Intellectual Property Rights, And Competition Law
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Lecture - 09
Introduction to Competition Law (Contd.)

Dear students in this class we will discuss about the development of Competition Law in India especially in the post independence scenario.

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India, as you know, was under the rule of British upto1947.

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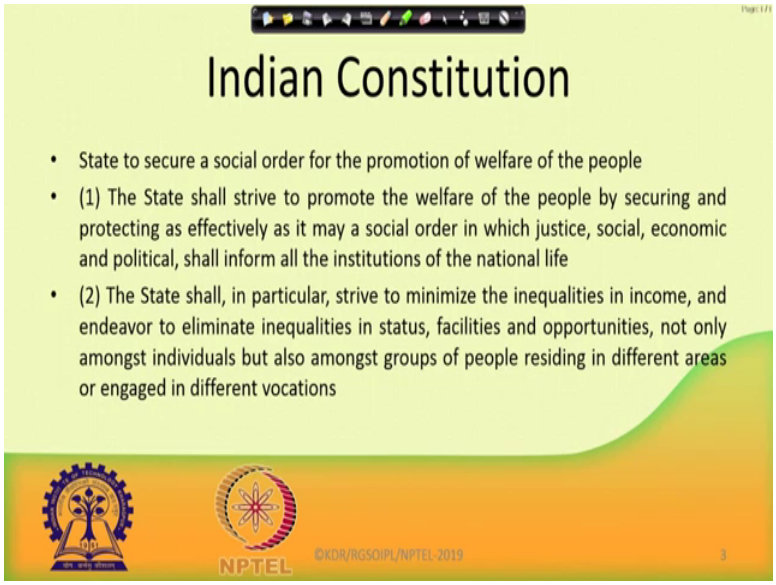

Much of the competitions were actually restricted or you can say that, the competition in the market was absolutely absent. This happened mainly because of the raw materials which were transported to Britain in order to increase the efficiency of the British companies rather than promoting the Indian companies at that point of time. Presently we can find provisions in the Indian constitution for promoting economic efficiency and the division of labour or division of economic, the concentration of economy is banned in the constitution.

So, relevant provisions says that the state will secure a social order for the promotion of welfare of the people. We have already talked about the welfare of consumers and Indian constitution clearly says that in order to achieve that objective the state shall strive to promote the welfare of the people by the securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all the institutions of the national life.

So, it means that the constitution will always look into the economical and political life and the state shall particularly strive to minimize the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities not only amongst the individuals, but also amongst groups of people residing in different areas or engaged in different vocations.

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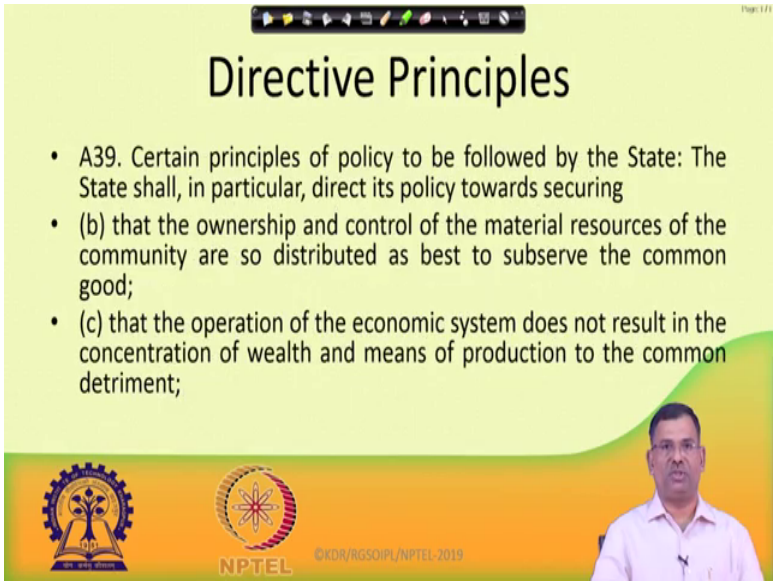

This is actually the reflection of the division of economic resources among the people and especially Article 39 of the Indian constitution directive principles of state policy clearly says that, the state must take into account in particular directive policies towards securing the ownership and control of the material resources of the community distributed as best to sub-serve the common good.

So, it means that the material resources should be divided among the communities so that there should not be any concentration of economy in the market. Again it says that the operation of the economic system should not result in the concentration of wealth and means of production to the common detriment.

So, we can say that there is a parallelism between the objective of the antitrust law and this particular provision of the Indian constitution which says that there should not be concentration of wealth. Actually the enactment of the antitrust law was against the concentration of wealth among the trust. So, our constitution also says that there should not be concentration of wealth and the means of production should not be detrimental to the society at large.

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If you look into the scenario post independence time the government was going massive on the nationalization process. The nationalization process was rampant immediately after the post independence scenario and the government was going with planned economies through the 5 year plans.

Again this was based on the 1956 resolution on social justice and self reliance of India. And India enacted the industrial policy in 1948 and all these nationalization and planned economic policies were based on these industrial policy of 1948. And the government told that the industrialization should be subject to the government regulations.

Because equal distribution of resources will ultimately lead to the societal welfare. The government has given more importance to the public enterprises and also through the nationalization process the government wanted to distribute the resources among the societies at large or through the equal distribution which they propounded. The government wants to restrict the overall economic activity.

For example even the size of the plant, the production, its location, sectors, allocation of finance and even allocation of loans from financial institutions. It followed a *Licence Raj System* and high tariff walls in order to prevent the imports, intrusion of the foreign companies into the Indian market was successfully prevented by high tariff walls.

And there were severe foreign direct investment restrictions and the quantitative restrictions were put on all imports. So all of this coming together, it was impossible for any foreign company to operate in the Indian market. So, the Indian market was artificially made which completely says that there was no competition in the Indian market. Everything was controlled or regulated by the government through the various regulatory measures.

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If we look into the competition law it was not an easy task to move to a competition law at that point of time, rather the government had come out with a legislation which was more restrictive in nature and known as the *Monopolies and Restrictive Trade Practices Act,1969* which is popularly known as the MRTP Act, 1969. The most planned economic development happened in accordance with the *Industrial Development and Regulation Act, 1951*.

So even though there was an industrial growth, it was completely a restricted *Licence Raj System* which prevailed in the market until the 1990s.

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But the government was actively considering the various reports prepared by the experts in order to distribute. The government thought that there should not be any concentration of economic power with few in the India in the post independent India.

So, the first such committee was constituted which was chaired by Mr. Hazari which is popularly known as the Hazari committee. And the *Industries Development and Regulation Act, 1951* played a very crucial role in the development of industry, rather restricting the industrial activities at that point of time and the committee came out with its recommendations in 1965.

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The Hazari committee gave a lot of recommendations. The Hazari committee studied the Indian market with two objectives and they looked into or reviewed the operation of licensing under the *Industries Development and Regulation Act, 1951*. And secondly considered and suggested in the light of the present stage of economic development what should be the direction or what are the modifications to be made to the licensing policy? This was the very confined agenda of this Hazari committee.

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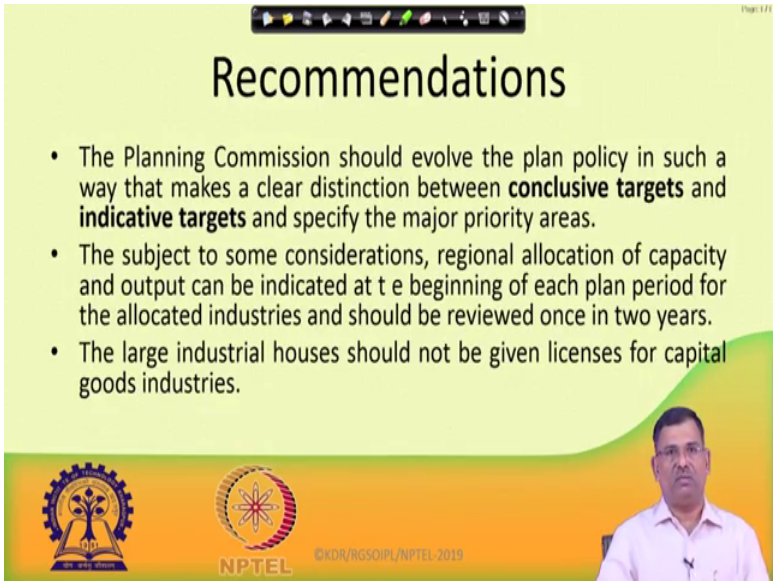

And if we see the recommendations of this particular committee we know that the entire resource allocation happened through the planning commission and the 5 year plans in different states of India at that particular point of time. For example, the planning commission recommended that the planning commission should come out with the plan and policy to distinguish between the conclusive targets and indicative targets as a priority area.

What should be the priority areas of investment and economic concentration? In a developing country like India at that point of time or immediately after independence, the regional allocation was very important for the distribution of a resources or efficient use of a resources. For each plan period, the 5 year plan period the allocation of industries should be reviewed every two years: this was another recommendation of the committee.

Then the most important recommendation of the committee was that large industrial houses should not be given licences for capital goods industries. Because the committee thought that this is going to lead to more concentration of wealth in the big industries at that point of time. That is why the committee recommended again for a curb, again there was a hurdle on licensing to the big industries on the capital goods.

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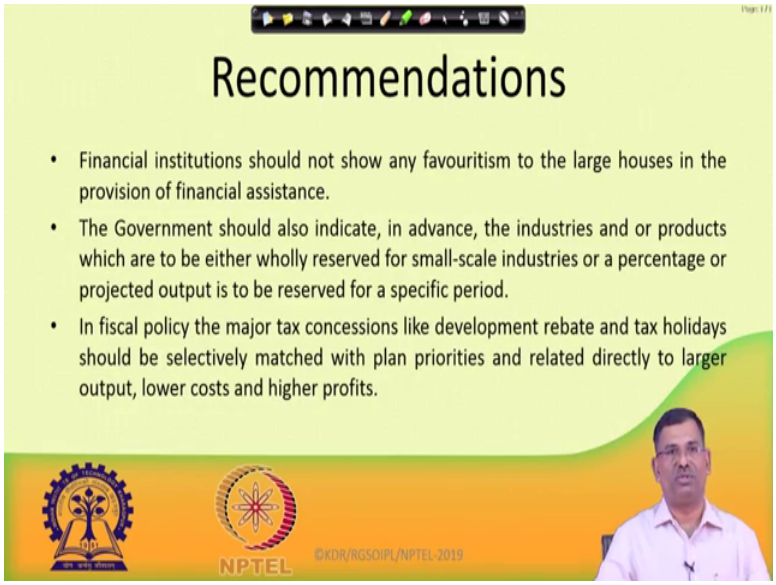

And another recommendation was the access to finance. It was not only post the independence scenario even today the financial institutions always favour the large business houses and they have a step motherly attitude towards small scale industries.

The British period policy is followed by the financial institutions in India, even though there are a lot of changes in the present days, but this was one of the recommendation of the Hazari committee also. And the government should prioritize the industries and a series of products which are exclusively reserved for small industries.

In the last class we discussed about the resource allocation to the large industrial houses and a harmonization between the large industrial houses and small scale industries, this exactly was recommended by the Hazari committee in 1956 in India.

And then major fiscal policy and the tax concessions for the major industries as well as the small scale industries. There will be tax holidays and tax rebates. There is a close

connectivity between the resource allocation and efficiency of the industries which is connected with the fiscal policies. So, the fiscal policy also should promote the market and competition in the industry.

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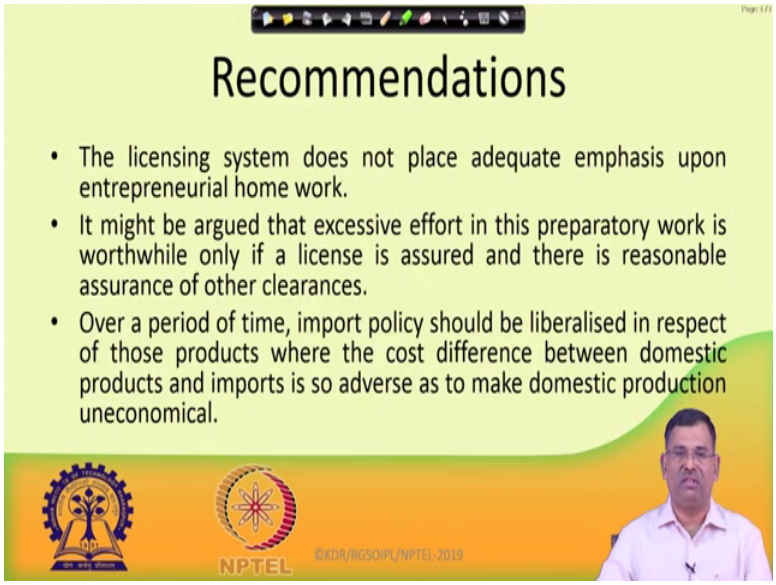

We will look closely into the licensing system and the entrepreneurial aspect of the licensing system. So, the committee thought that the excessive curbs on the licensing system will reasonably assure the small scale industries to grow, more curbs or more restrictions or regulations may lead to the promotion of small scale industry this is what the committee actually recommended.

And the cost of the products and the cost of imports. So, the committee recommended for domestic production rather than import of most of the goods even though it is uneconomical. This is mainly in accordance with the policy of self reliance at that point of time. The government followed the self reliance policy at that point of time.

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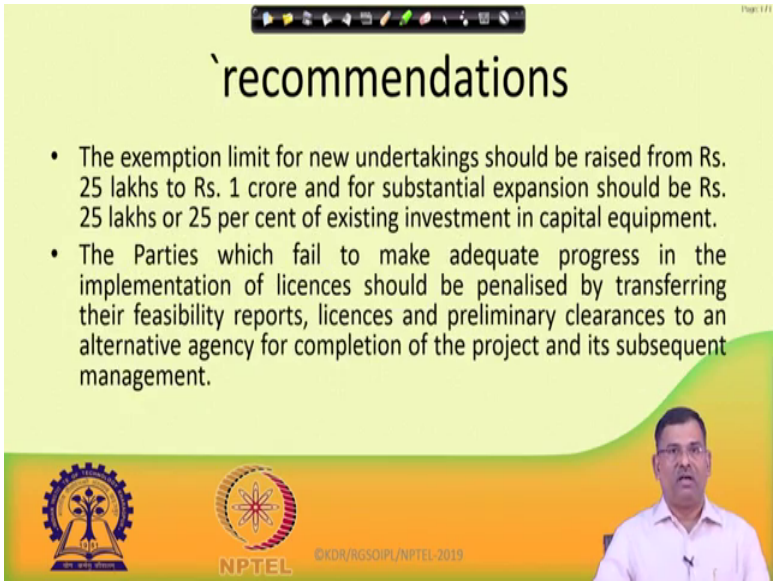

And if we look very closely into the specificities of the recommendation, the committee also recommended certain exemption limits, the committee put certain exemption limits for the existence on capital equipments. So, they put certain restrictions on the capital equipments and also the project management.

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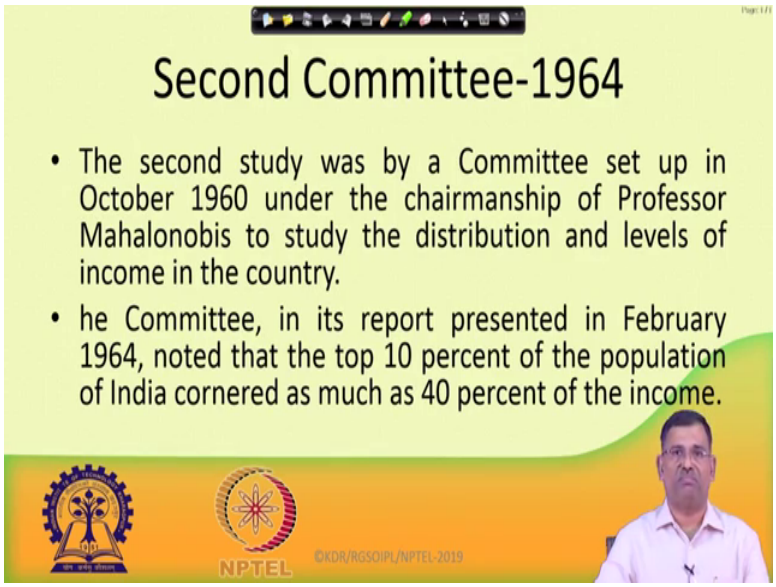

And we can see that the first committee recommendations lead nowhere. The second committee was constituted in 1964 even though it was set parallel in 1960. This basically and mainly concentrated on the level of income disparity in the country.

So, the committee found that the entire wealth in the country was in the top 10 percent of the population and I do not think the scenario has changed so far and still the wealth in India is with the top 10 percent of the population. And the 40 percent of the income was with the 10 percent of population at that point of time and now it is a much more.

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And this committee was known as the *Monopolies Enquiry Commission*. This commission was headed by Justice K.C.Dasgupta. So, this was popularly known as the Dasgupta Commission. Basically this committee looked into the economic power, the economic power product wise or industry wise concentration.

And the committee also noted that the industrial houses are controlling large number of companies and also the large scale restrictive and monopolistic activities of these particular companies.

So, the committee looked basically into the large business houses and their behavioural aspects which compelled the committee to look into the trust aspect which was in the United States mainly because there were policies for the distribution of resources. Similar aspect prevailed at that point of time in India as well. So, the committee was given this particular task.

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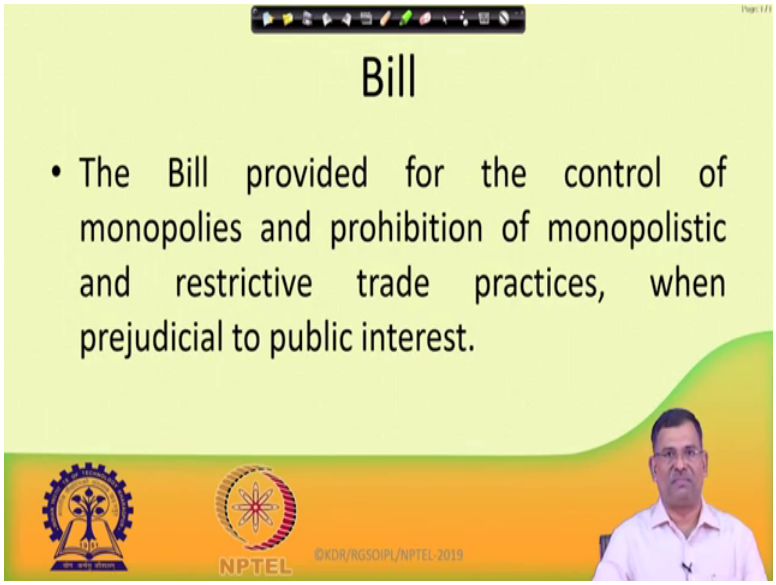

So, this particular committee came out with a particular bill which is recommended for the control of monopolies as well as the prohibition of monopolistic and restrictive activities of these big companies that are prejudicial to public interest.

So, definitely there is a close similarity or a parallelism between the antitrust act and this proposed legislation to control the monopolies and also the monopolistic activities or restrictive trade practices of companies big business houses.

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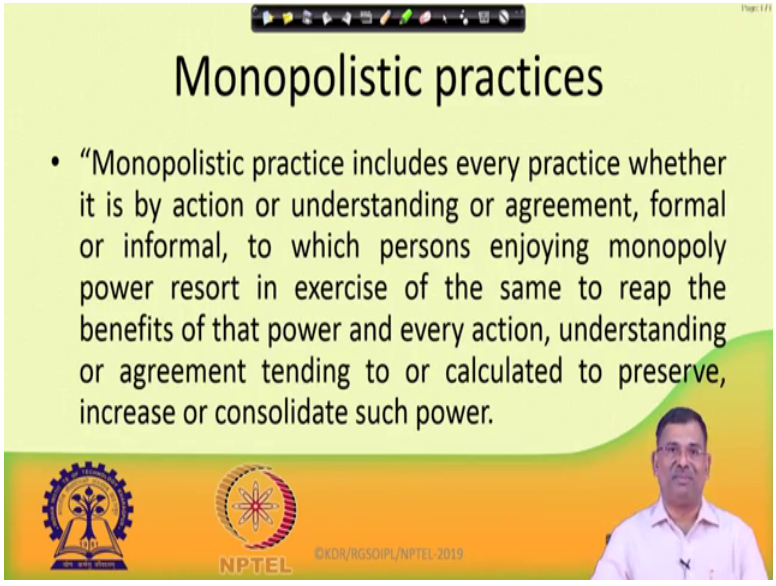

The monopolistic practices which were pointed out by this committee are every practice whether it is by action or understanding or agreement between companies or whether it is a formal agreement or informal agreement or persons enjoying monopoly power resorts to exercising the same to reap maximum benefits or to have a power in the market, understanding or agreement tending to calculate to preserve, increase or consolidate power to exploit market. All this will be considered as the monopolistic practices.

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And if you look into the two types of practices: one is the monopolistic practices and second is the restrictive trade practices. And there are a series of restrictive practices generally adopted by these particular companies in preventing, distorting or restricting competition.

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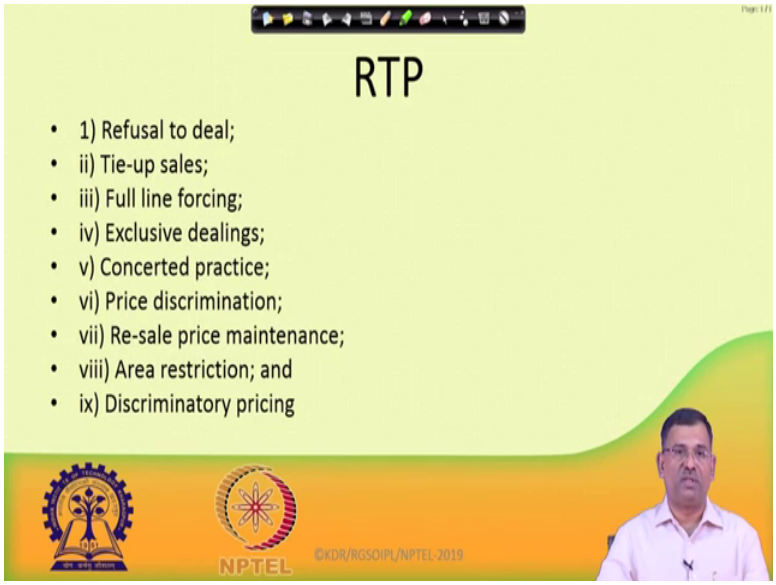

And there is a series of activities which you can find in the form of refusal to trade, tie up sales, tie up agreements or tieing up of products and then the full line forcing, then exclusive dealing agreements, then concerted practice; then price discrimination, then resale price maintenance, then area wise i.e. the territorial restrictions or area restrictions, then discriminatory pricings. All these are considered as restrictive trade practices by the commission at that point of time.

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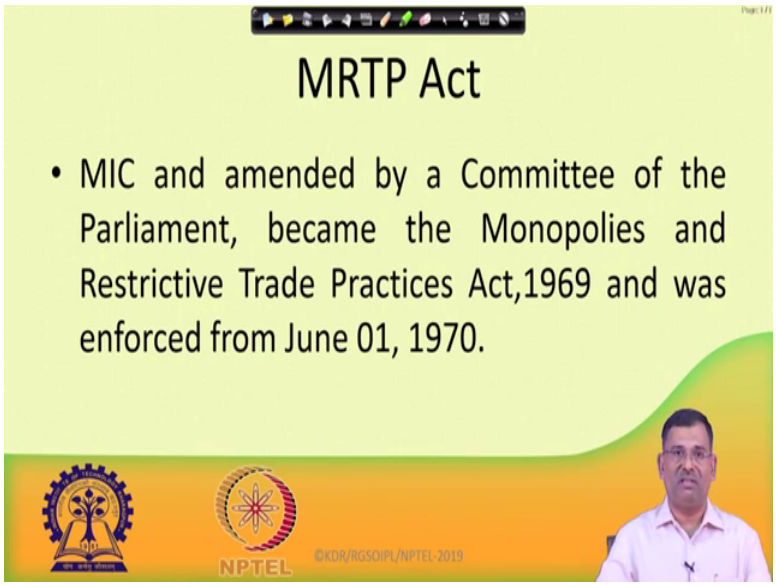

And you can see that ultimately this committee was successful in drafting a bill as well as the government converted it into the law in the form of *Monopolies and Restrictive*

Trade Practices Act, 1969 which is popularly known as the MRTP Act which came into existence from 1970 onwards. And this act has been in power for a long period of time and its objective have nothing to do with promotion of competition, but to restrict the monopolicies and restrict the trade practices; restrictive trade practices.

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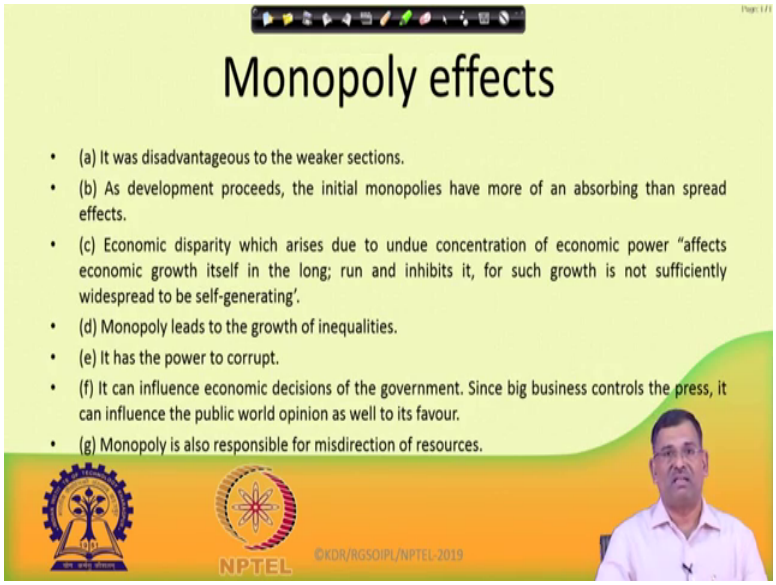

You can see that monopolistic effects are always a disadvantage to the weaker sections of a business especially the small scale industries. And we know that these monopolies basically absorb the small companies and become giants. It may lead to monopolies and to an economic disparity due to the concentration of these economic power.

These monopoly basically leads to the growth of inequalities in the market and also the power balances in the system increases and these power imbalance leads to corrupt practices or restrictive practices. And these corrupt practices can influence the economic policies of the governments. And also you can see that the monopolistic or oligopolistic activities are always responsible for misdirection of resources. This happens mainly to control the power as well as to control the market by these particular companies.

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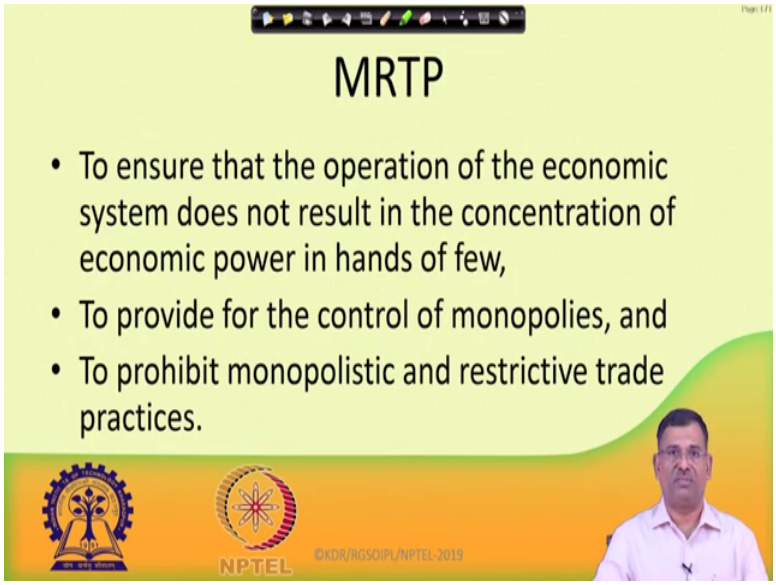

Particular objective of the act was to ensure the operation of the economic system, so that it does not result in concentration of economic power in hands of few. It clearly says that there should not be concentration of economic power and to provide for control of monopolies. Making monopolies is not illegal, but the monopolistic activities or prohibitive activities when it affects the market is to be controlled actually. Prohibiting monopolistic and restrictive trade practices was also one of the objective of the MRTP Act.

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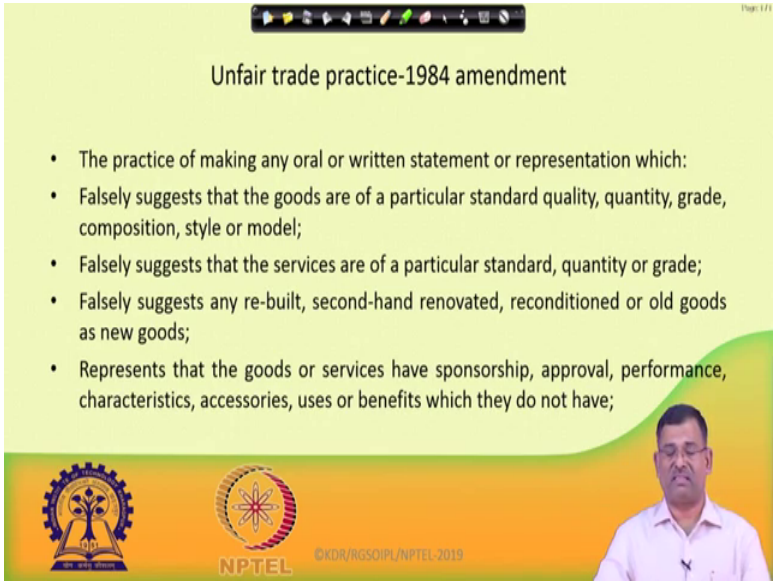

If we look into the unfair trade practices: they made an amendment in 1984 to include unfair trade practices. So, as we have already talked about when the Sharman Act came the companies wanted to avoid the provisions of the Sharman Act and they went for mergers.

And then the Clayton Act was passed in order to curb the loopholes in the Antitrust Act. Here they came out with an act for curbing the monopolistic activities, then the companies went for unfair trade practices. So, they were forced to come out with the amendment in 1984.

There are many activities which were considered as unfair trade practices which falsely suggest that services are of particular standard, quality, quantity, grade and again falsely suggesting rebuilt, second hand renovated recondition, the representation of goods and services, sponsorship performance, characteristics, accessories. So, we can see a bundle of unfair trade practices which were mentioned in the act.

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So the unholy relationship between the sellers and suppliers is again false or misleading representation concerning the need for the usefulness of goods and services. And then again there is an unfair trade practice in guarantee and warranties of products, performances and efficacy of product, their length of life.

And these misrepresentation on the goods without adequate or proper test, misrepresentation to the public, warranties and guarantees, promises of replacement and repair of goods. All this will come under the purview of unfair trade practices.

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Misleading in nature about the prices, misleading about the warranties and guarantees, misleading about the services and misleading about the goods and services are mostly unfair practices. I would say that all this will be considered as illegal practices.

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What is the effect of monopolistic practices? we know that all these monopolistic practices prevents the efficient allocation of resources, are more favourable to the big business houses and disadvantageous to the small business people.

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That is why these practices will be considered as monopolistic practices. There is a close connectivity between the market allocation and the production, the prices, price maintenance and the cost of production.

We already said that the small scale industries allocate resources very less. So, their cost of production will be more than when compared to the big business houses; the big business houses allocate more resources. So, their production cost will be very less. So, in the prices, the sale prices there will be a disparity between the sale prices of big business houses and the small business houses. So, this should be balanced.

So, the profit of big business production houses will be very high and if these big business can control the supply chain and supply and distribution of goods and services, then there will be more profit and which will be disadvantageous to the small business people, the small scale industries especially.

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We call it unfair trade practice because these trade practices are for the purpose of promoting sale, any kind of promotion of sales which is related to the goods, supply of goods, warranties and then unfair method or deceptive practices whether it is the warranties which is oral in nature or written or visible representation. All this will come under the purview of unfair trade practice.

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In 1978 Justice Rajinder Singh Sachar was appointed in one committee to study. The committee submitted its report in 1978. And you can see that there was no consumer welfare provision at all at that point of time.

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And on false or misleading representations. It was mainly on the restrictive trade practices at that point of time. In 1991 you can find amendments which were necessary in order to open the economy in 1991 in India.

So, the liberalisation or globalisation or the opening up of economy, liberal economies mandated to amend our competition policies. And also we saw that the *monopolies and restrictive trade practices act* was not contributing to this competition in the market rather lead to more and more cartelization, collusions and price fixing and abuse of dominance. More importantly bid rigging and predatory pricing happened under the MRTP Act.

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So, we can see that the 1991 opening up of economy was compelled or facilitated by the IMF conditionalities which India faced at that point of time due to the crunch. India was compelled to take the IMF loan due to the balance of payment problems at that point of time which compelled India to end the Licence Raj System in 1991.

So, the conditionalities of the IMF compelled India to take away the Licence Raj System and abolish levy. The entire market has made a transformation due to these IMF conditionalities and has removed the hurdles in doing business in India like quantitative restrictions and preferential treatment to the domestic industry and also restrictions on the foreign direct investment. The government was compelled to take away all these restrictions in the Indian market.

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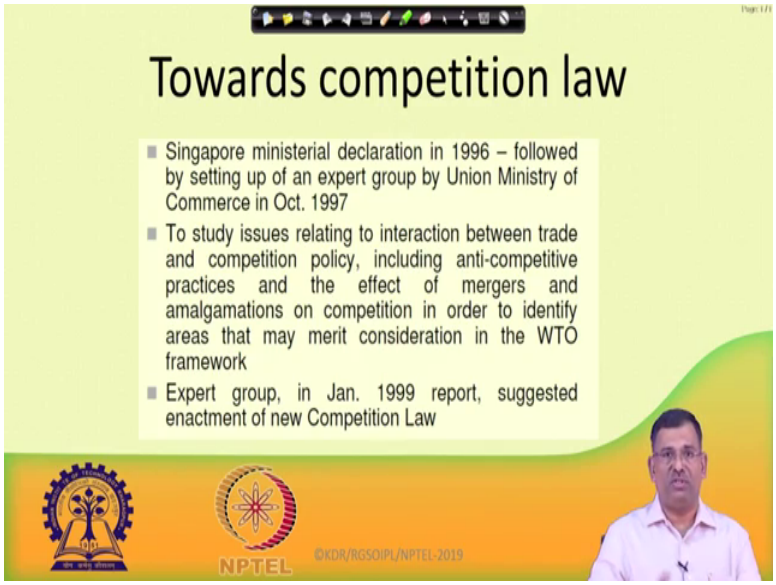

There was no other choice for India than to come out with a competition law at that point of time after the Singapore ministerial declaration, a WTO ministerial conference.

WTO ministerial conference in Singapore came out with the declaration in 1996 which emphasises on a competition law in each and every country. The union government set up a committee in 1997 to study the Indian scenario, the interaction between the trade and competition policy, the anti competitive practices, mergers and acquisitions and competition. Identifying these within the framework of WTO compelled India to appoint an expert group in 1999 which came out with recommendations.

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And in 1999 Raghavan committee was appointed to study the Indian market and to come out with a competition law in the country.

This is mainly on the background of many cases. Also India become a founding member of WTO which compelled India to come out with the changes in the policies like India amended its old intellectual property laws and most of the legislations India was compelled to amend and moreover India faced WTO cases like Indian agriculture case. India was forced to eliminate all quantitative restrictions, India was forced to amend its intellectual property laws, India was forced to change its investment policies in the auto case.

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So, all these combined together made India to think of a competition law and finally, and ultimately the committee came out with a bill which is in the form of competition provisions like any other developed country and you can find more parallels in the European Union which we will study in our other modules of the class. And you can find that even after enacting the 2002 act it was not operational mainly because of some of the disputes which were continuing in the different courts of India.

And you can find some of the very recent amendments in 2018 on “combinations”, the business relating to combinations in the Indian competition act. We will study about the Indian competition act in detail in the coming classes.

I would say that the journey from 1950 to 2002 was turbulent. Indian perspective changed from monopolistic and restrictive activities towards competition in the market and India enacted the C*ompetition Act* in 2002 which was operational from a later stage and which compelled India to a competitive economy and to adopt the competition policies in the market.

In the next class we will talk in detail about the act as well as the different policies which are adopted by India.

Thank you.