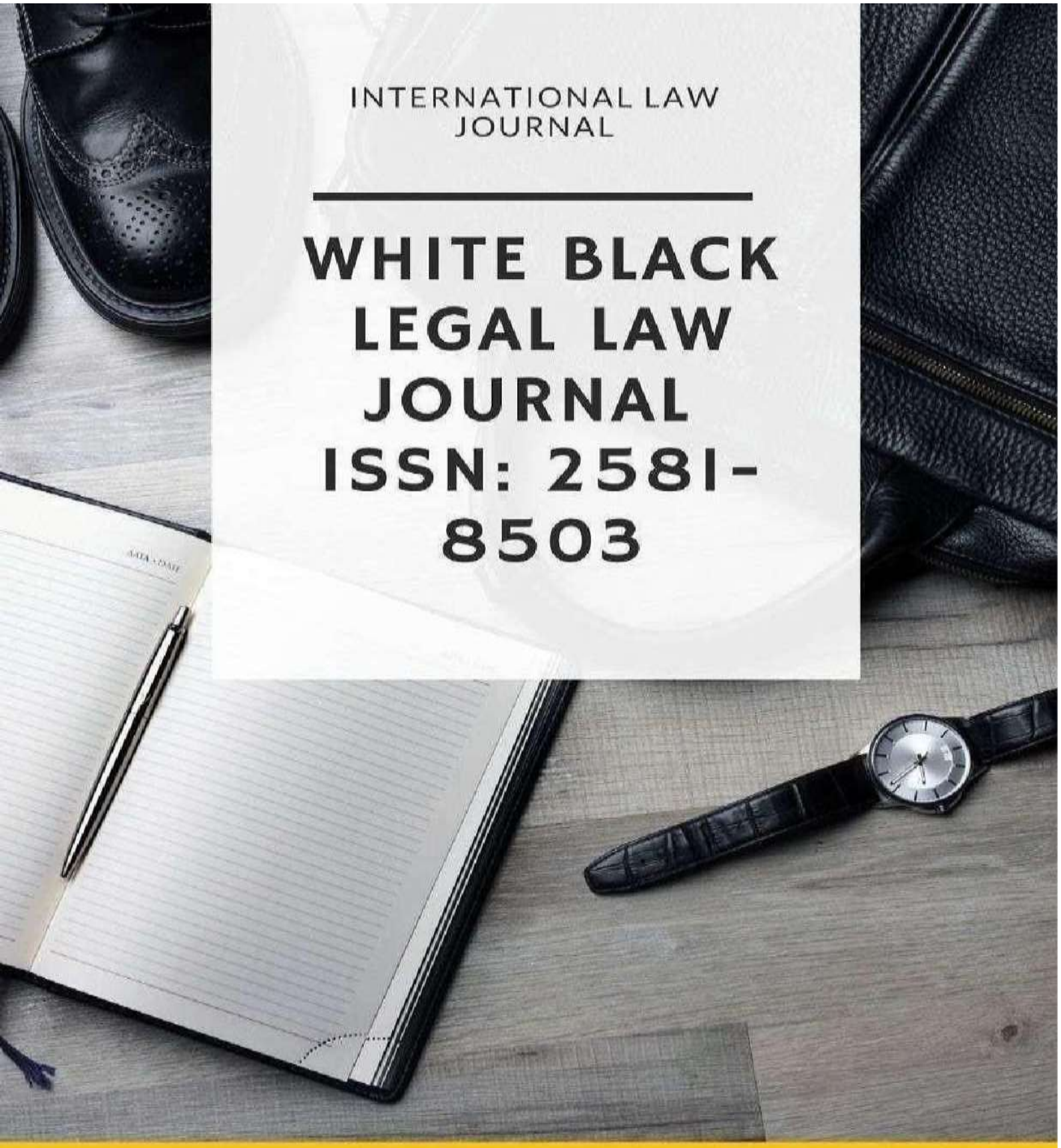

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TRADE UNIONS UNDER INDIAN COMPETITION LAW

AUTHORED BY - MUSKAN KALRA & MONIKA PRIYA

Introduction

With the advent of the Industrial Revolution, trade unionism grew as one of the most powerful socio-economic-political institutions. It aimed to reconcile the social and economic aberrations that occurred due to the Industrial Revolution. The basic philosophy on which these unions work is united, we stand, and divided, we fall. The policy of "Laissez-faire" left the working class at the mercy of the employers, leaving workers with no bargaining power, which led to the exploitation of labour[1].

Though the trade unions carried out a valid purpose of protecting workers' interests it mostly interfered with different avenues of law such as the law of contracts or the law of crimes. Combinations of workers were regarded as "criminal conspiracies," under the Indian Penal Code and also legal actions like allegations of encouraging contract breaches, business interference were brought against the actions undertaken by trade unions. These situations were pertaining as there was ambiguity in the legal status of the trade unions. Thereafter, with the advent of Trade Union Act of 1926 provided legality to such unions and gave shield to the trade unions from these kind of claims[2]

However, uncertainties were not restricted only for civil and criminal cases as market developed, it became necessary to prohibit universal collective bargaining to maintain market competitiveness. This would hinder the joint activities of trade unions once more. Therefore, in order to provide labor unions with the same degree of protection as outlined in the TU Act, the Monopolies and Restrictive Trade Practices Act of 1969 likewise released them from responsibility for engaging in anti-competitive behaviour in the marketplace.

However, the position on this issue became ambiguous with when the Competition Act of 2002

[1] https://egyankosh.ac.in/bitstream/123456789/95978/2/Block-2.pdf
[2] Trade Union Act, 1926 read with Article 19 of Constitution of India, 1950

was enforced as the act did not provide any explicit exemption to the trade unions or associations.

In this present paper, the author has tried to analyse whether the Competition Act prohibits trade unions from engaging in collective actions or can the trade unions lawfully engage in collective bargaining without violating the provisions of competition law. Further, what exemptions exist for trade unions under competition law in various jurisdictions

Competition law vis a vis collective actions by Trade Unions in India

As per Webbs, a trade union is a association of wage earners for the purposes of maintaining and improving the conditions of their working lives. Under the Trade Union Act, 1926 the term has been defined as " any combination whether temporary or permanent which is formed primarily for the purposes of regulating the relations between workers and employers or for imposing restrictive conditions on the condition of any trade or business and includes any federation of two or more unions." Simply speaking trade unions can be defined as an organisation of workers acting collectively seeking to protect and promote their mutual interests through collective bargaining[3].

The Trade Union Act 1926, legalised the formation of trade unions by allowing employees to form them. The act also enables trade unions to register themselves under the said act. Further, the act provides immunities from civil and criminal prosecution for bonafide trade union activities.

Analysis of applicability of Section 3 on Trade Unions

The title of the section which reads as 'Anti Competitive Agreements'

This section provides blanked ban to the anti-competitive agreements, certain ingredients which is required to be fulfilled for this section are first being that there must be presence of enterprise or association of enterprises, or person or association of persons hereinafter there must be some kind of agreement related to the production, supply, distribution or storage of any goods or services simply it should have relation with any kind of economic activity and lastly it needs to be analysed whether such agreement is causing or if not causing is it having probability to cause('ex-ante') appreciable adverse effect on the competition within India.

[3]De Cenzo & Robbins, 1993

Thus, the question is whether the acts of trade unions are falling under the ambit of Section 3[4].

Firstly, before dwelling into the word 'enterprise', it is important to understand how the term 'person' is read concerning the Act the Hon'ble Apex Court in CCI vs Steel Authority of India[5] clarified that the term person should be liberally construed as it is consistent with the purpose of the Act. Also, the Court in Samir Aggarwal vs CCI[6] noted that: the definition of "person" under section 2(l) of the Act "is an inclusive one and is extremely wide, including individuals of all kinds and every artificial juridical person".

Now, coming to the word 'enterprise' in the Competition Act, it also has a very broad scope. In the authority of CCI vs Coordination Committee of Artists[7], the court stated that the expression enterprise may refer to any entity regardless of its legal status or how it gets financed and, therefore, includes natural and legal persons. This statement gets even more credible as the agreement entered into by a 'person' or 'association of persons' is also included when read with the definition of the 'person' mentioned in the Act.

The Hon'ble Court of European Uunion, in the Pavel Pavlov v. Stichting Pensioenfonds Medische Specialisten case[8], conducted a similar approach. The Court stated that "there are no provisions in the Treaty that encourage members of the liberal professions to enter into collective agreements in order to improve their working conditions and terms of employment." As a result, in the context of competition law, the self-employed physicians were operating as "undertakings" when they made a combined contribution to a single occupational pension fund. Nevertheless, the Court determined that labor unions participating in collective bargaining are involved and that the choice made by members of a profession to establish a pension fund charged with overseeing an additional pension plan did not significantly limit competition within the common market and concluded that labour unions indulging in collective bargaining are getting involved in economic activity. The very existence of a trade union would not make a sense without this purpose, thus trade unions take on economic and financial risks when engaging in collective bargaining. However at the same time the court highlighted that agreements concluded in the pursuance of collective bargaining between employers and

[4] Competition Act, 2002.
[5] (2010) 10 SCC 744
[6] Samir Aggarwal v. Competition Commission of India, 2020 SCC OnLine SC 1023.
[7] CCI v. Coordination Committee of Artists & Technicians of W.B. Film & Television, (2017) 14 SCC 174.
[8] Pavel Pavlov v. Stichting Pensioenfonds Medische Specialisten, 2000 E.C.R. I-6451

employees aiming at improving employment conditions by the reason of their nature and purpose will not fall within the scope of Article 85(1) of the treaty[9].

Stepping further, it needs to be established that whether these acts of the union will be deemed to have appreciable adverse effect on the competition within that relevant market. It is pertinent to note here that the core function of the trade union is of collective bargaining. In the authority of FICCI Multiplex Association vs United Producers Distribution Forum[10] that in the name of collective bargaining these unions cannot indulge into agreements which are anti-competitive. The CCI stated that for analyzing the acts of unions it will depend on the factual matrix and circumstances of each case. Therefore, when trade unions enter into anti-competitive agreements they comply with all the three conditions mentioned in Section 3.

In addition to fulfilling the legislative obligations of Section 3, it is crucial to demonstrate the applicability of the safeguards inherent in several parts of the TU Act.

- Under Section 17 of the TU Act[11] which grants protection against Section 120A and 120B of the Indian Penal Code; however, its scope is limited.
- Under Section 18 of the TU Act[12], which protects against civil prosecutions for interference with business and commerce, will also be inapplicable as Section 60 of the Competition Act[13] has precedence over all other legislations. It is known that Section 62[14] mandates that the Competition Act be construed by all the existing statutes that may be in disagreement in the same regard. The authority in CCI vs. MS Fast Way Transmission[15], Hon'ble Supreme Court, underlined the overriding power over other statues has been provided to the Commission so that the objective of the Act can be achieved freely and to ensure that economic development of the country is achieved.
- Under Section 19 of the TU Act[16], an overriding clause over all the laws in force protecting agreements within the members of the Trade Union will also have no application as that only grants immunity to agreements from getting being declared

[9] Treaty Establishing the European Community, Article 85, 25 March 1957, 298 U.N.T.S. 3.
[10] FICCI-Multiplex Ass'n of India v. United Producers/Distributors Forum, Case No. 1 of 2009.
[11] Trade Unions Act, 1926, S 17.
[12] Trade Unions Act, 1926, S 18.
[13] Competition Act, 2002, S 60.
[14] Competition Act, 2002, S62.
[15] Competition Commission of India v. M/S Fast Way Transmission Pvt. Ltd., Civil Appeal No.7215 of 2014.
[16] Trade Unions Act, 1926, S 19.

void or voidable for restraint of trade. Therefore, Section 19 also does not act as a sword to the application of the Act.

Therefore, in the context of all the above discussed, it may be seen that Competition Act has applicability to trade unions as well. The provisions of Trade Union Act 1926 also do not exempt trade unions from applicability of the Competition Act. Hereinafter, it may be noted that in the previous regime under the Monopolies and Restrictive Trade Practices Act[17] trade unions and other workmen or employee unions were directly exempted from the application of the Act however, in its successor act i.e the Competition Act, 2002 the legislature purposely chose to not eliminate these organisations from the current act and as Section 3 of the act gets applied to trade unions collective bargaining suggesting that this non-exemption is definitely acting as catalyst for achieving market friendly environment and is able to maintain the competitive spirits of the market and to achieve the consumer good and public interest as the end goal as the CCI has the authority to pass the orders of cease and desist and impose penalties on the trade unions but as a result the trade unions might face a grave danger under Section 3 of the Competiton Act, 2002 which might hamper the interests of the labourers and the employers might assume that they can now exploit their workforce. In the next section, the author tries to analyse how the judiciary has tried to endeavour to address this legal tussle.

Case Laws Analysis

The actions of collective bargaining started explicity coming into light with the case of CCI vs Coordination Committee of Artists [18] where a hindi television serial of Mahabharat got dubbed in the language of Bengali and it was planned to be telecaseted on the two channels of West Bengal however there were two organizations opposing the telecast of the same first being Eastern India Motion Picture Association and the other one was Coordination Committee of Artists by pleading that the telecast would severely hamper all the artists and producers of West Bengal as this dubbed version will affect the visibility of native Bengali shows. In the pursuance of the same these organizations took the actions and went on strike if the channels did not stop the telecast of the dubbed show. The Hon'ble Court while adjudicating the matter was posited with the issue whether the Coordination Committee and EIMPA have violated the provisions of the Competition Act?

[17] Monopolies and Restrictive Trade Practices Act, 1969.
[18] AIR 2017 SUPREME COURT 1449

Hereinafter, the Court reiterated that how the word person is broadly construed under section 2(l) of the act which will also include these organizations as having relation with the economic activities alongside their members are also involved in the economic activities and their actions will also fall under the garb of agreement as defined by the act taking into account even the informal arrangements or concert in actions. The Court in its specific part also tried to mention the stance of EU where an institution completely dealing with social functions and solidarity will not be under the ambit of competition act. Therefore, focus in on the functional approach or substance over form where it is seen that whether the entity is involved in an economic activities.

In the case of Vipul A. Shah[19], the CCI has taken the opportunity to emphasise its position of re anti-competitive exclusivity. While determining the position of trade unions, the CCI has reiterated the evolving undertone of substance over form as previously affirmed by the Supreme Court in examining an enterprise in the Co-ordination Committee case and categorically determined that trade unions are not immune from antitrust scrutiny.

In the context of all the above discussed, it may be pertinent to mention that the minority view of which indicates that the right to hold dharnas, boycotts and setting out terms and conditions for employment, as in Vipul Shah, is a fundamental right of any trade union guaranteed under Article 19(1)(a) of the Constitution and then took the shape of TU Act, 1926 unless it is shown that the offending parties were involved in economic activities in the same 'relevant market' and they had entered into an 'agreement' which finds foul with the provisions of Section 3 of the Act. In essence, the minority view asserted that unless these conditions are met, the fundamental rights of trade unions should not be overridden by competition law. This opinion attempted to balance constitutional freedoms with the regulatory framework, arguing that competition law should not interfere with legitimate trade union activities unless a clear anti-competitive nexus is established. Further, these judgements have failed to adopt any stance on protecting the rights of labour unions.

View not Taken

With all the above discussed, it may be noted that the judgements passed by the Hon'ble Commission show the tendencies of rigid application of competition law provisions to labour

[19] 2017 SCC OnLine CCI 53

organisations and trade unions as it may be pertinent to mention that even the trade unions formed by the artists to protect the collective interests of workers which may be fundamentally different from the business cartels. Further, the judgements also raise concerns about the balance between the freedom of association and the enforcement of competition law; also reflecting a rigid interpretation of the competition law provisions, which somewhere lacking to take into account socio-economic dynamics for labour markets and appear as a chilling effect on the collective bargaining. Therefore, it may be argued that the CCI did take into account to establish a legal framework that accommodates labour protections within the regime of competition law.

Trade exemptions under various jurisdictions

In the regime of United States where the competition law is governed by the Sherman Act of 1890 and Clayton Act of 1914 however the exemption related to the activities of trade unions are covered under the Clayton Act and Norris- LaGuardia Act firstly, Section 6 of the Clayton Act[20] specifies labour as "not a commodity or article of commerce exempting labour associations acting in good faith from the applicability of all competition regime suggesting that as long as the trade unions are functioning under the umbrella of legitimate purpose they will remain protected from antitrust regulations as it has been recognized that there is a lack of bargaining power of labour workforce and their incapacity to get fair working terms and conditions. However, for exercising these exemptions two tests have been placed that is these organizations must act in self-interest that is their purpose should only be of collective bargaining and they must act independently that is they should not join with any other labour groups.

Now, in the reference of European Union there is no express exception for the trade unions and Article 101 of the Treaty on the Functioning of EU puts restraint on the anti-competitive agreements however, through the judgement of Albany International BV[21] the Hon'ble Court stated that incorporating such organizations under the scope of competition law would be contrary to the societal goal of improving working and employment conditions. Further, this position has alos been clarified that they will not be protected under this exemption is these trade associations or unions are having the purpose or intent of engaging in anti-competitive

[20] 15 U.S. Code S 17.
[21] Case C-67/96 [2000] 4 C.M.L.R 446

practices.

Different Roads but the same destination

It may be argued the spirits of the Competition Act and Trade Union Act might appear in derrogation of each other however; the case is not so both these acts have the aim to achieve market-friendly environments the difference only lies in where trade unions are very specifically concerned upon the proper treatment and rights of their members; the competition law focuses on the more significant dynamics of the market and Section 62 of the Competition Act clearly provides that provision of the act shall be in addition to and not in derogation of the provisions of any other law for the time being in force the only underlying intent is that there is no dispute between the freedoms enshrined in the constitution of India and the right to form associations or unions for securing the right of their members the only lakshman rekha is that the activities of such union should not be intended to restrain competition or harm consumers.