take care	16
No parents	20
Total	100



The following assessment as reflected in (Table No. 4) is based on observation of the clothes and personal hygiene of "Street Children" and they have been categorized into categories like 'Good', 'Average' and 'Poor' and it was found that out of the total sample children, almost 66% were identified in the category of 'Poor' i.e. very bad clothes, poor personal hygiene like the cleanliness of head, face, hand and legs etc. Poor personal hygiene has been a reason for poor health and morbidity. Whereas, around 33% of children were in the category of 'Average' and only 1 was found to be in good condition but that is not at all a good number.

Table No. 4						
Personal Hygiene of Street Children	Bhubaneswar	Berhampur	Cuttack	Rourkela	Sambalpur	Total
Average	15	09	09	00	00	33
Good	00	00	00	01	00	01
Poor	05	11	11	20	19	66
Total	20	20	20	20	20	100

Table No. 4



(Table No. 5) shows the different nature of works in which the sample children are engaged to earn a livelihood. It is found that a large number i.e. around 29% are engaged with begging in crowded places whereas, a bit lower than that i.e. 26% are engaged with cleaning work in food joints. That apart, 20% are engaged in rag picking and 14% are engaged in street vending but a few are engaged in shoe shining i.e. around only 01 and 10% of the total sample children, are not working at all.

Table No. 5				
Types of work children are engaged with	Age Group 15 to 18 years	Age Group 6 to 14 years	Age Group below 6 years	Total
Begging in crowded places	09	12	08	29
Cleaning work in food joints	10	13	03	26
Rag picking	05	14	01	20
Street vending	06	08	00	14
Shoe shining	00	01	00	01
Not working	03	05	02	10
Total	33	53	14	100

Table No. 5

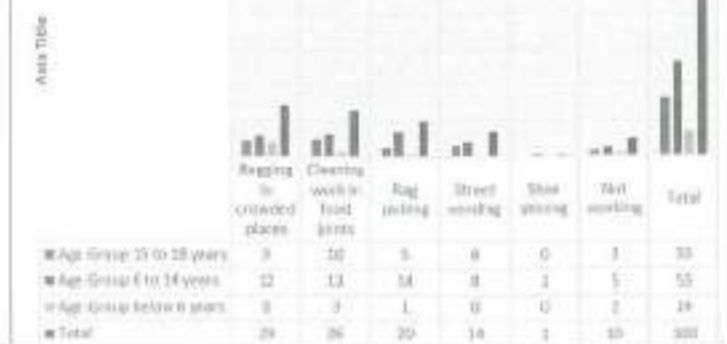


Table No. 6

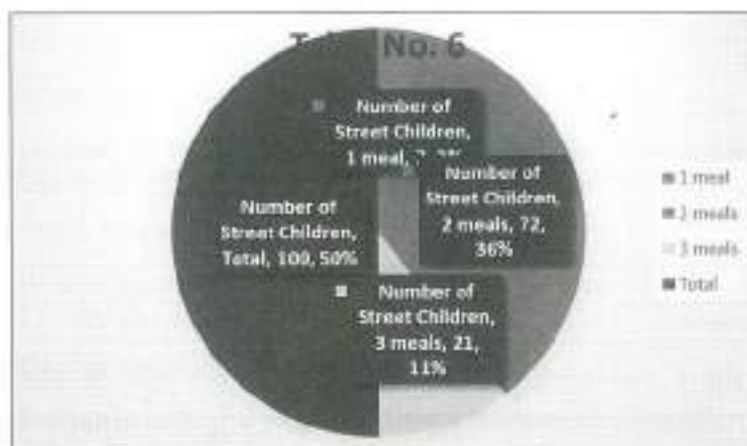
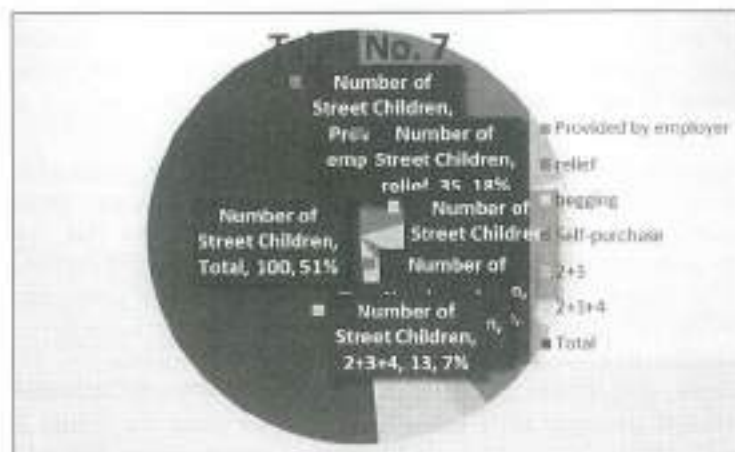


Table No. 7



A combined reading of (Table No. 6 & 7) shows that almost 72% of sample children are getting meals two times a day wherefrom majority are getting the same from the source "Relief" and 23% obtain the same by begging and 15% obtain it by self-purchase. Children so dealt with during the survey responded that they were getting 2 meals a day and the meal as per their definition is something available to eat, which ranges from biscuit packet or bread or rice whatever is available to them from anyone on charity or any Govt. agency or by purchasing themselves. The relief provided by the Government or Charitable Organizations is the major source of food for the Street Children. That apart few also get food as charity from social spirited citizens.

Table No. 6	
Number of meals they get per day	Number of Street Children
1 meal	07
2 meals	72
3 meals	21
Total	100

Table No. 7	
Source from where they get	Number of Street Children
Provided by employer	05
relief	35
begging	23
Self-purchase	15
2+3	04
2+3+4	13
Total	100

The rapid assessment has identified the vulnerable conditions of "Street Children" due to their geographical disadvantages, inadequate knowledge about their health, hygiene, about their rights, lack of access to food, engagement in work that is unacceptable under the protection mechanism and inability of their caregivers to provide protection and care. In the absence of adequate care and protection from the caregivers for various reasons, "Street Children" remain most vulnerable to exploitation and abuse and sometimes adopt delinquent behaviour leading to crime and drug addictions. The fast evaluation attempted to collect children's perspectives on their living and working environments to detect potential protection and human rights problems. There is a wide canvas of safety net provisions through various legislation as well as Constitution to protect the rights of the children to remain free from any sort of abuse, exploitation or negligence and specifically, the Juvenile Justice System recognizes every child below the age of 18 years and enlists 22 categories of Children who need care and protection among whom Street Children

is also there. The above study shows that the respondents' average age is 14 years which means that the bulk of Street Children is in their adolescent stage. A street child's daily earnings often range from Rs. 100 to Rs. 200. Due to a lack of security, they are unable to save money and hence spend it all in one day. Banks and the Postal Service refused to open accounts for them due to a lack of identity evidence. As per the Study, poverty has driven these Children to take shelter on the Streets.

RECOMMENDATIONS

Certainly, here are the points organized in a systematic manner for better clarity:

1. Data Compilation and Department Responsibility:

- Compile and maintain data on Street Children under the Departments of Child Welfare and Social Welfare.

2. Street-oriented Education System:

- Establish a Street-oriented Education System for Street Children to facilitate their integration into mainstream government schools.

3. Health Education and Personal Hygiene:

- Provide health education and knowledge of personal hygiene to Street Children for their well-being.

4. Funding and NGO Collaboration:

- Fund child protective programs through Government initiatives.
- Collaborate with Non-Governmental Organizations (NGOs) under the Department of Women and Children's Welfare.

5. Government Advocacy and Human Rights Commission:

- Government to advocate for and defend the rights of Street Children.
- Human Rights Commission to take *Suo Motu* initiatives to protect the rights of Street Children facing violations.

6. Police Protection:

- Ensure that the police department protects Street Children from street threats and gangs instead of ignoring or harassing them.

7. Media Advocacy:

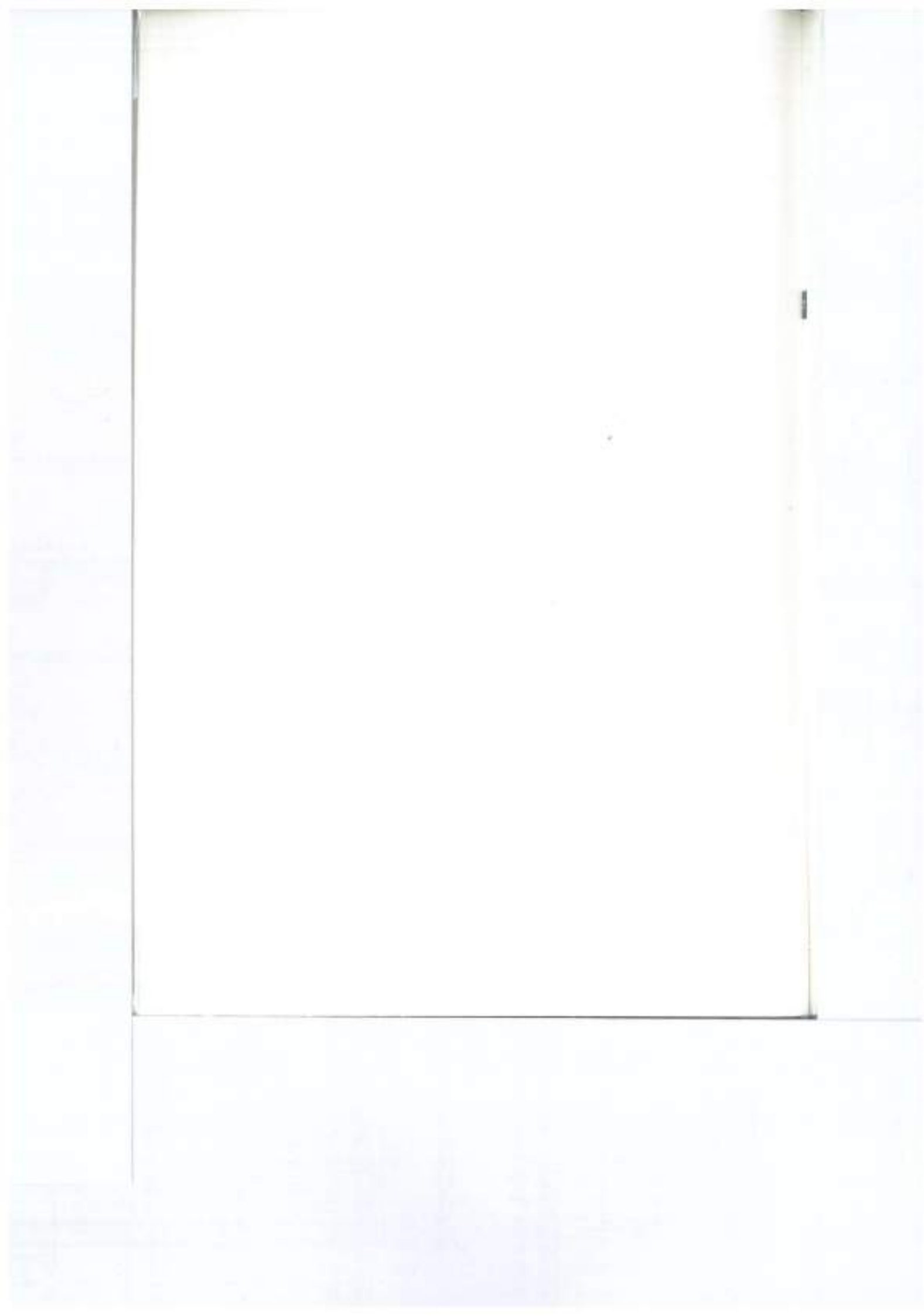
- Media to publicize success stories of Street Children reuniting with families.
 - Media, as the fourth pillar of democracy, should highlight Street Children's issues to reach concerned authorities effectively.
8. Shelter for Adolescent Girls:
- Provide protective shelter for adolescent girls who are alone in public places and squatters.
9. Repatriation, Reintegration, and Rehabilitation:
- Repatriate and reintegrate runaway Children with their families.
 - Economically rehabilitate families to provide care and protection for their Children.
10. Identity Documentation:
- Provide identity cards, ration cards, and Aadhaar cards for Shelterless Street Children.
11. Professional Counseling and Reformatory Services:
- Strengthen provisions for professional counseling and reformatory services.
12. Inclusion in Work Plan:
- Include a Street Children Survey in the Annual Work Plan of concerned Departments.
13. Ward-level Committee:
- Form ward-level Child Protection Committees to identify and map the needs of Street Children.
14. District Task Force:
- Ensure regular District Task Force meetings for the rescue and rehabilitation of Street Children.
15. Time-bound Support and J.J. (C.P.C) Act:
- Provide time-bound support for implementing individual care plans for rescued Children and those in conflict with the law, following the J.J. (C.P.C) Act.
16. Special Standard Operating Procedures (SOPs):

- Develop specialized SOPs to address the concerns of Street Children effectively.

Implementing these measures in a comprehensive and coordinated manner can significantly improve the conditions and prospects of Street Children while safeguarding their rights and well-being.

CONCLUSION

The United Nations Organization's Declaration of Human Rights issued dated 10.12.1948, was the first attempt to come up with a reasonable and adequate solution to address the challenges of "Street Children". The United Nation's Human Rights Council paved the path for this major scientific and legal issue, and all nations throughout the globe passed regulations, guidelines, and legislation to ensure proper implementation of the same. The United Nations' attempts to bring attention to the plight of vulnerable, needy, and innocent "Street Children" in India and around the world are laudable and commendable for many causes. In reality, it is regarded as a global issue, drawing the interest of developing countries grappling with problems. It is extremely wonderful that the Universal Declaration of Human Rights explicitly outlined and disseminated essential instructions to preserve them from all types of misery. The study as discussed in preceding chapters shows that the condition of "Street Children" across the state is worrisome and a cumulative and whole-hearted effort is needed both by Government Agencies entrusted with the job of upliftment of these disadvantaged groups and Non-Government Organizations as well as by the Civil Society in order ensure a flourished future for the "Street Children" ensuring their equality before the law and equal protection of the law, like other citizens of the Country.



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Sd/-

Prof. (Dr.) Bhavani Prasad Panda
Director
School of Law, KIIT University
Chief Editor
KIIT Journal of Law and Society

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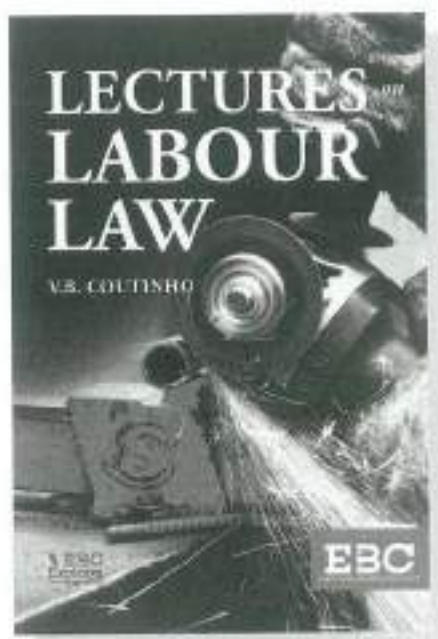
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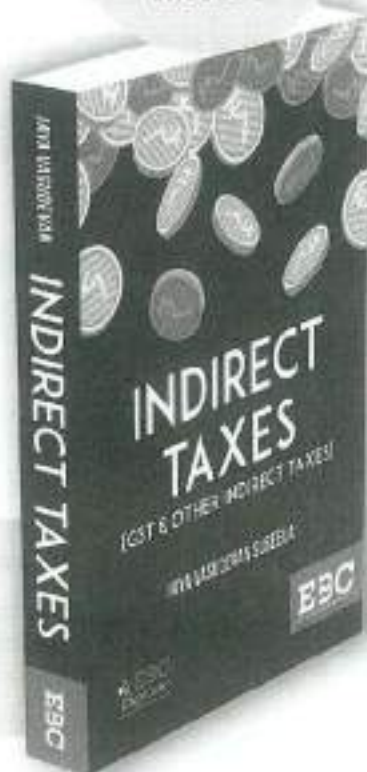
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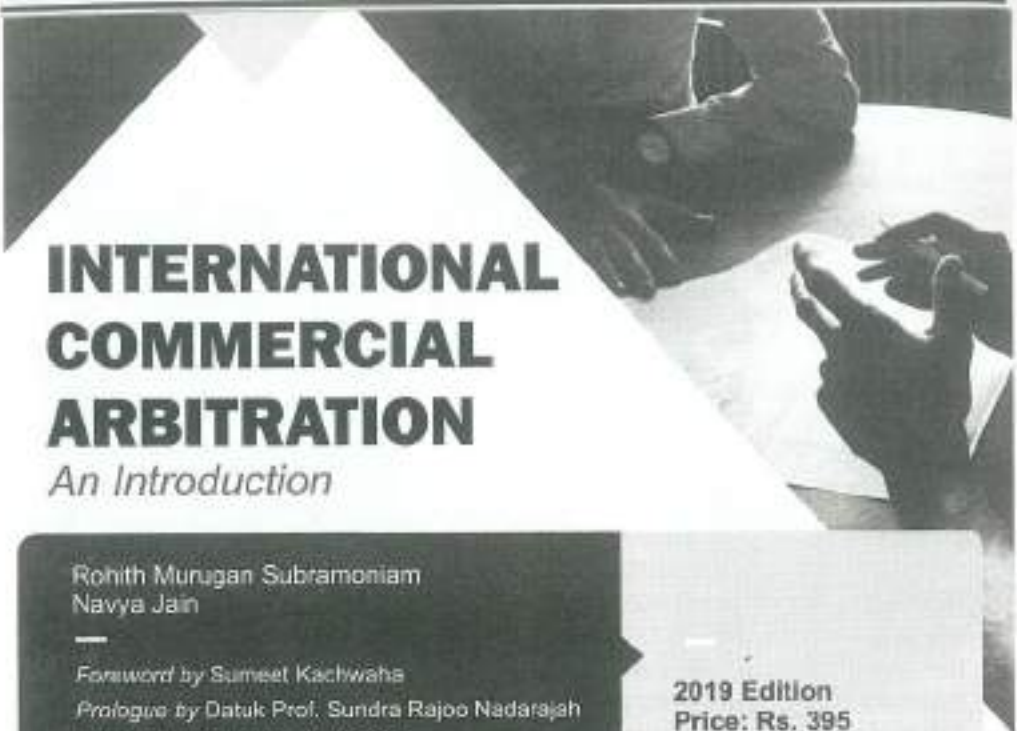
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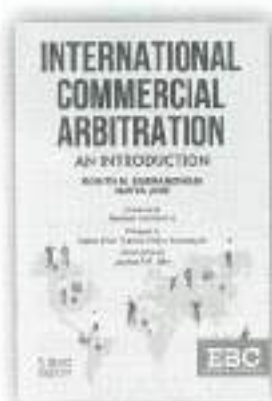
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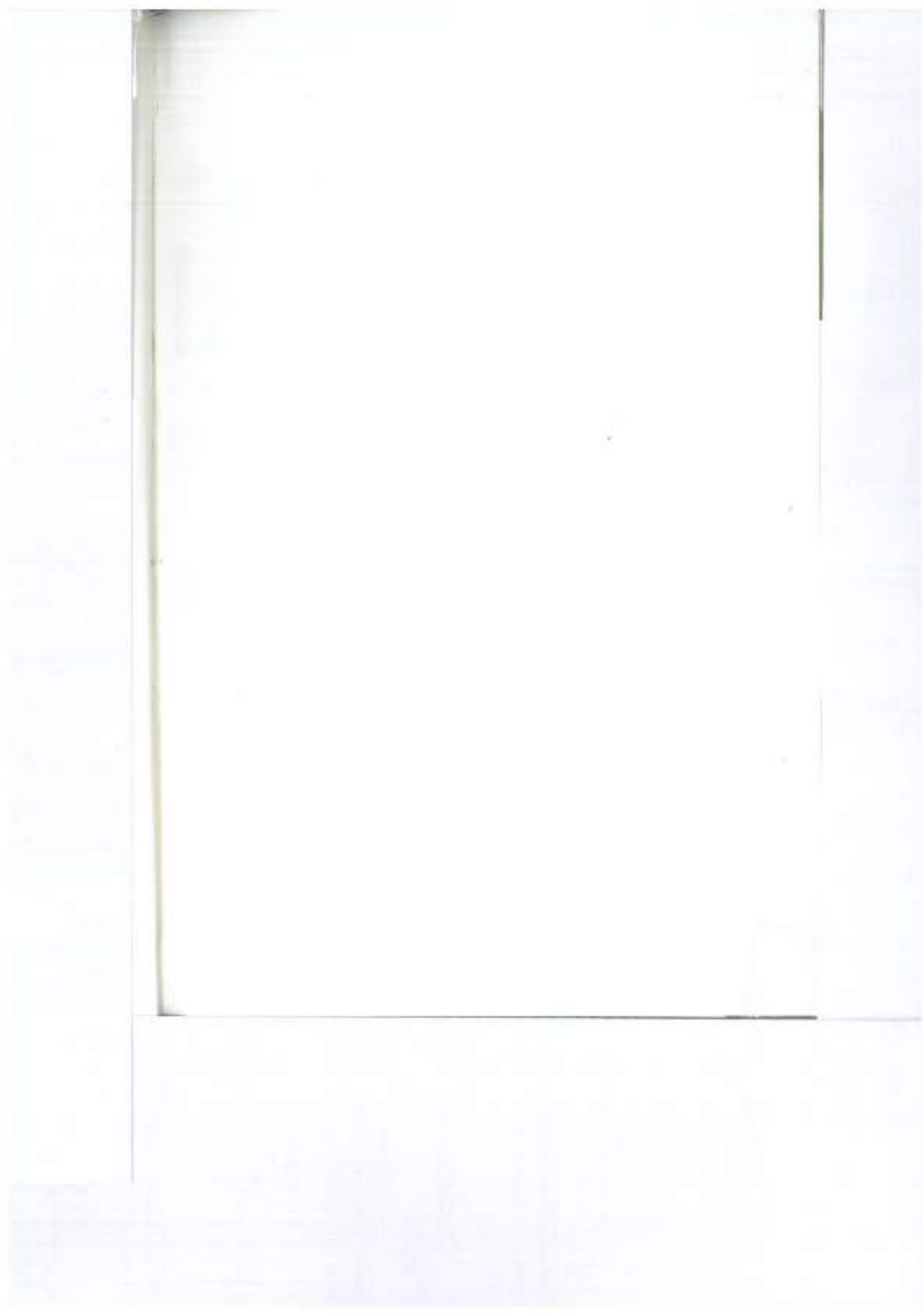
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