PHILOSOPHY OF COMPETITION LAW

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ABSTRACT

Competition is important because it encourages businesses to produce the highest-quality commodities (or services) at the lowest possible price, which is advantageous for consumers. Whilst exploring the philosophy, or the very nature of competition law, one must first know what entities make up competition law. This is done by exploring the history of competition law and understanding its objectives. Next, to observe how these norms are connected to the real world, the paper has delved into the concepts of authoritative issuance and social efficacy, and has also enquired into the correctness of the law. Finally, the paper stresses upon the importance of balancing conflicting interests and discusses the significance of this study in the current competition law scenario of India. Throughout the paper, some ideas relevant to the nature or administration of competition law have also been analyzed through the lens of various schools of jurisprudence.

Keywords*: Competition Law, Authoritative Issuance, Social Efficacy, Administration, Jurisprudence.*

I. Introduction

PHILOSOPHY HAS an aim of devising a fundamental explanation – a deep and comprehensive understanding – of the practical world of law. Oakeshott, from the stance of philosophical jurisprudence asserts that it relates ordinary ideas to a broader conceptual context, and that doing enables us to understand law and its place in human experience

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better.[1] Legal philosophy according to Alexy, refers to reasoning about the nature of law.[2] Competition Law is often defined as the rules and regulations codified to promote and sustain market competition.[3] Although the provisions of this law are unique to particular jurisdictions, the substance of competition laws, and intention behind their existence remains the same. Competition (or antitrust) law operates at the confluence of law and economics, and attempts to protect competition in a free market economy.

The importance of competition had been aptly described in the landmark Supreme Court of Canada case of *Weidman* v. *Shragge*:[4] "Every step taken in the past to enlarge the bounds of human freedom of thought and action has stimulated discovery and invention, and as a product thereof, increased competition … Destroy competition and you remove the force by which humanity has reached so far." This paper seeks to explore the very nature of competition law, by following Alexy's directions to exploring the nature of any law, i.e., by looking into the entities which make up the law, followed by enquiring into the validity of the law by considering the concepts of coercion and correctness.[5]

II. Historical Background and Approaches to Competition Law

Origins

To understand the nature of competition law, one must first explore its inception, and well as its foundations. Clio strongly believed that the study of law cannot be responsible without due attention to its history.[6] Law by nature is time-oriented and reflective; therefore, historical inquiry is indispensable within the philosophical enterprise.[7] In addition to this belief of philosophical jurisprudence, it is also important to mention the historical school of jurisprudence which emphasizes the dynamics of legal development and believes that laws are formulated by the people, subject to their changing needs. Montesquieu studied the laws of various societies and argued that laws are the result of local situations.[8] Anti-trust legislation is now an integral part of the economic life all the world over, traversing over

[1] Gerald J. Postema, "Jurisprudence, The Sociable Science", 101 (4) *Virginia Law Review* 881 (2015).
[2] Robert Alexy, "The Nature of Legal Philosophy" 17(2) *Ratio Juris* 161 –66 (2004).
[3] Competition Commission of India, *Introduction to Competition Law* (CCI, 2016), available at: https://cci.gov.in/public/images/publications_booklet/en/introduction-to-competition-law-part-1-basic-introduction1652182155.pdf (last visited on Feb. 12, 2024).
[4] (1912) 46 SCR 1.
[5] *Supra* note 2.
[6] *Supra* note 1 at 884-90.
[7] *Id.* at 884.
[8] Michael Freeman, *Llyod's Introduction to Jurisprudence* 1364 (Sweet & Maxwell, London, 9th edn., 2014).

varying jurisdictions, with unique provisions and approaches to regulate trade and protect competition for each country. Tracing the origins of competition law takes us all the way back to ancient Greece and Rome. In Athenian culture, the general spirit of competition was perceived as an essential element. Hesiod distinguished between good and bad conflicts, and regarded 'good conflicts' as "a vital entrepreneurial force that often permits the surmounting of the big problems the shortage of resources poses."[9] Aristotle believed the purpose of economic policy was to maximize happiness, and Aristotelian thinking in this respect can be perceived as the beginning of the utilitarian perception of good competition, reflected inter alia in the notion of "just price as a generalised norm".[10] From classical times, the Romans had legislated on the subject of monopolies and anti-competitive trade practices, imposing sanctions against cartels and price agreements.[11]

Proto-utilitarian economic reasoning can be found in the works of St. Thomas Aquinas, whose writings, against the background of the broader philosophical ideas created an intellectual premise for the development of economic liberalism.[12] As years passed by and scholars started exploring economics, ideas of free markets developed in two different dimensions: domestic and international. People from countries with an economically successful colonial past or the countries in which the dominant industries were on a very competitive level vis-à-vis their foreign counterparts vehemently advocated free international trade (consequentialist).

However, people who supported free trade and competition on the domestic level argued with the ideas of economic progress only peripherally; their support was primarily based on the ethical premises of individual freedom and human rights developed by the great philosophers and political activists of that time- in particular Mill, Bentham and Locke (deontological). It is imperative to note that the ethical premises do not negate the eventual positive impact on the economy.

The Consequentialist and Deontological Approaches to Competition Law

[9] Oles Andriychuk, *The Normative Foundations of European Competition Law* 12 (Elgar Online, 2017).
[10] *Id*. at 13.
[11] Halsbury, X *Halsbury's Laws of India: Competition Law and Trade Practices- Conflict of Laws- Courts*, para 70.001 (LexisNexis Butterworths, 2001).
[12] *Supra* note 9 at 17.

The evolution of the ideas of free competition should be perceived as a combination of both consequentialist and deontological movements, which despite their conflicting nature often reinvigorate each other. This can be connected to the ideologies of two American Schools of Thought concerned with the jurisprudence of competition law – namely the Structuralist (Harvard) School of Thought and The Chicago School of Thought. Consequentialism revolves around the concept of *the end justifies the means*. Furthermore, utilitarianism is a consequentialist moral theory focused on maximizing the overall good. Mill and Bentham believed that outcomes have a greater value than the action taken.[13] This can be connected to the Chicago School of Thought which focuses on efficiency and profit maximization, and argues that this would eventually result in the best quality of goods for the consumers.

On the other hand, deontologists such as Immanuel Kant believed that both the actions and outcomes must be ethical[14] – which is propounded by the Structuralist School of Thought. This school believes that the market should be concentrated on every level and small business should be protected as this approach leads to innovation and better products and services which would lead to the primary goal of competition law: consumer welfare.[15]

The highlights of above-mentioned schools of thought can be seen in *the Google cases,*[16] in which the primary contention was on the issue of proving anti-competitive conduct of google search engine. The searches were automated, and the results were shown for services or products by the companies which were dominant in their concerned markets. In the given case one can dissect the underlying ideologies of Chicago School and Structuralist School of Thought by interpretations in two different jurisdictions: the USA and the European Union (EU) interpretation of goals of competition law in the market.

The United States' interpretation is based on the assumption that the search engine offers the best result for the consumer after processing the statistics via an algorithm that determines the

[13] Walter Sinnott-Armstrong, "Consequentialism", *Stanford Encyclopedia of Philosophy*, *available at*: https://plato.stanford.edu/entries/consequentialism/ (last visited on September 22, 2023).
[14] Larry Alexander and Michael Moore, "Deontological Ethics", *Stanford Encyclopedia of Philosophy*, *available at:* https://plato.stanford.edu/entries/ethics-deontological/ (last visited on September 22, 2023).
[15] Saakshi Agarwal and Chintan Bharadwaj, "Goals of Competition Law in India" *SSRN* (2021), *available at:* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3789536 (last visited on Aug. 02, 2023).
[16] *United States* v. *Google* (2023) No. 1:20-cv-03010 (Dist. Ct. S.D.N.Y.); *Google Search (Shopping)* (2017) AT.39740 C (2017) 4444, *available at:* https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf (last visited on Feb. 12, 2024).

highest quality service or product at a fair price. The interpretation presented above reflects the Chicago School of Thought's approach. The EU, on the other hand, saw the issue through a different perspective, siding with the Structuralist School of Thought. It noted that such techniques can lead to monopoly, eliminate other businesses, and leave no room for customer preference.

Some scholars believe that it is necessary for legal practitioners to go beyond these two normative theories of competition law, and adopt a completely different approach: "value pluralism".[17] When adopting the value pluralism approach, Courts wouldn't be required to strictly prioritize the objectives of competition law in a definitive hierarchy. Instead, the Court would decide on a case-by-case basis, by adapting general principles to the specific context. By not restricting itself to a single approach or manner of reasoning the Court can avoid deliberating over whether or not the end justifies the means is applicable in all cases, and can avoid the shortcomings of each tradition. This however, has not been practically implemented, as evidenced by Courts in various jurisdictions adopting the methodology of a particular school of thought, and sticking to it (as evidenced by the aforementioned *Google Cases*).

Regardless, it is imperative to understand that in order to grasp the essence of competition law, one must recognise that, while the core goal of competition law stays the same (i.e., to secure consumer welfare and protect them from exploitation), the means used to attain those purposes may vary. In India, the jurisprudence of competition law seems to be inclining towards (deontological) Structuralist School of Thought. To understand the objectives of competition law in a better way, the author will now mostly restrict this study to Indian Competition Law.

III. Objectives of Indian Competition Law

Welfare State Principles

The legislative framework of domestic competition law has its genesis in the Constitution of India.[18] The Directive Principles of State Policy under Part- IV of Constitution mandate that

[17] Stavros Makris, "Applying Normative Theories in EU Competition Law: Exploring Article 102 TFEU" 3(1) *UCL Journal of Law & Jurisprudence* 31 (2014).
[18] The Constitution of India.

that while governing, the State must secure a social order for the promotion of the 'welfare' of the people, and also that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.[19] Drawing inspiration from this, the Monopolies and Restrictive Trade Practices Act, 1969 [20] (MRTP Act) was designed to prohibit monopolistic and restrictive trade practices, which are prejudicial to, the public interest. Monopoly power was defined by the Monopolies Inquiry Commission (MIC) as the ability to dictate price and control the market.[21]

Democratic Principles

India transitioned from a 'command and control' to a 'free market' government in 1991, owing to liberalisation, privatisation, and globalisation (LPG). Such freedom and the distribution of economic power are 'democratic' or libertarian goals. Despite the fact that the MRTP Act had been amended multiple times over the years to adapt to India's changing economic situation, it was understood after the 1991 LPG revolution that India needed to establish a system to support its economic growth. In 1999, it was determined that the MRTP Act had become ineffective in certain aspects due to international economic developments relating to competition policy, and that India needed to shift its focus from curbing monopolies to competition advocacy.

Therefore, The Competition Act, 2002[22] (CA) came into force, with the objectives as enshrined in its preamble to –

1. Prevent practices having adverse effect on competition in India;
2. Promote and sustain competition in markets;
3. Protect the interests of consumers; and
4. Ensure freedom of trade carried on by other participants in markets in India.

Liberal democracy embraces the idea that every value can claim protection and regulatory attention; otherwise, the rights of minorities would never be supported or taken into account.[23] A similar intention underlies the reason for the multiple objectives of the CA. Furthermore, the act of repealing of the MRTP Act and creation of a whole new legislation

[19] *Id.* arts. 38, 39(c).
[20] The Monopolies and Restrictive Trade Practices Act, 1969 (Act 54 of 1969).
[21] Government of India, "Report of the Monopolies Inquiry Commission" 125 (Ministry of Corporate Affairs, 1965).
[22] The Competition Act, 2002 (Act 12 of 2003).
[23] *Supra* note 9 at 208.

that is better equipped to deal with competition in India resonates with Postema's reasoning that historical inquiry helps us place present choices on a trajectory from past actions into a meaningful future.

Consumer Welfare

Welfare is, without doubt, a key objective of competition law. The Competition Commission of India (CCI), in *Neeraj Malhotra* v. *North Delhi Power*[24] emphasized that the preamble of the Competition Act aims protect the interests of consumers and ensure freedom of trade carried on by other participants in markets in India. This objective of protecting consumer interest, among other provisions, has been further reinforced in section 18 of the Competition Act, 2002.[25] In *Excel Crop Care Ltd.* v. *Competition Commission of India*,[26] the Supreme Court re-iterated the primary goals of the CA to enhance consumer well-being and stressed upon how restricting anti-competitive behaviour can 'level the playing field' in the market.

Economic Efficiency

Efficiency is another widely stated goal of competition law. It can be a significant factor in merger reviews, vertical agreements, and cases of abuse of dominance.[27] Considering the fact that competition law aims to promote efficiency, it can further be stated that such promotion can be in the aspects of production, supply, distribution, acquisition, and control of goods and services, which is only possible when present resources are widely used and maximum benefit is derived from them. In order to do this, the optimal allocation of resources in the competitive market is required. Fairness and reasonableness are the keys to achieve this objective.

Free and Fair Competition & other Associated Objectives

Competition is perhaps *the* core concept in competition law. In *United States* v. *Topco Associates, Inc.*[28] It was aptly observed that the freedom provided to any firm, no matter how small, is the freedom to compete – "... to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster." Competition is related with maximising society's well-being in mainstream economic theory. The perfectly competitive market is

[24] MANU/CO/0026/2011, 2011 SCC OnLine CCI 22: [2011] CCI 21.
[25] *Supra* note 22.
[26] AIR 2017 SC 2734.
[27] Cassey Lee, "The Objectives of Competition Law" *Research Gate* 7 (2015).
[28] (1972) US LEXIS 167: 405 U.S 596 (1972).

thus the cornerstone of pure economic theory. Associated objectives include freedom of trade, freedom of choice, securing economic freedom, and access to markets.

So far, the paper has discussed the emergence of competition law as a pre-understanding to the nature of legal philosophy (historical enquiry), and has tried to explore the entities which interact to constitute the over-arching entity of Competition Law (the objectives of competition law and the various approaches taken to fulfil the same). Now, the paper shall proceed to understanding the foundational nuances of the *modus operandi* of anti-trust regulation legislations, as well as the relevance of knowing such nuances in order to tackle contemporary competition law cases.

IV. Two Necessary Properties of Law

Coercion

Revisiting Alexy's analysis of the nature of law as 'legal philosophy',[29] the paper now proceeds to explain the interaction of these 'norms', *i.e.,* competition law with the real world-firstly through the concepts of authoritative issuance and social efficacy. Alexy observes that because it reflects a practical requirement that is inextricably linked to law, incorporating coercion in the notion of law is proper to its purpose. "Coercion is necessary if law is to be a social practice that fulfils its basic formal functions as defined by the values of legal certainty and efficiency as well as possible. This practical necessity, which seems to correspond to a certain degree to Hart's 'natural necessity…"[30]

It seems best to look at this through the lens of analytical school of jurisprudence. The analytical school is positive in its approach, and exponents of this school are concerned neither with the past nor with the future of law but with the law as it exists. The reader can analyse 'authoritative issuance' by looking at the four elements of typical command tradition.[31] First, law must be directives addressed to self-directing agents. Clearly, the CA directs market players. Second, the law must not only point out reasons for action but impose binding obligations. Chapter VI (Duties, Powers and Functions of Commission) of the CA deals with the same. Third, such directives must be commanded by one in authority, and

[29] *Supra* note 2 at 159-65.
[30] *Id.* at 165.
[31] Gerald J. Postema, "Legal Positivism: Early Foundations" in Andrei Marmor (ed.), *The Routledge Companions to Philosophy of Law* 34-35 (Routledge, New York, 2012).

fourth – the laws modelled on these commands pre- suppose such authority (in this case – the State). Austin's Imperative Theory that regards law as 'A Command of Sovereign backed by Sanction',[32] or Hart's assertion that legal rules are primarily enforced through the threat and actual use of 'physical sanctions' enshrine the belief of analytical positivists that coercive sanctions as an essential feature of law.

Simply put, laws can be effectively imposed if people are faced with sanctions as consequences for breach. The CCI and its investigative wing, the Office of the Director General (DG), is entrusted with extensive powers of investigation with respect to anti-competitive practices (including summons, and 'dawn raids').[33] The CCI relies on the report of the DG to pass orders and impose stringent penalties. Under the CA, against CCI orders, an appeal to the Competition Appellate Tribunal (COMPAT) is permitted. The Supreme Court of India may entertain a further review from the COMPAT's verdict.

In recent years, the CCI has conveyed a powerful message to the industry that it will not hesitate to exercise the Competition Act's extensive fining powers if the gravity and form of the infringement warrants it. In a cartel case involving seven regional film bodies for creating a cartel, the CCI imposed fines up to the maximum allowable level of 10% of the average annual turnover of the previous three years.[34] The Competition Act essentially divides all agreements into two types *i.e.*, Horizontal and Vertical wherein horizontal/ cartel agreements are agreements between suppliers of identical goods or services (pertaining to price-fixing, controlling production and supply in markets, market-sharing agreements and bid-rigging) and vertical agreements could be between suppliers of goods or services across the value chain.[35]

In *Builders' Association of India* v. *Cement Manufacturers Association*[36] the CCI fined 11 cement companies 50 percent of the profit made during the cartel period (fine worth INR 6,307 crore). The CCI imposed a penalty of Rs 1,773.05 crore on Coal India Ltd. for abusing

[32] *Supra* note 8 at 195-237.
[33] Samir Gandhi, Hemangini Dadwal and Indrajeet Sircar, "Antitrust and Competition in India", *available at:* https://www.globalcompliancenews.com/antitrust-and-competition/antitrust-and-competition-in-india/# (last visited on September 21, 2023).
[34] *Supra* note 33. *Mr. G. Krishnamurthy* v. *Karnataka Film Chamber of Commerce* 2018 SCC OnLine CCI 77.
[35] Deloitte, "Growing importance of the Competition Commission of India and impact of the Competition Law", *available at:* https://www2.deloitte.com/content/dam/Deloitte/in/Documents/finance/in-fa-growing-importance-of-competitition-commission-noexp.pdf (last visited on September 30, 2023).
[36] 2012 SCC OnLine CCI 43: [2012] CCI 42.

its dominant position as a fuel supplier (fixing prices and supplying poor quality coal).[37] Further, non-compliance with orders passed by the CCI or directions of the DG may also attract penalties. and failure to pay the fine could result in imprisonment. The CCI had for the first time imposed a fine of INR ten million on Kingfisher Airlines Limited for not furnishing information it sought during the ongoing investigation into Kingfisher's proposed strategic agreement with Jet Airways. Although the fine was later reduced to INR 7.25 million by the COMPAT, this particular CCI order sent out a strong message to the industry that the CCI may use its power to impose fines for non-compliance with CCI/DG's direction.[38] The necessity of coercion is therefore based on a practical necessity defined by a means-end relation (consequentialist).

Correctness of the Law

Another important property of law is its interaction with the world with respect to its correctness. This has a deontological character. Alexy asserts, "To make explicit this deontological structure implicit in law is one of the most important tasks of legal philosophy."[39] In the landmark case of RPM M/s Fx Enterprise Solutions India Pvt. Ltd v. M/s Hyundai Motor India Limited,[40] Hyundai did not authorize its dealers to provide discounts to its consumers after a permissible amount, and the CCI penalized Hyundai, but National Company Law Appellate Tribunal (NCLAT) overruled this order. In *Tamil Nadu Consumer Products Distributors Association* v. *Fangs Technology Private Limited and Vivo Communication Technology Company*, [41] the products in question were Vivo smartphones.

The complainants filed a report that Vivo has violated sections 3 and 4 of the CA[42] by asking for minimum price requirement from the distributors, but the CCI took cognizance of the fact that VIVO does not have market power and the dominant position in the market and its conduct cannot be said to violative of section 3 and 4 of the Act. These precedents set by the commission did not consider the primary goal of competition law which has been highlighted

[37] Bindu Menon, "Coal India faces Rs 1,773- cr fine for abuse of dominant position" *Hindu Business Line* (March 13, 2013), *available at:* https://www.thehindubusinessline.com/companies/coal-india-faces-rs-1773-cr-fine-for-abuse-of-dominant-position/article20697797.ece1. (last visited on September 30, 2023).
[38] PTI, "CCI imposes Rs 1 cr fine on Kingfisher Airlines" *Economic Times* (November 21, 2010), *available at* https://economictimes.indiatimes.com/industry/transportation/airlines-/-aviation/cci-imposes-rs-1-cr-fine-on-kingfisher-airlines/articleshow/6964501.cms?from=mdr. (last visited on September 30, 2023).
[39] *Supra* note 2 at 164.
[40] 2017 Comp LR 586 CCI: 2017 SCC Online CCI 26.
[41] 2018 SCC OnLine CCI 95.
[42] *Supra* note 22, ss. 3, 4.

in the preamble in the statute. Section 19(3)(d) of *the CA* [43] states, "The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely... (d) benefits or harm to consumers;" None of the above-mentioned cases contemplated on the provision, despite the consumers being the buyers, whose welfare is an important goal of competition law.

This shows that the goals of competition law being put in writing, the priorities of the competition law have evolved according to the demands of the economy. Sometimes, protection of consumer benefits has come to be treated as a consequence rather than taking initiative to ensure socio-economic welfare.[44] For instance, competition authorities that believe in the total welfare of the economy will approve of a merger if it increases the efficiency of the economy (thereby leaning towards the Chicago School and Consequentialism).[45]

Even the CA which considers protection of consumer interests as a crucial aspect, is concerned with the economic aspects of the market activities with little to no attention on the non-economic aspect. However, the Chicago School of Thought would generally favour a purely economic based argument, and it is clear that the Indian understanding of the competition policy is not a staunch follower of such purely economic objectives and duly factors in the non-neutral and socio-political aspects of the market (thus depicting a deontological approach in line with the Structural School).[46]

This is also clear looking at the CA that is based on the "effects doctrine". The Act seeks to regulate primarily three types of conduct – anti-competitive agreements, abuse of dominant position, and combinations (mergers, acquisitions and amalgamations). The CCI, while determining cases of Abuse of Dominant Power looks into several factors including size and importance of competitors, size of market and countervailing buying power (thereby depicting deontological approach). A similar effects test is envisaged in Merger Review; the CCI looks into the extent of barriers to entry, countervailing buying power, level of combination in the market, and extent of effective competition likely to sustain in the

[43] *Supra* note 22, s. 19(3)(d).
[44] *Supra* note 15.
[45] *Ibid.*
[46] *Ibid.*

market.[47] Therefore, Indian Competition Law aims to achieving consumer welfare in the long run. Having scrutinized the legislative intent and judicial standing in India, the jurisprudence of competition law seems to be inclining towards Structuralist School of Thought (Deontological Approach). Protection of small businesses in the market consisting of dominant enterprises has been prioritized. Such small businesses keep multiple options available for consumers which ultimately adds onto the consumer welfare.

V. The Mechanics of Balancing

It appears that in exploring the nature of competition law, a confusing detail might stand out to the reader- about how the claim to correctness of law (deontological approach), in a manner, stands in genuine opposition to authoritative issuance (consequentialist approach). Furthermore, attempts to take into account multiple objectives in the administration of competition law may give rise to conflicts and inconsistent results.[48] Protecting small firms and keeping jobs, for example, may conflict with achieving economic efficiency. Competitors, rather than competition, may be protected in the small business aim. Given that the latter has various advantages in terms of contract flexibility as part of the broader freedom to compete, there is no way to totally level the playing field between small and large businesses. Furthermore, issues like community breakdown, fairness, equity, and pluralism are difficult to quantify or even define. Trying to integrate them could lead to inconsistency in the implementation and interpretation of competition law.

In light of the aforementioned situations wherein fundamental principles may conflict with one another, it is imperative to note that the proper resolution of this conflict lies not always in the elimination of the inferior value but in determining the proper boundary between the conflicting values'.[49] Balancing is an unavoidable part of any decision-making process, be it in law, economics, or any other human activity.[50] Roscoe Pound propounded the doctrine of social engineering, under the Sociological School of Jurisprudence, and defined the law as follows – "Law is social engineering which means a balance between the competing interests in society." The nature of competition law too, is such that there may arise many situations in which two or more equally important values conflict with each other.

[47] *Supra* note 33.
[48] *Supra* note 27.
[49] Aharon Barak, *The Judge in a Democracy* 165 (Princeton University Press, Princeton, 2006).
[50] *Supra* note 9 at 186.

Even Adam Smith, whose allegory of the 'Invisible Hand' is often used to invoke the virtues of *laissez faire*, recognized the potential of collusion amongst sellers to the detriment of consumers. Smith developed his ideas on competition in consonance with those of Mill and Eucken –"People of the same trade seldom meet together . . . but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."[51] Mill and Eucken agreed too – "… Why should three bakers in a 13th century town compete with one another?"[52]

However, in the second part of the same paragraph Smith suggests that it would be impossible to prevent such gatherings by any law that could be enforced or would be consistent with liberty and justice. But, while the law cannot prevent individuals working in the same trade from coming together on sometimes, it should not make such assemblies convenient, much less necessary. This implies that the quintessential role of the freedom of contract as a part of the broader freedom to compete had been recognized at that time. The harmfulness of cartels is balanced with the rights of free economic associations, implying that the latter *can* prevail over the former. Obviously, this outcome of the balancing act reflects the situation in 19th century capitalist societies. Nowadays, however, the balancing pendulum has moved significantly towards prohibition of such anti-competitive conduct, as observed in the competition laws of the United States, EU countries and Canada.

Furthermore, it seems apt to make a reference to the Realist School of Jurisprudence, which supports a system of law that gives power and discretion to the judiciary. Balancing by definition implies some elements of arbitrariness and also because often the arguments of both parties are legitimate and both may be protected by the existing legal framework.[53] Even in competition law, authorities always ponder over balancing its various goals. Sweet and Mathews observe that judges are tasked with balancing and harmonizing conflicting concepts,[54] and that "a court that explicitly acknowledges that balancing inheres in rights

[51] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 183 (University of Chicago Press, Chicago, 1977).
[52] *Supra* note 9 at 23.
[53] *Supra* note 9 at 237.
[54] Alec Stone Sweet and Jud Mathews, "Proportionality Balancing and Global Constitutionalism" 47 *Columbia Journal of Transnational Law* (2008).

adjudication is a more honest court than one that claims that it only enforces a constitutional code, but neither balances nor makes law."[55]

Salmond, a keen contributor to Positivist Jurisprudence regarded activities of courts in deliberation and decision-making enable to be the key to understanding law.[56] Some of these conflicts are irresolvable dilemmas or paradoxes.[57] Balancing also harms legal certainty to some extent – a postulate of legality and legal clarity – 'a sovereign virtue in jurisprudence'.[58] As a quintessential aspect of post- modern jurisprudence, balancing does not provide ultimate solutions to legal dilemmas. Despite all of this, the fact remains that the balancing process converts rights into a common regulatory currency, which increases their chances of being prioritized by the decision-maker but at the same time deprives them of their authenticity and societal significance, transforming them from 'trumps' into ordinary cards (since it is often perceived that rights 'trump' any other interest).[59]

VI. Significance of Competition Law in the Contemporary Scenario and the Relevance of Knowing its Jurisprudence

Without mastering basic mathematical operations, scientists cannot work out complex physics and maths. Similarly, jurisprudence is a common subject every law graduate has studied, since it helps lawyers in understanding the basic ideas and reasoning behind the written law. This paper therefore, aims to explore the 'philosophy' or nature of competition law in order to understand the roots of this emerging field of law – the intricacies in its nature and objectives, and the foundations of its functioning. This in turn, holds relevance to aiding in the interpretation and ascertaining the functionality of this law, which can be a very useful tool not only for lawyers but competition authorities who enforce this law.

Developments in the Anti-Trust Regulation arena

Anti-trust regulation has gained momentum especially in recent times, giving rise to new conundrums, new possibilities and new questions. Competition authorities have begun the mission to adapt competition law to issues posed by digital markets. Competition law has

[55] *Id.* at 88.
[56] *Supra* note 31 at 47-49.
[57] *Supra* note 9 at 238.
[58] H. L. A. Hart, "Positivism and the Separation of Law and Morals" 71(4) *Harvard Law Review* 593 (1958).
[59] *Supra* note 9 at 240.

become extremely relevant for various business practices in digital markets, both in India and the EU. For instance, the CCI has recently announced investigations into "GAFA",[60] *i.e.,* into Google's billing policies and Apple's App Store. [61] It has probed into data sharing between Facebook and Whatsapp.[62] It has also suspended Amazon's deal with Future Retail.[63] Antitrust Regulation in the UPI sectors is another example of new horizons opening up in this area of law. When dealing with such newly-evolving concepts, being familiar with the genesis and core fundamentals of competition law is a basic requirement, which can best be understood when explored through a jurisprudential lens.

M&A and Competition Law

Issues concerning anti-trust regulation are becoming increasingly relevant when it comes to Mergers and Acquisitions as well. This is evident from the rising speculation that the ZEE – Sony merger could face legal hurdles posed by the CCI.[64] This is because market definition and combined market shares of the merged entity play an important role as the CCI that aims to prevent monopoly in the market. To navigate through such approvals, lawyers will be required to understand what exactly are the barriers posed by anti-trust regulation, why they are barriers in the first place, and what recourse should be taken in order to cross over such barriers, i.e., taking steps that are in consonance with the objectives of anti-trust regulation.

Illustration: Applicability of Philosophy of Competition Law in Contemporary Situations

The Indian Google Meet case[65] is an apt illustration wherein one of the two fundamental norms discussed in this paper (authoritative issuance and coercion – Chapter IV) comes into

[60] GAFA is an acronym for Google, Apple, Facebook and Amazon - the dominant companies which control much of the digital markets.
[61] Shrimi Choudhary, "Exclusive: CCI to seek details on Google's payment policy from app makers" *The Economic Times* (Jan. 10, 2022), *available at:* https://economictimes.indiatimes.com/tech/technology/ci-to-seek-details-on-googles-payment-policy-from-app-makers/articleshow/88798742.cms (last visited on January 28, 2023).
[62] Parumita Pal and Hrishav Kumar, "Data Sharing between WhatsApp and Facebook: The CCI Opens an Investigation Against the Social Juggernauts", *Competition Policy International* (June 20, 2021), *available at:* https://www.competitionpolicyinternational.com/data-sharing-between-whatsapp-and-facebook-the-cci-opens-an-investigation-against-the-social-juggernauts/ (last visited on January 18, 2023).
[63] Ruchika Chitravanshi & Peerzada Abrar, "CCI suspends Amazon deal with Future, fines US giant Rs 200 crore" *The Business Standard* (Dec. 17, 2021), *available at:* https://www.business-standard.com/article/companies/cci-suspends-amazon-s-2019-deal-with-future-cites-suppression-of-info-121121701162_1.html (last visited on January 20 2023).
[64] Maulik Vyas and Guarv Laghate, "ZEE- Sony merger could face legal hurdles" *The Economic Times* (Dec. 23, 2021), *available at:* https://economictimes.indiatimes.com/industry/media/entertainment/media/zee-sony-merger-could-face-legal-hurdles/articleshow/88442789.cms (last visited on January 19, 2023).
[65] *Baglekar Akash Kumar* v. *Google LLC*, 2021 SCC OnLine CCI 2.

play. In this case, it was alleged that *Gmail* was inaccessible without *Google Meet*, and such an event might be classified as an abuse of dominance, namely a tying *sensu stricto* in competition law. 'Abusive Tying' is not allowed under both Indian,[66] and European Law.[67] While the CCI determined that the tying element was absent, it is highly improbable that the European Commission (EC) would think the same way. The rationale could be profoundly different at the European level, for two reasons: first, the EU supports a lower level of coercion to indicate a tying misuse, and second, the EU appears to take an inverse approach to assess & evaluate coercion. While the CCI analyzed *Meet's* availability without *Gmail*, the European tying regime examines the availability of the dominant product, *Gmail*, without the tied product, *Meet*. Such varying interpretations with respect to the degree of coercion in Tying can be traced back to the jurisprudential roots of competition law under both these jurisdictions, i.e., difference in perceptions of authoritative issuance, despite both entities showing an inclination to follow the Structuralist School of Thought.

More recently, in February 2022, the CCI slapped a hefty fine of approximately Rs 1,788 crore on five tyre companies: Apollo Tyre, JK Tyre, Ceat, MRF and Birla Tyre.[68] Accused of anti-competitive practices such as cartelization and price-rigging, the companies are now mulling legal recourse against the fine. Just like how it is common practice to rely on "the intention of the legislature" whilst interpreting statutes to build a case, it would be much easier for competition law practitioners to understand the nuances of anti-trust regulation by knowing the "intention" behind the Competition Act, and the authoritative issuance being doled out by the CCI. In all the aforementioned situations, it is evident that the core objectives and basis for the *modus operandi* of competition law act as deciding factors for the competition authorities and lawyers whilst deliberating upon such issues. Hence, having deep jurisprudential knowledge of anti-trust regulation would go a long way in comprehensively understanding emerging trends in this fast-evolving area of law.

[66] The Competition Act, 2002, s. 4(2)(e).
[67] The Treaty on the Functioning of the European Union, art. 102(d), *available at*: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:12008E102 (last visited on February 05, 2024).
[68] Nandini Sen Gupta, "Tyre Companies to Appeal Against CCI penalty of Rs 1,788 cr for Price Rigging" *Times of India* (February 3, 2022), *available at:* http://timesofindia.indiatimes.com/articleshow/89328136.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (last visited on February 4, 2023).

VII. Conclusion

Justice Marshall rightly called competition laws the 'Magna Carta' of free enterprise. Due to strong economic connotations, competition law is often perceived as an applied branch of law full of technicalities, which only uses the rich legacy of legal theory as far as the jurisprudence of courts is concerned. Regardless of the eventual correctness of this common perception, legal theoretical issues are of direct relevance for antitrust too.

This paper has explored the nature of competition law and observes in its enquiry into the philosophy of this law, that some areas of legal theory are of paramount importance to truly understand competition law comprehensively, and they may help to address the many antitrust dilemmas and paradoxes as well. Legal theory too can be enriched by some of the theoretical aspects of competition law. For instance, because it is predetermined by the necessity to balance law, economics and politics, competition law constitutes a unique forum for the analysis of interdisciplinarity. Commencing an argument from the goals of antitrust is misguided, as the philosophy of competition law must be determined first from where its objectives and rules can be extracted. To make sense of the future direction of this fairly recent and fast- developing area of law, competition law needs anchoring which can be found in its philosophy.