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FOUNDATION OF COMPETITION LAW IN INDIA THROUGH INTERPRETATION OF ARTICLE 38 AND ARTICLE 39

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ABSTRACT

This article deals with the foundation of Competition Law In India and the fact that the Directive Principles Of State Policies envisaged in the Indian Constitution has laid down the foundation of the competition law in India. According to Article 38[555] and Article 39[556], Indian Constitution ensures the protection, promotion and welfare of people in all the sphere and control prosperity of wealth in the hands of some. Consequently, these two Articles of the Indian constitution resulted in the formation of Monopolies and Restrictive Trade Practices Act[557] (MRTP) in 1969 and Competition Act in 2002.[558]

Keywords - Welfare, Protection, Promotion, Mixed Economy, Monopolistic, Constituent Assembly, Common Good, Dominant Position, Competition, Anti – Competitive Agreements.

[555] India Const. art. 38
[556] India Const. Art. 39
[557] The Monopolies and Restrictive Trade Practices Act, No. 54 of 1969, India Code (1969).
[558] The Competition Act, No. 12 of 2003, India Code (2003).

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Introduction

The history of the Foundation of Modern Competition law global can be traced to the Sherman Act [559]of 1890 and Clynton Act[560] of 1913. Also, India wanted its own Competition Law to control the forces of its internal market as well as provide protection to consumer from domestic, especially because at the time of independence India was a mixed economy (combination of socialism and capitalism). Keeping all this in view, there was a major focus on the regulation of Monopolies; and Dutt Committee was appointed on its recommendations, MRTP Act,[561] 1969 was framed to deal with Monopolistic and Restrictive Trade Practices . Article 38[562] and 39[563] has had a huge role in its formulation since it calls for nothing to be left in the hands of the few as well as immoderate acts that affect people in varied fields should be curtailed.

They (DPSP) are not enforceable by Court of law but it does not mean that they have not importance…they prove that what the founding father thought might be needed for the future.

Therefore, these principles can be enforced whenever the government has economic strength. In these Principles, the ideas of the Constituent Assembly are depicted here as they believed in such cases that the market forces of time will evolve and people earning will be the only goal of these players so there should be some protection provided for people that for their welfare and for removing exploitation from the consumer. Thus they passed these principles, those for the time being, at any time when the government thinks that the market forces can commit such abuses it can then be curtailed under the enactment of such special laws.

India opened its economy in the year July 1991 and adopted the LPG (liberalisation, Privatisation, Globalisation) reform for its Balance of payment crisis. The results of this step had extremely wide reaching impact in the upcoming years. From various countries there were multiple Large Number of Players in different sectors got introduced which resulted into the loss of small players as they happened to be unable to match up to them.

In Press comment of the Finance Minister in the year 1999, they stated that they are appointing a select committee to make recommendations to amend MRTP Act 1969 in the light of current international trends which has become obsolete. After the Raghavan Committee came into existence in 1968, the committee was headed by SVS Raghavan, and was called as the Raghavan Committee, which suggested changes to the Act in accordance with the principles of Article 38 and 39 of the Indian Constitution and resulted in formation of Act 2002 which encouraged competition and thereby made distribution of wealth possible and provided the consumers with more choice offering them better prices and better services on the basis of the principles of the said article.

Provision

Article 38 reflects State's responsibility to build up a social order to boost the welfare of the individuals. Clause (1) stipulates that the State must work to actualize a social structure comprising such social, economic and political justice as permeate all the institutions of the nation. It goes on to Clause (2) where the State is to act proactively to lessen income inequalities and abolish disparities in status, facilities and opportunities. This obligation does not stop when it comes to individual citizens with their many distinguishing kind; indeed, it extends to groups of citizens differentiated according to geography, occupation, or some other feature.

Article 39 further elaborates a State's specific policy objectives in order to achieve equitable socioeconomic development. These include: ensuring all citizens, irrespective of gender, have the right to an adequate means of livelihood; securing equitable distribution of material

[559] Sherman Act, 26 Stat. 209 (1890).
[560] Clayton Act, 38 Stat. 730 (1914).
[561] Ibid
[562] Ibid
[563] Ibid

resources to serve the collective interest; preventing economic systems from enabling the concentration of wealth and means of production to the public's detriment; guaranteeing equal remuneration for men and women performing the same work; protecting the health and strength of workers and children, preventing their exploitation; and fostering environments where children can grow in freedom and dignity, shielded from moral and material neglect.

Influence of Article 38 and 39 on MRTP Act, 1969

In the light of the Directive Principles of State Policy enshrined in the Articles 38 and 39 of the Constitution of India, the Act of Monopolies and Restrictive Trade Practices Act 1969 (MRTP Act) was enacted. Thus these constitutional provisions lay stress on the establishment of just and equitable social order, the minimisation of inequalities and equal distribution of material resources for the benefit of all. Furthermore, Section 38[564] of the MRTP Act contains presumption against restrictive trade practices that is against public interest and that directly advance these constitutional goals by the very provision.

Section 38 further states that for a proceeding on section 37[11], a restrictive trade practice shall be regarded as prejudicial to the public interest where it is not found to apply to one or more specified exceptions by the Monopolies and Restrictive Trade Practices Commission. The exceptions are instances in which there is a necessity of restrictions, inter alia, to protect consumers from harm connected with the use or installation of goods, or the provision by a provider (including the subsequent delivery by the product's purchaser to the end consumer) of benefits substantially greater in measure to consumers than what would be at risk upon the elimination of the restriction; or the necessity to redress anti-competitive action by non-party actors.

Furthermore, the section acknowledges that some such restrictions are legitimate more for the purpose of guaranteeing fair negotiations in cases where competition on the market is concentrated on a single entity or to keep employment levels sufficient and to provide an income for exporting. It also provides exceptions for restrictions of a national defense, of public security, or are necessary to ensure the continued supply of essential goods and services. However, as important, even when there are such exceptions, the restriction must still be found reasonable, in that the balance between the benefits and the harm to consumers and competitors is struck.

Section 38 acknowledges these concerns with these provisions and was made with the intent to safeguard the consumer interests and limit monopolistic habits and to prevent any commercial arrangement from adversely affecting the public welfare. As it is, it therefore has statutory embodiment of the constitutional vision expressed in Articles 38 and 39 around the principles of economic justice, equitable access to resources and the general welfare of the people.

Influence of Article 38 and 39 on Competition Act 2002

The Competition Law in India has taken a turn with the enactment of Competition Act 2002 and any Law that is enacted in India should be in consonance with the provisions of Indian Constitution especially Article 13[12] which talks about law and whether a particular Act is valid or void . But the

Competition Act 2002 was a valid legislation because it incorporated within itself the objective of the Article 38 and 39 of the Indian Constitution which can be found in Section 3 and Section 4 of the Act. They are ready as follows-

[564] The Monopolies and Restrictive Trade Practices Act, No. 54 of 1969, § 38, India Code (1969). [11]
The Monopolies and Restrictive Trade Practices Act, No. 54 of 1969, § 37, India Code (1969). [12]
India Const. Art. 13

3. Anti-competitive agreements

The Competition Act, 2002, serves as the cornerstone of India's competition law framework. Section 3[565], forbidding anti competitive agreements, is the most important of its provisions. As the law is directed towards checking out practices injurious to the interests of competition in the market it is in consonance with the objects of Article 38 and 39 of the Indian Constitution which provide for social justice and equitable distribution of resources.

Section 3(1)[566] lays down general prohibition to the effect that an agreement, regardless of its essence, production, supply, distribution, storage, acquisition or control of goods or provision of services as the case may be, if it has been found or likely to be in the matters of production or supply to cause or tends to cause an appreciable effect on competition in that country, is void. The term of any such agreement shall be declared void in accordance with Section 3(2).[567]

Subsection (3)[568] gives further definition as it specifically specifies particular types of agreements which will be presumed to have an appreciable adverse effect on competition. Agreements that directly or indirectly fix the amount of purchase or sale, fix or control production, supply, markets, technical development, investment, or services are included. Among these, it includes agreements in the context of market sharing—be it at geographical level, type of goods and services or customers distribution—also agreements that imply bid rigging and collusive bidding. Note that, it is true that, but in case of such arrangements, it provides an exception for joint ventures so long as these arrangements benefit the efficiency in production, supply or distribution.

The provision further reflects that even though such parties are not directly engaged in the same trade, they may be a part of an agreement if they do participate or intend to participate in its implementation. The attached explanation explains bid rigging as any agreement that distorts the bidding process to the extent that real competition is destroyed or substantially impaired.

Vertical arrangements, or those between parties at different stages or levels of the production chain, could also be anti competitive, and are addressed in section 3(4}). They include tie in (the requirement to buy the goods or services tied in) exclusive dealing agreements (limiting the seller or buyer's dealings with competitors), exclusive distribution arrangements (restricting access to the market), refusal to deal is the refusal of an economic operator to deal with another in the case of businessmen it demands that other businessmen not do business with its preferred (most likely) competitor and resale price maintenance (fixing resale prices unless lower prices are permitted).

Such agreements are prohibited. This sub section makes an important exemption for agreements and such agreements are not covered under this sub section.

Some specific exemptions are made in the section. It enables the enforcement of the intellectual property rights under Copyright Act[569], 1957, Patents Act[570], 1970, Trade Marks Act[571], 1999 and other laws in presence. This also permits agreements about the export of only goods or services, thereby promoting India's export economy while retaining domestic competition.

[565] The Competition Act, No. 12 of 2003, § 3, Acts of Parliament, 2003 (India).
[566] The Competition Act, No. 12 of 2003, § 3 (1) , Acts of Parliament, 2003 (India).
[567] The Competition Act, No. 12 of 2003, § 3 (2), Acts of Parliament, 2003 (India).
[568] The Competition Act, No. 12 of 2003, § 3 (3), Acts of Parliament, 2003 (India).
[569] The Copyright Act, No. 14 of 1957, Acts of Parliament, 1957 (India).
[570] The Patents Act, No. 39 of 1970, Acts of Parliament, 1970 (India).
[571] The Trade Marks Act, No. 47 of 1999, Acts of Parliament, 1999 (India). [18] The Competition Act, No. 12 of 2003, § 4, Acts of Parliament, 2003 (India). [21] The Competition Act, No. 12 of 2003, § 4 (2), Acts of Parliament, 2003 (India).

Section 3 of the Competition Act, 2002 in essence aims to strike a balance between restraining from market distortions on the one hand and enabling beneficial collaborations on the other hand. This supports constitutional understanding of a just economic order while advancing the standard of parity and innovation on the market.

Abuse of dominant position

According to Section 4[18] of the Competition Act 2002 the Indian market requires a level playing field because any enterprise or group cannot abuse their dominant position. Every enterprise along with its affiliated groups operating in Indian markets requires to maintain a non-abusive conduct in relevant market places.

A business becomes "dominant" when it possesses enough market strength to operate independently from competitors or to impact rivals and customers and the market according to its preferences. Neither the law nor its regulations prohibit dominant market positions but they restrict the practices which enterprises can undertake using their dominant market positions.

Section 4(2)[21] contains a list of practices which establish dominant position abuse.

A dominant player in the market must avoid setting unfair terms or prices during purchases or sales of goods while avoiding discriminatory practices. Predatory pricing exists as an unlawful practice that involves charging below-production-cost for goods or services to eliminate business competition.

- The inappropriate use of market control or production limits or technical barriers or market entry restrictions causes damage to consumers together with competition.
- A company prevents market access for other participants through any method when this practice hinders competitive market dynamics and technological advancement.
- Contractors impose mandatory supplementary obligations on their agreements that both lack connection with the contract content and require abusive behavior.
- Dominant market positions lead to market advantages that block potential competitors from entering both markets while creating reduced market competition.

The section contains clarification about predatory pricing except where it involves competitors' strategies to match market prices.

Section 4 plays an important constitutional role by fulfilling the aims of Article 38 and Article 39 of the Indian Constitution to distribute resources through means that do not concentrate wealth and power into few hands.

The purpose of Section 4 protects competing businesses from monopolization in order to provide all market participants equal access and to protect consumer rights.

Conclusion

India's competition regime has undergone a significant transformation from where it was in a command economy to a market driven one all these years. This evolution is best shown in the course of development from the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) to the more peripheral and current Competition Act, 2002. Nevertheless, these laws are structurally different from each other, differently approached and enforced but the underlying philosophy behind these laws upon the Directive Principles of State Policy, especially Articles 38 and 39 of the Indian Constitution.

Although these Articles are not justiciable, the facts of which they speak are considerations for the formulation of laws and policies. They serve as a moral compass for governance and much of the time are the learned basis of the legislature and judiciary to interpret socio-economic laws.

India's first attempt to curb monopolistic practices as well as ensure that wealth did not accumulate in few hands, was the MRTP Act, 1969. However, India liberalized its economy in the 1990s and the MRTP Act began to pale. Rather, it was aimed at restraining monopolies than fostering competition. The Competition Act, 2002, was enacted keeping in view the requirement of modern and proactive framework.

Finally, the Directive Principles, as such, may well not be enforceable in a strict legal sense, though they are a matter that will inspire and inform the spirit and content of competition law in India. From the MRTP Act to the Competition Act, the change from legal framework is not just a shift, but it continues the constitutional journey to economic justice and equitable growth that corresponds to the vision of a welfare state.

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