VISION 2017

SINDH JUDICIAL ACADEMY

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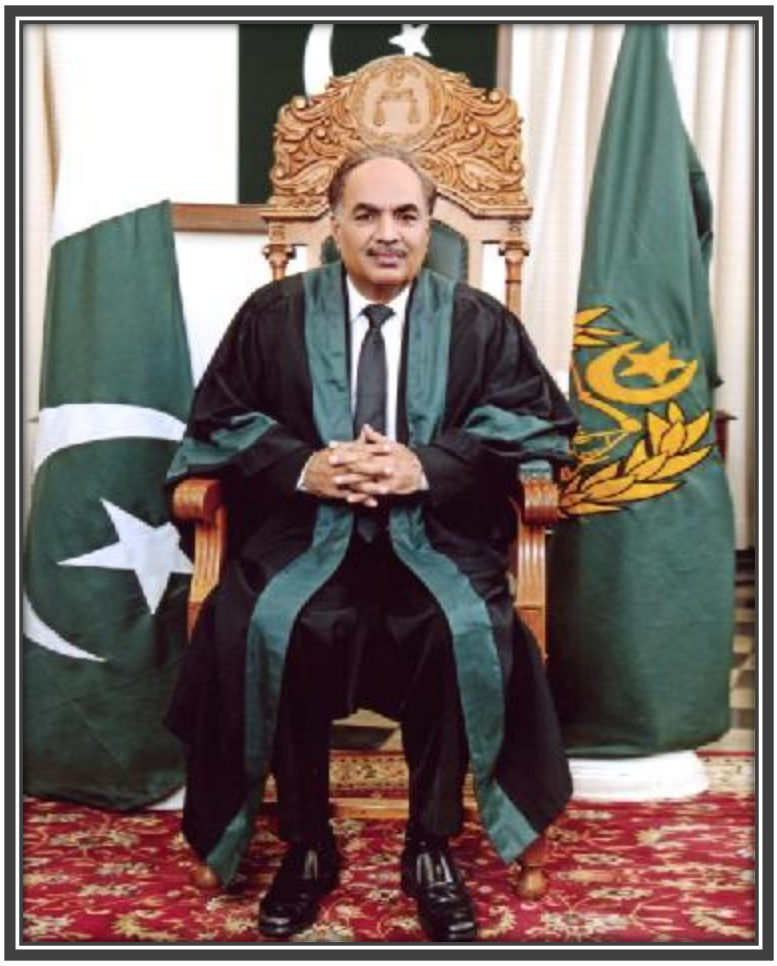


Mr. JUSTICE AHMED ALI M. SHAIKH

HONORABLE CHIEF JUSTICE HIGH COURT OF SINDH

MESSAGE

Hon'ble Chief Justice, High Court of Sindh.

The importance of Judicial Academies in the advancement of Justice Sector entities has been now well established throughout the world. Our province is pioneer in establishing the Sindh Judicial Academy back in 1993. I am pleased to recognize deep insight grafted by the Sindh Judicial Academy into its detailed Judicial Training Calendar for this year. Besides this, Sindh Judicial Academy has proposed an activity for setting up a process to deal with the causes of less effectiveness of our justice system and to bring consensus for paving a way towards success in the next ten years under the concept a Vision for justice 2027.

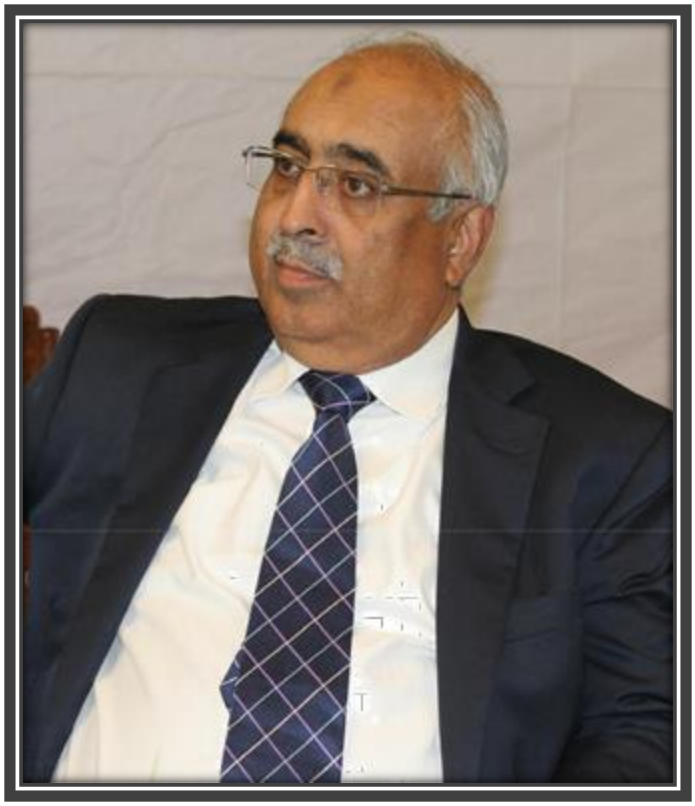
The Vision 2017-2027 was initially shared with me by the Director General, Sindh Judicial Academy. I believe it is first time in provincial judicial hierarchy whereby a log-term policy is being designed and the Sindh Judicial Academy has developed a step forward in this regard.

The Academy has shared number of soft reforms such as establishing Court Annexed Mediation Centre; suggesting amendments in the procedural and substantial laws; publication of Electronic Law Journal, research papers, law books; introducing distance learning and skills based training for judicial officers, practicing advocates, investigators and prosecutors which shall be considered in more detail in the workshop planned.

I appreciate the Academy's strategy as they before executing the ideas decided to consult with the stakeholders and thereafter on their suggestions would finalize the Vision 2017-2027.

I have been informed that Hon'ble Judges of apex court, leading advocates, high officials, media personnel have been invited. I hope the amalgam of diversified experience and intellectual approach of the worthy participants shall crystalize a productive and do able strategy to deal with the menace of justice system and upholds the mandate of our constitutional norms.

I extend my full cooperation with the Sindh Judicial Academy in this regard.



Mr. JUSTICE KHILJI ARIF HUSSAIN

DIRCTOR GENERAL SINDH JUDICIAL

MESSAGE

HONOURABLE DIRECTOR GENERAL

A Judicial Academy is known by imparting of judicial training at the pre-service and during service stage of services of Judges. It was long felt need to establish a Judicial

Academy in Sindh in order to improve the working and skill of district judiciary and their Staff, to achieve said purpose, the Sindh Judicial Academy was established by the Sindh Act No. IX of 1994 with the following objects:-

a) Legal orientation, training of members of the subordinate judiciary, law officers and members of the bar.

b) Continuous education of the members of the subordinate judiciary.

c) Holding of conferences, seminars, workshops for improving of judicial system and quality of judicial work.

d) Providing opinion and constitutional research.

e) To conduct departmental examination of the members of establishment of the High Court and subordinate Courts.

f) Publishing of general memorize, research papers and reports.

Sindh Judicial Academy, being the oldest Academy in Pakistan, is performing this job as per the mandate given by its Act. We have trained more than 63 batches, and participants of these batches are performing their duties with great zeal and dedication in these difficult times.

The academy was headed by prominent Judges like Z.A. Channa, Ghous Muhmmad, Saleem Akhtar, Shabbir

Ahmed and Ali Aslam Jafri. The Academy is arranging continuous judicial education programs for preservice and in service Judicial Officers of

Sindh, and transferring education, knowledge, skills, and habits of the legends of Judiciary to the next generation through teaching, training and research. It nurtures the Judicial Officers in a way that they may become 'the Judges of future" as visualized in Judge's Book published by the American National Judicial College;

"Although speculations about the judge of the future bring visions of robotic truth-assessing machines, law dispensing computers, and chemical-test-determined dispositions, human being, rather than mechanical marvels, will continue to exercise the fine art of judgment for any foreseeable future."

The Sindh Judicial Academy has developed an institutional culture by developing such syllabus of different courses and training manuals. After launching the newer version of our Website, I invite the senior judiciary from Sindh to contribute in its continuous uplifting by providing feedbacks and by writing articles and other material which can help the young Judges in performing the judicial duties. All the stake holders are also invited to use this Website as best tool of communications, among themselves as well as with Academy.

Moreover, I would request all the respectable judicial officers and others entities of judiciary to join our Forum for their regular communication, queries and even for productive chitchat.

Justice Khilji Arif Hussain
Former Judge, Supreme Court of Pakistan,
Director General, Sindh Judicial Academy

About Sindh Judicial Academy

In the beginning of the year 1992, the then Chief Justice and Judges of the Honorable High Court of Sindh felt the importance of judicial education and training for the judges in the province of Sindh. Thus, the Sindh Judicial Academy was set up in May 1992 under a resolution of the High Court of Sindh. In the year 1993, the Sindh Judicial Academy Ordinance, 1993 (Ordinance No. XVIII of 1993) was promulgated to provide legal cover for its working and functions. In the year 1994 Sindh Assembly repealed the Ordinance by the Sindh Judicial Academy Act, 1993 which was promulgated on 7th March, 1994 (Act IX/94). So far, SJA has trained 62 batches of judges, law officers including the officers of JAG branch of armed forces have been passed off by the Academy.

In the beginning, the Academy started functioning in a portion of the High Court Building under the able leadership of Late Justice Z.A. Channa. The Academy functioned for some time in a court room of the Annexe Building of the High Court with inadequate facilities but in the year, 2003 it was shifted to the High Court Bungalow Nos.1 & 2 at Bath Island, the present location. The High Court under the direct supervision of the Hon'ble Chief Justice, Mr. Justice Sabihuddin Ahmed, Mr. Jus-tice Ata ur Rehman, Mr. Justice Musheer Alam and Mr. Justice Arif Hussain Khilji completely renovated the Academic and Administrative blocks of the Academy and provided two furnished and renovated buildings to serve as hostels for the trainee judges. The Board of Governors (B.O.G.) provided a dynamic and visionary direction to the Academy. At this crucial point, the B.O.G. requested the present Directory General to lead the Academy, who accepted this responsibility and offered to work purely on honorary basis and started functioning as such W. E. F. 02-02-2007 afternoon.

To realize the vision and direction of the B.O.G. far reaching steps were taken to transform Academy in a Center of Excellence. The entire academic activities were carried out with the assistance of visiting faculty members but now a permanent faculty has been added to the Academy. In this respect, the Access to Justice Program (AJP) has assisted the Academy and Civil Law Expert, Criminal Law Expert and Curriculum Development Experts have been appointed. Now the training is

imparted by the permanent faculty members and visiting experts who comprise of retired judges and leading advocates. Previously the academic and hostel for the trainee judges were situated in the same premises but now besides the two separate blocks reserved for administrative and academic activities; two separate hostels are in operation. It was noticed that the output of the staff was at the minimal but due to proper organizational approach and orientation in the administrative set-up the output of the staff has increased. Some new posts have been created and now the Academy is running as an institution heading towards its goal of transforming into a Center of Excellence.

Board of Governors

1 Hon'ble Mr. Justice Sajjad Ali Shah, Chief Justice,
High Court of Sindh, Chairman
Sindh Judicial Academy, Karachi.

2 Hon'ble Mr. Justice Ahmed Ali Sheikh, Senior Puisne Judge,
High Court of Sindh,
Vice Chairman Sindh Judicial Academy, Karachi.

3 Mr. Salman Aslam But, Attorney General for Pakistan, Islamabad.
Advisor to Chief Minister Sindh For Law, Sindh Assembly Building,
Karachi.

4 Mr. Nisar Ahmed Durrani, Advocate General Sindh,
2nd Floor, Old Annexe Building, High Court of Sindh, Karachi.

5 Vacant
One District & Sessions Judge to be nominated.

6 Mr. Mushtaque Ahmed Memon, Senior Advocate & Member of Sindh High Court Bar Association.

7 Mr. Justice (R) Nasir Aslam Zahid, Dean, School of Law,
Hamdard University.

8 Mr. Prakash Lal Ambvan, Acting Secretary Law, Government of Sindh, Sindh Assembly Building, Karachi.

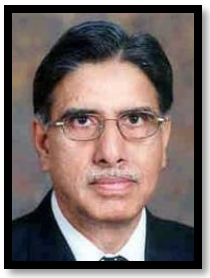
9 Mr. Javed Jabbar,
Former Senator and renowned Scholar, House No.57, Street 21,
Off. Kh-e-Mujahid, Phase-V, DHA, Karachi.

10 Mr. Ghulam Mustafa G. Memon, Registrar,
High Court of Sindh, Karachi.

11 Mr. Justice Khilji Arif Hussain Director General,
Sindh Judicial Academy, Karachi.

COMPETITION LAWS IN PAKISTAN & EU

By:
FORMER JUSTICE QAZI KHALID ALI
FOUNDING VICE CHANCELLOR OF
SHAHEED ZULFIQAR ALI BHUTTO UNIVERSITY OF LAW



I have been asked to speak on the "Competition Laws in Pakistan & E.U". This topic does not occupy purely a juridical field. Its inter-face with economics and sociology is paramount.

2. Conceptual Paradox Before I proceed to discuss the contemporary competition laws of our country a conceptual paradox is required to be understood in its true perspective.

2.1 In a purely capitalistic set-up the market forces are allowed to operate freely without any pertinent checks. This is what the economists call a "perfect competition" or "laissez faire" economy. The idea is that there are no checks on the stake-holders, and the economy is principally unplanned or unregulated. However, the economists confirm that even in as competition there comes a point when certain factors hinder a "laissez faire" state of affairs; and unless and until those factors are checked by statutory or executive regulation, a "laissez faire" state cannot prevail. The great economist Paul A. Samuelson, as quoted by S.M. Dugar in his book "Commentary on MRTP Law Competition Law and Consumer Protection Law" (2006, 4th Edition, Vol.I), confirms this in the following words:-

"By laissez faire one does not automatically get perfect competition. To reduce imperfections of competition, a nation must struggle perpetually and must ever maintain its vigilance."

2.2 This means that a monopolistic situation can deter free competition or a "laissez faire" state. Therefore, to create a better level playing field for free competition the state is called upon to legislate 'competition', 'antimonopoly' or 'anti-trust' (as known in the USA) laws. Sometimes the rai-son de etre for the promulgation of competition laws is to the desire create a welfare state so

as to hamper the con-centration of wealth into a few hands.

2.3 while in practice it makes no difference as to whether the competition laws are brought about with the objective to create a laissez faire economy or whether the intention is to create a welfare state, the basic objective behind such a legislation can, however, be important to gauge the national fabric of the society.

2.4 In my opinion any anti-monopoly or competition law can validly function within the dispensation prescribed by the Constitution of Pakistan, 1973. Article 18 of the Constitution protects the right to enter into lawful profession, occupation or conduct any lawful trade or business, how-ever, as per article 18(b) nothing shall pre-vent "the regulation of trade, commerce or industry in the interest of free competition therein." Again article 38 of our Constitution provides that the state shall, inter alia, prevent "the con-centration of wealth and means of production and distribution in the hands of a few to the detriment of general interest..." Article 18 and 38 of our Constitution reflect the same paradox which is at the heart of the economic debate in introducing competition laws i.e. article 18 of the Constitution prescribes regulation so as to provide a better and free competition in business, whereas article 38(a) of the Constitution provides for taking steps which would hamper concentration of wealth into a few hands.

2.5 I leave this paradox to be resolved by our policy or law-makers!

3.0 History of Competition Laws in Pakistan

3.1 On 18th April, 1947 the Government of United India promulgated the Capital Issues (Continuance of Control) Act, 1947. This Act was adapted on 14.8.1947 by Pakistan upon independence. The idea behind this statute was to regulate the issuance of capital with a view to control accumulation of wealth in a few hands. In order to relax the control the legislature subsequently promulgated the Capital Issues (Exemption) Order, 1967 with a view to exempt certain entities from the vigours of the Capital Issues (Continuance of Control) Act, 1947. But the basis of the formal anti-monopoly laws in Pakistan is the budget speech of the then Finance Minister for the fiscal year 1963-64, when for the first time in Pakistan he

announced the intention of the legislature to promulgate "antimonopoly laws". For such purpose an "Anti Cartel Law Study Group" was brought about, which prescribed the draft of the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance 1969. The said draft was published in the Gazette of Pakistan on 28.6.1969 for the purposes of eliciting public opinion. After consideration the comments received from the public, industry, financial institutions and academics on 26.2.1970 the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 (hereafter: "the 1970 Ordinance" was promulgated. This law was enforced on 17.8.1971, on which date the Federal Government also constituted the Monopoly Control Authority Vide SRO 315(I)/1971 dated 17.8.1971. Soon after the appointment of the Authority, rules regarding the procedure, fees and other matters for carrying out the purposes of law were notified in the gazette on 31.12.1971. These rules were termed as the Monopoly Control Authority Rules, 1971, Rule 10 of the said Rules provided that undertakings, individuals and agreements which attracted the provisions of the registration were asked to get themselves registered with the Authority by 15.1.1972 or within 15 days of the date when such undertakings, individuals or agreements became registrable under law.

3.2 Between 1972 and 1977 the major industries of the country were nationalized in view of this shift in the economic policy to regulate the economy and discourage private ownership. Thus the 1970 Ordinance was not put into much application. However, post 1977 the government again encouraged private enterprises as a result of which there has been both legislative amendments to and court cases arising out of the 1970 Ordinance.

3.3 The fundamental approach of the 1970 Ordinance was to expressly prohibit unreasonable growth in the following situations:-

a) Undue concentration of economic power;

b) Unreasonable monopoly power;

c) Unreasonable restricted trade practices.

(See PLD 2008 Karachi 583 titled Exide Pakistan Ltd Vs Malik Abdul Wadood,

authored by Speaker for High Court of Sindh as he then was a Judge)

3.4 The 1970 Ordinance did not per se prohibit the above three situations, as was prescribed in the American Anti-Trust Laws (see "Competition in British Industry" by Swaun, Brien, Maunder and Howe, 1974). Instead the 1970 Ordinance stipulated a case to case approach and under it each situation was to adjudged on its own merits through the test of reasonableness. The anti-monopoly law as pre-scribed through the 1970 Ordinance in Pakistan was largely based upon the British legal system as it prevailed then. In the British system, prevalent from the 1960s to the 1980s no practice was regarded as illegal or even presumed contrary to the public interest (see "The Law of Restrictive Trade Practices and Monopolies" by Lord Wilberforce, Allan and Neil, 1966).

3.5 As stated above, after 1977 there has been a plethora of case law developed by the Pakistani courts with regards the 1970 Ordinance. In Haji Ismail Dossa v. Monopoly Control Authority PLD 1984 Karachi 315 a learned Single Judge of the Sindh High Court was pleased to observe that the 1970 ordinance was an economic legislation intended to create an economic system which would not result in the concentration of economic power, monopolization and create unreasonably restricted trade practice. Writing for the Court, Saleem Akhtar J, as he then was, observed as follows:-

"From its very nature the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 imposes restrictions on trade, commerce and business. The object of the Ordinance is to prevent concentration of wealth in the hands of a few and to curb monopolistic and expansionist tendencies in trade, commerce, industry and business. It prohibits undue concentration of economic power, unreasonable monopoly power and eliminate unreasonably restrictive trade practices from the market. It also discourages such trade practices which prevent, restrain or lessen com-petition. The Ordinance is designed to restrict and prohibit. In public interest, dealings, agreements, arrangements and practices which create monopoly and economic power and unreasonably control the business, undertaking and market. These economic evils as specified in the Ordinance have been considered detrimental to public interest

therefore, the Ordinance has provided measures to regulate, check or eliminate them."

In re: Islamization of Law PLD 1985 FSC 193 a full bench of the Federal Shariat Court was pleased to observe that the objects of the 1970 Ordinance advanced the objectives of Sharia. It was observed that the main object of the 1970 Ordinance was to ensure that the wealthy did not become wealthier and the poor did not get poorer in view of the entities acquiring monopoly in their respective fields and in-creasing prices so as to control market and restrict supplies. Reference is also invited to a judgment of the Division Bench of the Sindh High Court reported as Habib Bank Limited v. Monopoly Control Authority 1986 CLC 2489. In this decision it was observed that the aims of the 1970 Ordinance was to break the monopolies and avoid concentration of economic power. It was held that one of the modes of avoiding undue concentration of economic power was to break or at least weaken such associations which were commonly managed but had semblance of separate entities. Right from the inception till date we have seen in Pakistan that the economic power or concentration of wealth has been in the hands of the few. During the days of Ayub Khan it was a known fact that the entire concentration of wealth was in the hands of 22 families of Pakistan. In Rafan Maize Product Company Limited V. Monopoly Control Authority PLD 1986 Lahore 346_it was recognized that the objectives of the 1970 Ordinance was to, inter alia, distribute the economic power which was concentrated in the hands of individual and their families. It was further observed that the idea behind the law was to eliminate such narrow family oriented attitudes of the entrepreneurs and the subsequent establishment of professional management to control enterprises, which are in turn managed and controlled by big business family groups. In Sanaullah Woolen Mills V. Monopoly Control Authority PLD 1987 SC 202 the Supreme Court of Pakistan expounded the criteria to judge "concentration of economic power." It was held that the magnitude of the undertaking had a direct nexus with "concentration of economic power". The manner in which the 1970 Ordinance prescribed norms and actions is very ably analyzed in a judgment of the Lahore High Court reported as Pakistan Industrial Promotors Limited v. Monopoly Control Authority 1990 CLC

1008; a relevant excerpt from the judgment of Abdul Majeed Tiwana J, as then he was, is underscored for convenience as follows:-

7. "The purpose of the Ordinance is stated in section 3 thereof which prohibits undue concentration of economic power, unreasonable monopoly power, and unreasonably restrictive trade practices because these factors give rise to uneven distribution of wealth amongst different sections of society, ultimately leading to unrest, strife and conflict amongst them, thereby regarding economic growth and impairing its general welfare. To achieve this object the Ordinance creates a body known as Monopoly Control Authority which administers this law and in that context exercises many power and performs various functions. The first step in this direction is the collection of necessary information and data from those engaged in business and commerce in the private sector and that is done through the process of registration as embodied in section 16 of the Ordinance and the rules made thereunder. After completing this step, the Authority begins the process of inquiry and if it prima facie finds that the provisions of section 3 ibid have been or are likely to be contravened it passes an order under section 12 after following the procedure laid down in section 11 and keeping in view the guidelines given in sections 4, 5 and 6 of the ordinance. Section 19 thereof empowers the Authority to impose penalty if its order is not complied with or any person or undertaking does not himself or itself registered under the Ordinance. In nutshell this is the scheme of the Ordinance".

In Arshad Mehmood V. Government of Pakistan PLD 2005SC 193 the Supreme Court of Pakistan found a franchise to be a privileged contract aimed at creating a monopoly and popularly known as a "CARTEL". This judgment also lays down tests as to how reasonableness of restriction with regards the fundamental right pertaining to freedom of trade, business or profession has to be adjudged.

4. The Competition Ordinance, 2007

4.1 The Competition Ordinance, 2007 (hereafter: "the 2007 Ordinance") (reported in PLJ 2008 Federal Statutes 292) was promulgated on 2nd of October, 2007. Vide section 59(a) the 2007 Ordinance

repealed the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970. The said 2007 Ordinance came into force on the date of its promulgation mentioned above. The 2007 Ordinance was repealed by the section 61 of the Competition Act, 2010, which was published in the Gazette of Pakistan, Extra-Ordinary Part I dated 13-10¬2010 from pages 645 to 677 (Hereafter Act XIX of 2010). This law has made a clear departure from the standards which were prescribed in the 1970 Ordinance. As mentioned above, under the 1970 Ordinance every action was tested on the touch-stone of reasonableness. In striking contrast under the 2007 Ordinance and Act XIX of 2010 clear standards are provided as to what would be permissible and what would be impermissible. As such, in term of providing legal certainty the Act XIX of 2010 is a definite improvement.

5. The Competition Act, 2010 (Act XIX of 2010)

5.1 Under section 3 of the Act XIX of 2010, no person shall abuse "dominant position" [see section 3(1)]. I n turn it has been provided that "dominant position" shall be deemed to have been brought about if there are "practices" which prevent, restrict, reduce or distort competition in the "Relevant market" [see section 3(2)]. Section 3(3) defines that the expression "practices" shall include and not be limited to the following situations:-

(a) "Limiting production, sales and unreasonable in-crease in prices or other unfair trading conditions;

(b) Price discrimination by charging different prices for the same goods or services from different customers in the absence of objective justifications that may justify different prices;

(c) Tie-ins, where the sale of goods or services is made conditional on the purchase of other goods or services;

(d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage, have no connection with the subject of the contracts;

(e) Applying dissimilar conditions to equivalent trans-actions on other parties, placing them at a competitive disadvantages;

(f) Predatory pricing driving competitors out of a market, prevent new entry, and monopolize the market;

(g) Boycotting or excluding any other undertaking from the production, distribution of sale of any goods or the provision of any service; or

(h) Refusing to deal. ”The term “dominant position” has been defined in section 2(e) as follows:-

“2(e) ‘dominant position’ of one undertaking or several undertakings in a relevant market shall be deemed to exist if such undertaking or undertakings have the ability to behave to an appreciable extent independently of competitors, customers, consumers and suppliers and the position of an undertaking shall be presumed to be dominant if its share of the relevant market exceeds forty percent.”

5.2 Apart from the abuse of dominant position the Act XIX of 2010 prohibits the execution of certain agreements in section 4. According to section 4(1) of the Act XIX of 2010 an undertaking and associations of undertaking are prohibited from entering into any agreement calculated to be a decision in respect of the production, supply, distribution, acquisition or control of goods or the provision of services, which have the object or effect of preventing, restricting or reducing competition within the relevant market, unless exempted under section 5 of the Act XIX of 2010. Again section 4(2) provides that the prohibited agreement shall include and not be limited to the following:-

“(a) fixing the purchase or selling price or imposing any other restrictive trading conditions with regard to the sale of distribution of any goods or the provision of any services;

(b) Dividing or sharing of markets for goods or services, whether by territories, by volume of sales or purchases, by type of goods or services sold or by any other means;

(c) Fixing or setting the quantity of production, distribution or sale with regard to any goods or the manner or means of providing any services;

(d) Limiting technical development or investment with regard to the production, distribution or sale of any goods or the provision of any service, or

(e) Collusive tendering or bidding for sale, purchase or procurement of any goods or service;

(f) Applying dissimilar conditions to equivalent trans-actions with other trading parties, thereby placing them at a disadvantage; and

(g) Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

5.3 It is clearly provided in section 4(3) of the Act XIX of 2010 that any agreement in violation of section 4 of the Act XIX of 2010 shall be void.

5.4 An important feature of section 3(3) and section 4(2) of the Act XIX of 2010 is that the definitions of "practices" and "prohibited agreements" are not exhaustive, the two definitions being inclusive. This is an important aspect of the statute since the law-makers cannot possibly foresee and add to these lists all the possible eventualities, there-fore the two lists have been left flexible.

5.5 The statute provides for individual exemption from the Act XIX of 2010 which can be granted by the Commission under section 5 and for block exemption from the operation of the Act XIX of 2010 in section 7 thereof.

5.6 Very importantly the Act XIX of 2010 in section 10 denounces deceptive marketing practices. In other words, the law regarding misrepresentation has been reiterated.

5.7 An important feature of the Act XIX of 2010 in section 11 thereof which clearly provides that no undertaking shall enter into a merger which substantially lessens com-petition by creating or strengthening dominant position in the relevant market. The term "relevant market" has been defined in section 2(k) of the Act XIX of 2010 in terms of both a "product market" and a "geographic market".

5.8 For the purposes of monitoring the Act XIX of 2010 the said statute provides for the establishment of a Com-mission which is to comprise not less than 5 and not more than 7 members, while the government is given the power to increase or decrease such membership. The members of the Commission are appointed by the Federal government for a complete term; not more than 2members of the Com-mission shall be from the federal government. This is to ensure that the Commission is represented by persons from the private sector as well.

5.9 The Commission has been made financially independent by creation of a fund so as to meet the

charges and its expenses including salaries of its members and staff. The Commission is required to keep proper accounts and shall be subject to audit and has to file an annual report.

5.10 Under section 33 of the Act XIX of 2010 the Commission is given the same power as a civil court under the Code of Civil Procedure 1908 (Act V of 1988) and the proceedings are deemed to be judicial proceedings within the manner of the Pakistan Panel Code (Act XLV of 1860) and the Criminal Procedure Code 1898 (Act V of 1898). The Commission has the power to enter and search premises, force entry, call information and undertake enquiries and studies.

5.11 The hallmark of the Act XIX of 2010 is provided in section 29 which caters to promote awareness. The Com-mission is empowered to impose penalties in case of contravention under section 30, while under section 31 it has powers to issue orders which fall under the following broad categories:-

(a) In case of abuse dominant position the undertaking can be required to take certain steps so as to re-store competition;

(b) In case of prohibited agreements the commission can either annul the agreement or require the undertaking concerned to amend the agreement;

(c) In case of deceptive marketing practices the Com-mission can confiscate, forfeit or destroy the property or product or the guilty party can be directed to restore the previous market position;

(d) In case of merger it can either authorize them, un-conditionally or conditionally or review them.

5.12 Under section 32 the Commission has the power to grant interim orders. Section 38 of the Act XIX of 2010 allows the Commission to impose penalties whereas u/s 39 the Commission can afford leniency.

5.13 An order of a single member of the Commission is appealable before the Appellate Bench (section 41), while an order of two or more members of the Commission or the Appellate Bench , as the case may be ,is appealable before the Competition Appellate Tribunal Act XIX of 2010.

5.14 An order of Competition Appellate Tribunal, is appealable before the Supreme Court under 44 of the Act XIX of 2010.

6. Selected Foreign Competition Regimes:

6.1 The American Sherman Act, 1890 is reckoned to be started point of modern competition or antitrust laws. Senator Sherman of the USA himself recognized that the American Sherman Act, 1890 was based in part on the Constitution of Zeno, Emperor of the East from 474 to 491 AD. According to Mark Furste in "Competition Law of the EC and UK" Sixth, Edition, 2008, this is not a correct statement. Ac-cording to him the Roman Legislation dealt with anti-monopoly laws even some 500 years before the Constitution of Zeno.

6.2 Be that as it may, at the time of Magnacarta, 1215 legislation provided that all monopolies were contrary to the law as they had a bearing on individual freedoms. In modern times the two contemporary statutes which govern competition laws in the UK are the Competition Act, 1998 and the Enterprise Act, 2002.

6.3 Article 81 and 82 of the European Treaty provide for the control anti-competitive agreements scheme and dominant firm abuses.

6.4 In India the Monopoly and Restrictive Trade Practices Act, 1969 had principally provided a similar anti-monopoly regime which was provided under our 1970 Ordinance,. In India the anti-monopoly law was brought about in view of recommendations given by the Monopolies Inquiry Com-mission which was set up by the Government of India in 1964. The Indian anti-monopoly law was principally based upon the UK legislation in particular the Restrictive Trade Practices Act, 1956 the resale prices Act, 1964 and the UK fair Trading Act, 1973. Anti-Trust Legislation in USA notably the Sherman Act, Clayton Act and the Federal Trade Com-mission Act, as also the Australian and Canadian legislation on the subject have also been a guide in framing the Indian legislation (see S.M. Dugar, cited as above at page1)

6.5 EU COMPETITION LAW

Together with its public services, the Europe Union's market economy, which competition law aims to protect from un-fair trade practices and private monopolization generates GBP 14.303 trillion in 2013.

6.6 European competition law promotes the maintenance of competition with the European Union by regulating anti-competitive

conduct by companies to ensure that they do not create Cartels and monopolies that would dam-age the interest of society. With a history that traces back to the prohibition on the restraint of trade, and influenced by the experience of the United States Sherman Act, 1890, and the Clayteon Act, 1914, European Competition law to-day derives mostly from article101 to 109 of the treaty on the functioning of the European Union, as well as series of Regulations and Directives. Four main policy areas includes:-

a. Cartels, or control of collusion and other anti - competitive practices under article 101 of the treaty of the functioning of the European Union (TFEU).

b. Market dominance, or preventing the abuse of firm's dominant market position under article 102 TFEU.

c. Mergers, control of proposed mergers acquisitions and joint ventures involving companies that have a certain, defined amount turnover in the EU, according to the merger regulation.

d. State aid, control of direct and in-direct aid given by member's states of the European Unions to the Companies under TFEU article 107.

This last point is a unique characteristic of the European Union Competition Law regime. As the European Union is made up of independent member's states, both competition Policy and creation of the European Single market could be rendered ineffective, were member states free to support national Companies as they saw fit. A 2013 Civitas report list some of the artifices used by participants to the state aid rules on procurement. Primary authority for applying Competition Law within European Union rests with European Commission and its Directorate General for Competition, although state aids in some sectors, such as transport, are handled by other Directorate General. The Directorates can mandate that improperly given state aid be repaid, as was case in 2012 with Malev Hungarion Airlines.

7.0 Corporate Veil

7.1 The discussions will not be complete unless some-thing is also said about the concept of "veil of incorporation" in company law. One of the important aspects of any competition law is to explore as to whether there exists a fit case for piercing the veil incorporation. In the classical Pronouncement of Salomon

V. Salomon case (1897) AC 22 it was held that a company is an entity distinct from its members. This concept found in English Company Law is very much recognized in Pakistan. The Courts in Pakistan following the English Law have also expounded tests as to when the corporate veil would be pierced. In Union Council V. Associated Cement (Pvt) Ltd 1993 SCMR 468 the Supreme Court of Pakistan found that in certain events the veil of incorporation could be lifted. One of such instances was fraud. Earlier, the Supreme Court of Pakistan in the President v. Justice Shoukat Ali PLD 1971 SC 585 was pleased to pierce the veil of incorporation so as to determine the true relationship of the share-holders with the company.

EXECUTION PROCEEDINGS IN BANKING COURTS

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Section 19 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (the Ordinance) provides a mechanism to initiate process to exe-cute decree of the court. It defines steps to be followed. Upon pronouncement of judgment and decree by a banking court, the suit is automatically converted into execution proceeding. The decree holder is not required to file separate application, however mode of execution is highlighted by the decree holder and accordingly detail of assets, if any, is pro-vided to the court. This provision of law empowers financial institution to initiate sale of mortgaged, pledged or hypothecated property. Section 19(3) & (4) of the Ordinance describes procedure to sell an immoveable property by a financial institution without intervention of the court. This mode is not in practice after declaring section 15 of the Ordinance as void by the Hon'ble Supreme Court of Pakistan in the case of Baz Muhammad Kakar and others v. Federation of Pakistan through Ministry of Law and Justice, Islamabad and others [PLD 2012 SC 870].

Auction process is initiated by the courts after assessing the liability judiciously. Sub-section 7 of section 19 of the Ordinance provides a procedure to entertain objection and investigate a claim of an objector/claimant within thirty (30) days from the date of filing the claim. A summary procedure is opted to decide the claim. Banking court may in its discretion proceeds with the sale of property provided that the financial institution gives a written undertaking that in the event the objections are found to be valid, or are sustained, it shall in addition to compensating the aggrieved party by the payment of such amount as may be adjudged by the Banking Court also pay a penalty

up to twenty percent of the sale proceeds.

2. Civil Procedure Code, 1908 (the Code) provides a comprehensive procedure to execute and enforce execution of a decree. Section 51 of the Code provides five modes to execute the decree, which are:

(a) By delivery of any property specifically decreed;

(b) By attachment and sale or by sale without attachment of any property;

(c) By arrest and detention in prison;

(d) By appointing a receiver; Or

(e) In such other manner as the nature of the relief granted may re-quire.

Arrest of a judgment debtor is avoided as there is limited scope when a person may be detained in prison. Section 51 of the Code elaborates circumstances when arrest can be affected. However in any case a woman is not arrested as to execute decree of a court.

3. Order XXI, Rule 11 of the Code explains information to be incorporated in execution application. It is a normal practice in the banking courts that the decree holder formally files written execution application in the manner as defined under Order XXI, Rule 11(2) of the Code.

4. In most cases those are filed before banking courts, finances are secured by executing a mortgaged deed. In a few cases finance is not secured, such as Personal Loan, Credit Card facility. In such cases for executing a decree the decree holder opts to cause arrest of judgment debtor. Or-der XXI, Rule 37 of the Code states that before issuing war-rant of arrest a notice is to be issued to call upon the judgment debtor to appear before the court and show cause why he should not be detained in prison. Under Order XXI, Rule 38 of the Code warrant of arrest is issued and object of such warrant is to recover the decretal amount and if such amount is paid his arrest is not affected.

5. In the case of unsecured loan the decree holder may request to court to attach moveable and immoveable properties of the judgment debtor. Most of the time, after attachment, objection are filed by the judgment debtor or any person having claim or interest in the

property. Under Order XXI, Rule 54 of the Code courts attach immoveable property and under Rule 58 objections are filed and decided. During pendency of such application the sale can be postponed. In such situation claimant and objector is asked to adduce evidence as to show that on the date of attachment he had a title, right or interest in the property attached. Rule 62 states that all questions relating to right, title or interest shall be decided by the executing court and no separate suit shall lie. Rule 65 states that sale will be con-ducted by an officer of the court or by such other person as the court may appoint in this behalf. It also states that sale be made by public auction. This is the reason that most of the time Nazir of the court is appointed to conduct sale. Procedure for public auction has been defined in Order XXI of the Code. A Notice under Order XXI, Rule 66 of the Code is issued which explains description of property offered for sale, its forced value and terms and conditions of sale. In the first instance the notice is served upon the judgment debtor and upon the service of the notice he is given opportunity to file objections. In case objections are filed, are examined and accordingly terms and conditions of sale are finalized. Most of the time judgment debtor disputes assessed value of the immoveable property. The court at the initial stage normally considers valuation report filed by the decree holder. In case of differences, the judgment debtor may be asked to submit valuation report or the court may itself direct to an independent valuator for re-assessment. Once the terms and conditions are finalized a public auction notice is issued through publication in two daily newspapers. Notices are also affixed at the outer door of the mort-gaged property. Banners are also affixed at the prominent places including the property going to be sold.

6. Sometimes on the day of sale or before it objections are filed with the prayer to postpone the sale. Order XXI, Rule 65 of the Code empowers the courts to stop the sale. In case sale is adjourned for a longer period than seven (7) days, a fresh proclamation notice under Order XXI, Rule 67 of the Code is made unless the judgment debtor consents to waive it.

7. In case on the fix date sale is conducted, and the purchasers/bidders deposit 25% of their bid amount; the highest bidder is asked to deposit rest of the amount

with-in fifteen (15) days. In case he fails to deposit remaining amount, initial deposit may be forfeited as provided under Order XXI, Rule 86 of the Code. Sometimes after the sale an application is filed under Order XXI, Rule 89 of the Code by an objector claiming his interest in the property sold. He, while applying under Order XXI, Rule 89 of the Code, has to deposit an amount equal to 5% of the purchase money for the purchaser and the amount specified in sale proclamation for the decree holder. Order XXI, Rule 90 of the Code also deals to set-aside sale on the ground of irregularity and fraud. For filing application under this rule, it is mandatory for the person filing application to deposit up to 20% of the sum realized the sale or furnishes such security. Once a sale is finalized, Sale Certificate is issued under Order XXI, Rule 94 of the Code on the 30th day of the sale and accordingly property is transferred by the concerned authority in favor of the purchaser. The decree holder withdraws the amount equivalent to their claim and rest is return to the judgment debtor.

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PROSECUTION IN PAKISTAN VIZ-A-VIZ IN OCCIDENTAL COUNTRIES- AN OVERVIEW

BY: M. MEHBOOB AWAN 1ST ADJ

The criminal justice system is the set of agencies and processes established by governments to control crime and impose penalties on those who violate laws. Criminal law in Pakistan and the procedural codes that are followed are very different in their application from the criminal law that is followed in the developed world. For a layman, Criminal Justice System means the entire state machinery which is channelized in order to control crime in society. It consists of, the legislature / criminal procedure which regulates how an accused is tried in a criminal court for any offence; The second branch of the criminal justice system is the executive which appoints police officials who detect and investigate crimes and the prosecutors who prosecute the accused in the courts of law; The third branch are the courts which try an accused; Fourth is the lawyers who defend the accused; and Finally is the prison system where convicted and under trial prisoners are lodged.

Historical record and present statistics suggest that Pakistan is ailing in discharging justice in true spirit. There is plethora of examples that suggest that there are severe lapses in the criminal justice system of Pakistan. Multiple factors are liable to aggravate such injustice. In this regard, let's discuss the role of prosecution that literally seems to be flawed and presumes to be a leading cause of miscarriage of justice, with a comparative assessment with the western countries. A severely deficient pre-trial phase is the main cause of weak prosecution cases. Evidence is poorly recorded and stored, lost, compromised, falsified or simply inadequate; crime scenes are regularly contaminated. It is the main responsibility of police to ensure law and order and implement law in the society so it is essential for police to bring criminals/ law breakers to the court of law for justice through investigation facts. Without proper criminal investigation it is impossible to prove the crime in Court. Thus criminal investigation has a great importance in any society of the world and so in our country. It is said that in United States has almost 18000 public

law enforcement agencies at the Federal, State and local levels of governments Each of the 69 federal law enforcement agencies large and small has a specific jurisdiction, although one criminal event may involve crimes that give several federal agencies concurrent jurisdiction and conduct the criminal investigation. But in Pakistan situation is totally different and concerned police is authorized to conduct criminal investigation (inquiry) at various levels in the same department. In Pakistan when a FIR is registered at Police Station, Generally Station House Officer (SHO), who is head of the police station, would assign duty to a lower rank officer usually the rank of Assistant Sub Inspector (ASI) or to Sub Inspector to conduct the investigation, who mostly have no proper training or technical experience. What he has seen during the police job according to that experience he would conduct the inquiry and will prepare a report, regarding that crime, which is called "Challans" and it is submitted to the concerned court. Being an important task to search out truth regarding so sensitive responsibility is just nothing to do with so seriousness. Generally it is the cause that police do not get success in most of the criminal investigation and the alleged accused being the culprit gets freed just because of lack of substantial evidence. Whereas, in developed countries like USA, UK and Australia ample evidence is collected during the preliminary investigation so that the alleged accused may not receive any benefit of doubt or concession due to the lapses of prosecution. In Pakistan an Investigation Officer follows the following route to conduct the investigation i.e. i) Proceedings to spot

ii) Ascertainment of facts and circumstances of case iii) Discovery and arrest of suspected offender IV) Collection of evidence; and only an officer In charge of police station has jurisdiction to investigate a cognizable offence. On the other hand in the United States there are three major sources in which police suspicion is aroused; i) A victim or other witness complains ii) An officer on patrol observes a crime iii) Police units actively search out a crime. Hence, both the procedures are systematically contrasting and we can judge easily as to which procedure is result-oriented. There are no scientific sources introduced in the police to investigate criminal cases but still it

depends on old conventional tactics and barbaric sources to investigate the crime. The government has done very little to train police for investigation. Forensic, DNA, medical, etc. testing and investigations are outdated and ill-managed to conduct investigation. Karachi is the biggest city of the country but even there police is facing dearth of modem methods and scientific technology and rely heavily on Mukhbars (Informers) and forensic evidence is relegated to a secondary position. Statistics suggest that Pakistan has only 18 Forensic science labs with DNA facility. Low budget to police has caused lower rates of recruitment in Police. A senior investigator of Sindh Police suitably describes while saying that;

> "If you analyze the ratio of crime to the number of available investigators, you find a huge imbalance. The police force does not have a proper shift system. What you need is to distinguish between shifts (for example, day and night; urban and rural), and then determine the number of investigators you need in each shift based on population and crime rate"

RECOMMENDATIONS:-

Monitoring committee be formed at district level to keep a check over performance of prosecutors and particularly oversee the genuineness of FIRs lodged at concerned districts. Raising police and prosecutors' salaries and facilities. Providing security of tenure to prosecutors, empowering them to reject weak cases, as well as specialized training in such fields as homicide and counter-terrorism, and integrating it with related police training programs; Mandating joint police-prosecutor committees to oversee investigations; Establishing a committee within each prosecution service, headed by the prosecutor general and comprising respected jurists, to examine the number of cases an individual. Creating new vacancies and speeding up the recruitment process in police service to meet the demands. Allocations of surplus funds as other investigation agencies are provided.