CARTELS IN SHARIAH AND IN LAW WITH REFERENCE TO COMPETITION ORDINANCE, 2007

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LIST OFABBREVIATIONS

OECD	Organization for Economic Cooperation and development
WTO	World Trade Organization
MRTPO	Monopolies and restrictive Trade Practices Ordinance
UK	United Kingdom
USA	United States of America
EEC	European Economic Community
OFT	Office of the Fair Trading
CAT	Competition Appeals Tribunal
EU	European Union
MCA	Monopolies Control Authority
CCP	Competition Commission of Pakistan
SCC	State Cement Corporation
ECC	Economic Coordination Committee
MOIP	Ministry of Industries and Production
FFC	Fauji Fertilizers Corporation
APCMA	All Pakistan Cement Manufacturing association
PBA	Pakistan Banks Association
SBP	State Bank of Pakistan
NBP	National Bank of Pakistan
DFIs	Development Financial institutions
ESA	Enhanced Saving Accounts
PSMA	Pakistan Sugar mills Association
UNCTAD	United Nations Conference on Trade and Development

Dedication

I dedicate this work

To My PARENTS

Who supported me throughout my educational career.

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Syed Liaqat Ali Khan.

ABSTRACT

CARTELS IN SHARIAH AND IN LAW WITH REFERENCE TO COMPETITION ORDINANCE, 2007

By

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Competition law is a branch of economic law; its purpose is to control the behavior of economic agents. It is true that economics provides theoretical basis for the competition law and policy. In reward the Competition law makes the business activity fair and transparent.

For the issue of anti-competitive market practices, including cartels, there is solution both in the modern law as well as in *Shariah*. Present research topic, "Cartels in *Shariah* and in law with reference to Competition Ordinance, 2007" reveals its importance, to evaluate the Competition Law of Pakistan as well as the rules of *Shariah* about anti-competitive business practices including cartels problem. The scope of research also extends to some sector vise anti-competitive analysis of the economy.

The teachings and directives of *Shariah* with reference to competition law can be traced in the basic sources of Islamic law i.e. Holy *Quran* and the *Sunnah* of the Holy Prophet (peace be upon him). The rules of competition law in *Shariah* may be derived from the doctrine of, objectives of *Shariah (maqasid-al-shariah),* public

interest *(maslahah)*, blocking the means to an evil deed *(sadd-al-zarai)*, using the rights unfairly *(su isti'mal al-haq)* and Islamic legal maxims *(qawaid al-fiqh)*.

Cartels are the most blatant form of anti competitive business practice, which shake the foundations of economy, in such practice, the competitor firms do a secret agreement that they will not compete with each other, and the agreement is either to limit the production jointly or raise the prices. The consequent looser in these arrangements is the consumer.

The first ever law regarding competition in Pakistan after its independence was Control Act, 1947 which was a broad based law in its approach. Then the Monopolies and Restrictive Trade Practices (Control and Prevention) ordinance, 1970 was promulgated, which was the first specific piece of anti-monopoly legislation in Pakistan. But this law could not achieve its aim of ensuring free and fair competition, therefore it was superseded by the Competition ordinance, 2007 and the Monopolies Control Authority (MCA) was replaced by the Competition Commission of Pakistan (CCP).

In the Ordinance there are provisions that deal with cartel agreements, but despite these provisions the dream of fair competition could not convert into reality. In different industries cartels have been reported and the problems of prices hike, commodities scarcity crisis and inflation affected the consumers as well as the economic growth, this is due to certain hurdles in the effective implementation of the law. The hurdles in the way of proper implementation are also pointed out, and some suggestions are also given to make the competition law more effective and fruitful.

CHAPTER 1

INTRODUCTION

Competition Law: Definitions, History, Theories, Modern Competition Laws, its status in *Shariah* and Need for competition law

1.1 Definitions

1.1.1 Competition law

Black's Law Dictionary defines competition as, the effort or action of two or more commercial interests to obtain the same business from third parties[1]. Advance Law Lexicon defines the competition policy and competition law: It is the legislation and regulations designed to protect and stimulate competition in markets by outlawing anticompetitive business practices such as cartels, market sharing or price fixing[2].

Competition is the precondition that protects freedom of decision and action of self-interested individuals from leading to anarchy or chaos, but rather to economically optimal, socially fair and desirable market results[3]. Competition law is the legal framework to give effect

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[1] *Black's Law Dictionary*, s.v. "competition" (London; West Publishing Company, 1999) Ed.7th, p.209

[2] *Advance Law Lexicon,* s.v. "competition policy" (Nagpur; Butter Worth Wadhawa) Ed. 3rd vol. 1, p.925

[3] Adam Smith, quoted in, W. Lachman, *"the development dimensions of competition law and policy", part.1 fundamentals,* (Geneva: UNCTAD, 1999) p.3 available at http://www.unctad.org/en/docs/poitcdclpm9.en.pdf visited on 22 February, 2009.

to the competition policy. By competition or antitrust law, economists usually mean government interventions for securing market competition[4].

Broadly speaking competition in market based economies refers to a situation in which firms or sellers independently strive for buyer's patronage to achieve particular objective e.g. profit, sales and market share. In other words we may say that competition is the 'object' that is fostered, protected and promoted by competition policy and law, as the Advance Law Lexicon has defined it. So, the competition law can be termed as a set of governmental measures that may stimulate competition, protect consumers and business firms from the evils and bad effects of cartelization, monopolies and market entry barriers. The policy areas that fall in its purview include control of abusive practices of dominant market position, control of mergers to prevent monopolization, and control of anti-competitive behavior including cartels.

1.1.2 Cartels

Advance Law Lexicon enlisted the definitions of different enactments and organizations, for cartels. Some of them are:

"Cartels" includes an association of producers, sellers, distributors, traders or services providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.[competition Act, 2002 (12 of 2003), S.2 (c)]

Arrangement between firms to control a market--for example, to fix prices or limit competition between members of the cartel. (WTO).

[4] Rachagan S.S, *"competition policy and law in the consumer and development interest"* in (UNCTAD, communication from consumer international Asia pacific office, July 2003).

The Indian supreme court define cartel "it is an association of producers who by agreement among themselves attempt to control production, sale, and prices of the product to obtain a monopoly in any particular industry or commodity. It amount to an unfair practice which is not in the public interest. (*Union of India vs. Hindustan Development Corporation*, AIR 1994 SC 988, 1008).[5]

Although the term cartel has not been used in the competition ordinance 2007, but Section 4 of the Ordinance prohibits all types of agreements in which the undertakings or association of undertakings, shall make 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[6]. This definition is used for cartel agreements, but all horizontal agreements are not necessarily cartel agreements, if the agreements are contributing to improve production or distribution and promote technical or economic progress, while allowing consumers a fair share of the resulting benefit. Such types of agreements are exempted from the prohibition of S.4.

1.2 History of Competition law

The history of competition law can be traced back to the time when attempts were made by governments to regulate competitive markets for goods and services, leading up to the modern competition or antitrust laws. Early consumer protection machinery was closely linked to the then existing units of local governments. The hierarchy of government was king in the parliament and locally, the official dignitaries of the county, the Lord Lieutenant, the High

[5] See Supra note 2, S.V. "Cartels" PP 693-694.
[6] Competition Ordinance, 2007 S.4

Sheriff and the Justice of Peace[7]. Statutory control of various types of monopolistic conduct can be traced at least until the thirteenth century[8].

Historically the common law courts were also concerned with the problem of anti-competitive and restrictive trade behaviour. The courts do not enforce a contract which is in unreasonable restraint of trade, as to do so would be contrary to public policy. A particular contract, whether it is according to the restraint of trade doctrine or not, its validity will depend upon three requirements.

Firstly the court will only uphold a restriction to the extent that it is needed to protect some legitimate interest of the covenantee. Secondly the restriction must be no more than is reasonable between the parties to protect the interest of the covenantee. And thirdly the restriction must be reasonable in the public interest[9].

To judge whether or not there was a restraint of trade in a particular market, at the first place, it must be considered that both of the parties must have provided valuable consideration for their agreement. In *Dyer's* case a dyer had given a bond to the plaintiff and agreed that he will not carry his trade in the town where the plaintiff exercise his business, for six months. In the said agreement there was no consideration from the plaintiff side. On hearing the plaintiff's petition to enforce this restraint, Hull J held, "if the plaintiff were here, he should go to prison until he had paid a fine to the King."

In modern times, the competition policy in the UK is put within a series of statute which gives it a predominantly legalistic form. The Monopolies and Restrictive Practices (inquiry and control) Act, which was the first specific piece of anti-monopoly legislation in UK, was passed

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[7] Brian W Harvey and Deborah L parry, *The law of consumer protection and fair trading*, 5th edition,
[8] Wilberforce, Campbell and Elles, *Restrictive Trade Practices and monopolies*, Ch. 1, 2nd Ed. 1966, quoted in Richard Wish, *Competition Law* (London: Butterworths, 1985) p.26
[9] Richard Wish, *Competition Law*, (London: Butterworths, 1985) pp.26-28

in 1948 and monopolies and Restrictive Practices Commission was set up[10]. So far as restrictive trade practices were concerned, impact of the act was very limited as the commission lacked the character of the court of law and moreover no restrictive agreements were required to register with it. But the effect of the act was profound, as a series of reports prepared by the commission indicated how widespread and deeply entrenched restrictive trade practices were. In the light of the findings of those reports, the UK parliament in 1956 enacted the Restrictive Trade Practices Act[11].

In UK besides the aforesaid enactments and the provisions in the law of contract about illegal arrangements in restraint of trade there are a number of statutes designed to secure the benefits of competitive trading conditions. The main ones are the Restrictive Trade Practices Act 1976, the Resale Prices Act 1976, the Fair Trading Act 1973, the Competition Act 1980, the Competition Act, 1998 and the Enterprises Act, 2002.

In addition, UK acceded to the Treaty of Rome on joining the European Economic Community (EEC) on 1 January 1973, and this treaty has as its major objective the elimination of custom barriers and free movement of persons, services and capital. Accordingly the UK is now subject to the competition policy of the EEC[12]. The EEC competition law is mainly contained in Articles 85 and 86 (now Article 81 and 82) of the Rome Treaty. Article 85 prohibits various restrictive trading agreements, although exemption may be given to restrictive agreements which have beneficial effects by virtue of Article 85(3). Article 86 prohibits the abuse of a dominant position on the market[13].

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[10] M.S. Khan, *Regulation and control of monopolies and restrictive trade practices in Pakistan,* (Karachi: Royal Book Company.1992), p.49
[11] Ibid, p.50
[12] See supra note 7, p.28
[13] See supra note, 9, p.20

In the nineteenth century, competition in America was largely a local affair the country was so big and the transport was so poor that companies primarily competed in the local market. It was too costly to transport goods at great distance. State laws rather than national statutes regulated competition. By the second half of the nineteenth century, four railroad lines crossed the continent from coast to coast. For the first time national markets was a real possibility[14]. With the coming of the railroads, it became clear that large companies might be able to control other industries as well. To prevent extreme controversies of economic power, congress passed the Sherman Act in 1890. It was one of the first national legislation to regulate the competition in the United States.

In the light of experience gained from the working and administration of the Sherman Act,1890, for almost more than two decades, the antitrust legislation was further strengthened in 1914 by the enactment of two other laws namely, the Clayton Act and the Federal Trade Commission Act. The Clayton act was subsequently amended by the Robinson-Patman Act, 1936, the Celler-Kefauver Act, 1950 and the Antitrust Improvement Act, 1976. Now, these laws collectively provide a comprehensive regulatory framework for antitrust in the USA[15].

In the USA two public bodies namely the antitrust division of the Department of Justice and the Federal Trade Commission share the task of enforcing the antitrust laws. These two bodies have concurrent jurisdiction over the offences created by the Clayton Act[16].

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[14] In 1859 Edwin L Dark a retired railroad conductor drilled the first commercially successful oil well in the USA. Three years later Rockefeller entered into oil industry which was full of producers too small to benefit from economies of scale. Production was inefficient and prices varied dramatically in different parts of the country. Rockefeller set out to recognize the industry. He began by buying refineries first in Cleveland and then in other cities. By 1870 Rockefeller had achieved his goal but some his tactics were controversial, as when a competitor tried to build an oil pipeline he used every weapon short of violence to stop it. Taken from (Mr. Mario Monti, "Fighting Cartels Why and How" (STOCKHOLM: Konkurrensverket SE-103 85, 2001) p.34)

[15] See supra note, 10. pp.58-59

[16] Ibid, p.60

1.3 Theories of competition Law

Competition is an economics related phenomena, so every economic theory presents solution for the competition issues according to its own approach. In the following lines we will briefly discuss the approach of different economic theories toward competition law.

1.3.1 Classical Economics Theory

The classical economists like Adam Smith and John Stuart Mill advocate free trade and they consider that certain restrictive agreements and business practice are unreasonable restraint on trade activity of individuals. Restraints should be evaluated as legal or not by courts as new cases come in the light of changing business circumstances and new priorities. Therefore the courts declared certain agreements against the doctrine of economic fairness.

On this ground Smith rejected any monopoly power, as he says, *"A monopoly granted either to an individual or to a trading company has the same effect as a secret in trade or manufactures. The monopolists, by keeping the market constantly under-stocked, by never fully supplying the effectual demand, sell their commodities much above the natural price, and raise their emoluments, whether they consist in wages or profit, greatly above their natural rate"*[17].

In this book, Smith also pointed out the cartel situations, and considers it a conspiracy against the general public, but he did not favor to adopt legal measures to eliminate such agreements. *"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder*

[17] Adam Smith, *The wealth of Nations 1776 (London; W. Strahan & T. Cadell,)* Book I, Chapter 7, Para 26

people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary"[18].

Another classical economist John Stuart Mill was also a staunch advocate of free trade and he considers all restraints on trade and business activity as an evil. He considers trade as a social act, and is, for the interest of the general public, to whom the commodities shall be provided cheaper and of good quality.

He says in his treatise On Liberty (1859), *"Trade is a social act. Whoever undertakes to sell any description of goods to the public, does what affects the interest of other persons, and of society in general; and thus his conduct, in principle, comes within the jurisdiction of society... both the cheapness and the good quality of commodities are most effectually provided for by leaving the producers and sellers perfectly free, under the sole check of equal freedom to the buyers for supplying themselves elsewhere. This is the so-called doctrine of Free Trade, which rests on grounds different from, though equally solid with, the principle of individual liberty asserted in this Essay. Restrictions on trade, or on production for purposes of trade, are indeed restraints; and all restraint, qua restraint, is an evil"*[19].

1.3.2 Neo-classical Economic Theory (Theory of perfect Competition)

Perfect competition is defined by four conditions (in a well-defined market);

(a.) There are such a large number of buyers and sellers that none can individually affect the market price.

(b.) In the long run, resources must be freely mobile, meaning that there are no barriers to entry and exit.

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[18] Ibid Book I, Chapter 10, Para 82

[19] John Stuart Mill, *Treatise On Liberty* 1859, (Arlington Heights, IL: Harlna Davidson, Inc., 1947) Chapter V, Para 4

(c.) All market participants (buyers and sellers) must have full access to the knowledge relevant to their production and consumption decisions.

(d.) The product should be homogenous.

When these conditions are fulfilled in any well-defined market, the market is perfectly competitive; when they are fulfilled in all markets, the economy is perfectly competitive.[20] The Neo-classical economic theory presents, a more precise and theoretical model of competition. They talk about the maximization of social welfare. "The Neo-classical model of free markets considers that production and distribution of goods and services in competitive free markets maximizes social welfare"[21].

These models of 'neo-classical economists' support the new firms to enter into a specific market and compete with existing firms. In legal sense we may say that there should be no barriers to entry. This will lead the market to economic efficiency. In other words we may say that competitive free markets deliver allocative, productive and dynamic efficiency.

According to the neo-classical economic theory, consumer welfare is maximized in conditions of perfect competition. For this purpose consumer welfare does not express some vague generalized concept, but instead has a much more specific meaning. Under perfect competition, economic resources are allocated between the different goods and services produced in precisely the quantities which consumers wish (their desires being expressed by the price they are prepared to pay on the market). This is termed as allocative efficiency. Under perfect competition goods and services will be produced at the lowest cost possible, which means that as little of society's wealth is expended in the production process as necessary. This

[20] Glossary of Industrial Organization Economics and Competition Law (OECD), s.v. "Perfect Competition ", p.66 available at http://www.cpc.bg/public/index.php?id=49&letter=p visited on 10 March 2009

[21] http://www.unbeatablelawyers.com/Competition_law/encyclopedia.htm visited on 17 March 2009.

is termed as productive efficiency. The combined effect of allocative and productive efficiency is that society's wealth overall is maximized[22].

In perfect competition any producer would be able to sell his product on the market only at the price which the market is prepared to bear. The producer is price taker with no capacity to affect the price by his own unilateral action. The consumer is sovereign. The reason why he cannot affect the price is that any change in his own individual output will have only an imperceptible effect on the aggregate output on the market as a whole, and it is aggregate output that determines price through the law of supply and demand[23].

1.3.3 Theory of workable competition

If perfect competition is not attainable, the question arises whether there is any other model to which it would be reasonable to be resorted to. Some economists present for such situation the theory of workable competition.

Workable competition is a notion which arises from the observation that since perfect competition does not exist; theories based on it do not provide reliable guides for competition policy. The idea was first enunciated by economist J.M. Clark in 1940. He argued that the goal of policy should be to make competition "workable," not necessarily perfect. He proposed criteria for judging whether competition was workable, and this provoked a series of revisions and counter-proposals. The criteria put forward are wide ranging e.g. the number of firms should be at least large as economies of scale permit, promotional expenses should not be excessive and advertising should be informative[24].

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[22] see supra note 9, p.1
[23] Ibid, p.2
[24] See Supra note 20, s.v. "Workable Competition ", p.85

If it is accepted that workable competition is desirable, then any competition law designed to protect it will need to deal with four problems. Firstly it will have to prevent agreements between individual firms which have the effect of restricting competition between them. Secondly it will need to deal with attempts by monopolists or dominant firms to abuse their position and prevent new competition emerging. Thirdly it will need to ensure that workable competition is maintained in oligopolistic industries. Fourthly it will need to monitor mergers between independent firms whose effect will be to concentrate the market and diminish the competitive process within it[25].

1.4 Modern competition laws in various jurisdictions

In the following lines some selected modern competition law regimes will be discussed.

1.4.1 The United Kingdom

Competition policy in the UK is put within a series of statute which gives it a predominantly legalistic form. The main statutes are, The Monopolies and Restrictive Practices (inquiry and control) Act, 1948, Restrictive Trade Practices Act, 1956, The Monopolies and Mergers Act, 1965, the Restrictive Trade Practices Act, 1968, Fair Trading Act, 1973, Restrictive Trade Practices Act, 1976, Competition Act, 1980, competition Act, 1998 and the Enterprises Act, 2002.

In the UK, anti-competitive behaviour is prohibited under Chapters I and II of the Competition Act 1998 and may be prohibited under Articles 81 and 82 of the EC Treaty. These laws prohibit anti-competitive agreements between businesses and the abuse of a dominant position by a business. Businesses that infringe competition law may face substantial financial

[25] See supra note, 9, p.11

penalties of up to ten per cent of their worldwide turnover[26]. In the recent time, the UK competition law is mostly contained in the following two statutes;

(a) The Competition Act 1998; and

(b) The Enterprise Act 2002

1.4.1.1.1 The Competition Act, 1998

The Competition Act prohibits agreements, business practices and behaviour that have, or are intended to have, a damaging effect on competition in the UK. Businesses that breach the Act can be fined. There are two different prohibitions. The first is the Chapter I prohibition covering anti-competitive agreements which have an appreciable effect on competition. This includes collusion by competitors on customers, markets, prices or output. The second is the Chapter II prohibition which prevents businesses that are dominant in a market from abusing that position through activities such as predatory or discriminatory pricing. In essence, these mirror the provisions of Articles 81 and 82 in the EU legislation[27].

1.4.1.1.2 The Enterprise Act, 2002

Only four years after the enactment of Competition Act, 1998 the UK Government decided to take a very bold step; make its investigation powers tougher and more effective, to stop the cartels and other anti-competitive market practices, with the promulgation of, the Enterprise Act, 2002.

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[26] Office of the Fair Trading, "Cartels and the Competition Act 1998, A guide for purchasers". Available at http://www.oft.gov.uk/nr/rdonlyres/78ad1280-4eb8-46d4-a52b-207f9afeaae1/0/oft424.pdf visited on 26, April, 2009.

[27] Speech by, Christopher Clarke Deputy Chairman UK Competition Commission, "*the UK Competition Regime Recent Changes and Future Challenges*" Tokyo 6, December 2004. Available at http://www.competition-commission.gov.uk/our_role/speeches/pdf/tokyo_speech_201204.pdf last visited on 26, April 2009.

Apart from the measures taken in the Competition Act, some additional measures in the Enterprise Act, 2002 were also taken to combat anti-competitive behaviour, which include:

(a) First, a criminal cartel offence carrying a sentence of up to five years imprisonment and/or an unlimited fine; it is directed at individuals and operates alongside the Competition Act's civil law procedures against companies involved in cartel agreements;

(b) Second, disqualification of company directors for breach of UK or EU competition law; and

(c) Third, increased powers to investigate anti-competitive behavior, such as the power to compel persons to provide evidence, and to enter private premises to seek evidence; again, these are in addition to existing powers under the Competition Act[28].

1.4.1.2 The Institutional framework of the UK competition law

In the UK Implementation of competition policy is entrusted to three principal organizations:

1.4.1.2.1 The Office of Fair Trading;

The Office of Fair Trading (OFT) is an independent competition and consumer protection authority. Its responsibilities are to make markets well workable, efficient and competitive for consumers and enforce the legislation against anti-competitive behaviour. It also implements the first phase of the UK mergers and markets regime. If the Office of Fair Trading (OFT) in its initial investigation finds a potential competition problem, it must refer it to the Competition Commission for a phase II investigation. If the Office of Fair Trading (OFT) came to know in its

[28] Ibid.

evaluation of a market, that competition law has been violated it may refer it to the Commission for exhaustive investigation.

1.4.1.2.2 The Competition Commission

The Competition Commission is a statutory body, independent of Government. Its function is to conduct detail phase II inquiries into mergers and markets, referred to it by other competition authorities, usually the Office of Fair Trading (OFT). The Competition Commission can impose remedies, by way of orders, to lessen or prevent the adverse effect of anti-competitive behaviour on consumers. The Competition Commission also hears appeals against some decisions of the regulators.

1.4.1.2.3 The Competition Appeals Tribunal

The Competition Appeals Tribunal (CAT) is an expert competition court which can review, on application from main parties and third parties with sufficient interest; it also hears appeals against the decisions of the Competition Commission, the Secretary of State or the Office of Fair Trading (OFT) in merger and market investigations. It also hears suits for damages and other monetary claims under the Competition Act and appeals against certain economic regulatory issues.

1.4.2 The USA

Competition law in the USA is called, the Antitrust Laws. The first antitrust law in the USA is Sherman Act, 1890. in the light of experience gained from the working and administration of the Sherman Act, for almost more than two decades, the antitrust legislation

was further strengthened in 1914 by the enactment of two other laws namely, the Clayton Act and the Federal Trade Commission Act. The Clayton Act was subsequently amended by the Robinson-Patman Act, 1936, the Celler-Kefauver Act, 1950 and the Antitrust Improvement Act, 1976.

The Sherman Act, 1890, contains two important substantive prohibitions. Section 1 of the Act makes illegal every contract, combination in the form of trust or other wise, or conspiracy in restraint of trade or commerce among several states or with foreign nations. On the other hand, section 2 declare illegal every person who monopolies or attempt to monopolies, or combines or conspire with any other person or persons to monopolize any part of trade or commerce among several states or with foreign nations[29].

To supplement the Sherman Act, the Clayton Act was passed in the USA in 1914. This Act deals with the problems of mergers and prohibition of certain types of individual conducts which stood beyond the jurisdiction of the Sherman Act. The Clayton Act declares the following four types of monopolistic or restrictive trade practices as illegal:

(1) Price discrimination

(2) Exclusive-dealings and tying contracts.

(3) Acquisitions of competing companies.

(4) Interlocking directorates.[30]

The Federal Trade Commission Act was also enacted in 1914 to declare every unfair or deceptive act or practice in commerce as illegal.

In the USA two public bodies namely, the Antitrust Division of the Department of Justice and the Federal Trade Commission enforce the antitrust laws. Both these bodies have concurrent

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[29] See supra note, 10, p.59
[30] Ibid.

jurisdiction over the offences created under the Clayton Act. The difference between the two bodies is that the Federal Trade Commission (FTC) is responsible for consumer protection issues, whereas criminal violations of Sect. 1 of the Sherman Act (e.g., price fixing and market division) are the responsibility of the Antitrust Division. It is also important to note that most enforcement activities, when successful, lead to injunctive remedies, where the party that is violating the law, is required to cease the harmful activity.

1.4.3. The European Union

In 1957, six Western European countries signed the Treaty of the European Economic Community (ECC Treaty) which is also known as the Treaty of Rome. In 1993, the European Community (EC) became the European Union (EU), following the adoption of the Treaty of Maastricht. The EC Treaty (as amended, by the Maastricht Treaty), and was further amended by the Amsterdam Treaty of 1997. Competition law was originally included in the Treaty of Rome; therefore it is called "EC competition law". The EEC competition law is mainly contained in Articles 85 and 86 (now Articles 81 and 82 of the EC Treaty) or the Treaty of Rome together with a number of implementing regulations. In the following lines we will discuss both these Articles in detail.

1.4.3.1 Article 81 (Article 85 of the original Treaty of Rome)

Article 81(1) prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between members states and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

Article 81(2) provides that any agreements or decisions prohibited pursuant to this Article shall be automatically void.

According to Article 81(3) of the Treaty it is not necessary that every agreement which falls within Article 81(1) will be necessarily 'automatically void' as Article 81(2) states.

To deal with an agreement being competitive or anti-competitive we should consider the following three elements:

- To consider whether the agreement will have an anti-competitive effect or not. This can be judged that whether it affects competition between the parties or restricts their freedom in dealing with customers or suppliers. This can involve market collusion, expressly restrictive agreements, standardized contract terms, and exchanges of market information.
- To consider whether the agreement is capable of having a direct or indirect effect on trade between EU Member States. If it has no such effect on trade between EU member states, then Article 81(1) will not apply.
- To consider whether the effect on competition and inter-state trade is appreciable or not. There is a "Notice on Agreements of Minor Importance" which sets out some guidelines on what is meant by "appreciable effect". The Notice states that the European Commission holds the view that agreement between undertakings which affect trade between EU Member States do not appreciably restrict competition if;
    - The aggregate market share of the parties to an agreement between actual or potential competitors does not exceed 10%, or
    - The market share held by each of the parties to an agreement between non-competitors does not exceed 15% provided that they do not contain any

"hardcore" restrictions of competition, such as price-fixing, market sharing or limitation of output or sales.

Article 81(2) states that any agreement prohibited pursuant to 81(1) is automatically void. Article 81(2) has both prospective and retroactive effect. It is clear, however, that it is not the whole agreement which is automatically void, but only those clauses which infringe Article 81(1). The whole agreement becomes void only if the offending clauses cannot be separated from the contract. The question of severability is determined by the national court dealing with the dispute by reference to the law applicable to the contract. This will usually be the law chosen by the parties and in, the absence of express choice, the judge will look at the Rome Convention on the law applicable to contractual obligations.[31]

However, an agreement which falls within Article 85(1) of the Treaty is not necessarily 'automatically' void as Article 85(2) states.[32] An agreement which is prohibited by Article 81(1) may be "justified" and thus capable of being "cleared" if Article 81(3) applies. Article 81(3) can clear agreements which:

- Improve production/distribution or promote technical/ economic progress, and
- Give consumers a fair share, and
- Contain only indispensable restrictions, and
- Do not lead to substantial elimination of competition[33]

Thus to keep an agreement out of the effect of Article 85(1) and (2) it has to fulfill the following four requirements;

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[31] CMS Cameron McKenna, competition survival pack, Edition, 4th, p.28. Available at www.law-now.com visited on 11, May 2009.
[32] See Supra note 9, p.195
[33] See Supra note 31.

Benefit: The agreement must either contribute to improving the production or distribution of goods or promote technical or economic progress.

Fair share to consumers: The parties will have to show that the fair share of benefit that results from the agreement will accrue to the consumers.

No indispensable restrictions: The commission will not grant exemption, if the restriction of competition which it would entail, is greater than is necessary to procure the benefit in question.

No substantial elimination of competition: When the result of an agreement, would be substantially, to eliminate competition, it will not be given an exemption.

1.4.3.2 Article 82 (Article 86 of the original Treaty of Rome)

Article 82 (article 86) of the Treaty provides that any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between member states. Such abuse may, in particular, consist of;

(a) Directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions;

(b) Limiting production, markets or technical development to the prejudice of consumers;

(c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) Making the conclusion of the 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.

Article 86 has also been applied to behavior, which the commission and court considers to be anti-competitive. These cases have tended to cause more controversy than those on exploitation. It was at one time thought that Article 86 was a piece of consumer protection legislation in the simple sense that it prohibited problems such as monopolistic pricing.[34] But this idea has been shattered by the court decision[35].

Article 86 depends for its applicability upon the existence of dominant position and its abuse. Once it has been decided that a firm has a dominant position in a substantial part of the common market, it than has to be decided what is meant by an abuse of that dominant position. Article 86 gives examples of abuse of dominant position – charging unfair prices, limiting production and discrimination - but the list given there is not exhaustive and the case law of the court has revealed Article 86 to be a much more formidable weapon that it might appear to be[36].

The concept of a dominant position, although not defined in Article 82, but it is meant to have such a market control which enables an undertaking to behave to an appreciable extent separately of its competitors and customers. The problem of market dominance should be considered when a company has a substantial market share. But there is no precise threshold above which dominance is to be presumed. The level of dominance will vary from market to market depending on its particular characteristics.

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[34] See supra note,9, p.232

[35] In the 'continental cane case' the question before the court was whether mergers could be prohibited under Article 86. One argument against this was that Article 86 was designed to prevent the direct exploitation of consumers and not to deal with more indirect adverse effects that might be produced by harming the competitive process. Therefore structural change in the market could not be caught. But the court rejected this notion.

[36] See Supra note 9, p.230

An important question is what type of competition there is, in a particular product market, how many competitors and on what do they compete? In this regard the things that to be considered include: Firstly when the competition is more fragmented, the percentage share will be lower that may enable the market leader to dominate the sector. Secondly the ease with which new competitors can enter the market and existing competitors may get out. Lastly the barriers to entry and exit in terms of cost, regulation, availability of raw materials, attitude of other players, etc.

The mere existence of a dominant position per se is not a breach of Article 82. There must be an abuse of it. Abuse of dominant position is always a question of fact.

The following are examples of abuse of dominance:

Excessive pricing

A dominant business entity must take care in setting the prices of its products in a relevant market. In certain circumstances, fixing a price which has no reasonable relation to the economic value of the product may be considered abuse of dominant position.

Discriminatory pricing

A dominant company must also be careful about its pricing policy, to ensure that this does not lead to partitioning of markets.

Predatory pricing

When a company is dominant in a market and set up any arrangements through which it carry its trade at unprofitable prices (selling below cost price), or it deal with price cuts selectively with intention to keep out a competitor of the market. This also amount to the abuse of dominant position.

Refusal to supply

Where a company has a dominant position in a market and it, objectively without any justification refuse to supply its products it will always be contrary to Article 86.

Tying in

Where a company has a dominant position in a market, Article 82 prohibits it to make the conclusion of contracts and business transaction subject to the acceptance by the other parties of supplementary obligations which have no commercial concern with the product or service in question. We may illustrate that the sale of product A must not be conditional upon the purchaser to also buy and pay for unrelated and unwanted product B.

1.5 Competition Laws in Pakistan; a brief overview

The first ever law regarding competition in Pakistan after its independence was the Control Act, 1947 which was a broad based law in its approach. The Monopolies and Restrictive Trade practices (Control and Prevention) Ordinance, 1970 is the first specific piece of anti-monopoly legislation in Pakistan which was made on the basis of recommendations of Anti-cartel laws study group(Anti-cartel laws study group was set up by the government in 1963). The report of the study group established that monopoly situations and cartel like arrangements exist in the country. As a result The Monopolies and Restrictive Trade practices (Control and Prevention) Ordinance, 1970 was promulgated. This was the first specific piece of antimonopoly legislation introduced in Pakistan. The basic approach of this law explicitly prohibits the unreasonable growth of the following situations:

- Undue concentration of economic power.
- Unreasonable monopoly power.

- Unreasonable restrictive trade practices.

Certain amendments were brought in the 1970's ordinance vide The Monopolies and Restrictive Trade practices (Control and Prevention) (amendment) Ordinance, 1980. Subsequently certain other amendments were also made under The Monopolies and Restrictive Trade practices (Control and Prevention) (amendment) Ordinance, 1982. In the 1970s ordinance the important thing was the establishment of the Monopoly Control authority.

The Monopolies and Restrictive Trade practices (Control and Prevention) Ordinance, 1970 remained intact till 2007, when the new competition law i.e. the competition ordinance 2007 was promulgated and the Monopoly Control Authority (MCA) was replaced by The Competition Commission of Pakistan (CCP).

It is pertinent to mention here that, Pakistani competition law is basically founded on European model, which's foundation is the Treaty of Rome. The competition law of European Union is contained mostly in Articles 85 and 86 (now Article 81 and 82) of the treaty of Rome. Article 85 prohibits various restrictive trading agreements, although exemption may be given to restrictive agreements which have beneficial effects by virtue of Article 85(3). Article 86 prohibits the abuse of a dominant position on the market.[37]

Section 4 of the competition ordinance 2007, prohibits all types of agreements in which the undertakings or association of undertakings, shall make 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. All horizontal agreements are not necessarily cartel agreements, if the agreements are contributing to improve production or distribution and promote technical or

[37] See supra note 9, p.20

economic progress, while allowing consumers a fair share of the resulting benefit. Such types of agreements are exempted from the prohibition of S.4.

Under Section 5 the commission can grant individual exemptions and under section 7 it can give block exemption. The ordinance also does not allow mergers which substantially lessen competition by creating a dominant position in the relevant market. In the ordinance severe punishments were introduced. The right of double appeal was provided to the aggrieved party.

1.6 Islamic Concept of Competition law

Islam is a practical system of life and provides guidance in every walk of life i.e. individual, social, economical, moral, and political including intellectual property right. *Shariah* has to protect its five basic objectives *(Maqaasid al shariah)* which are connected to the interests of a man. These are vital values for a man, prosperous and protected life in this world and also in the life hereinafter. These values are, *hif'z-ul-din* (protection of Islamic religion), *hif'z-ul-nafs* (protection of soul or life), *hif'z-ul-'aql* (protection of intellect), *hif'z-ul-nasl* (protection of lineage) and *hif'z-ul-mal* (protection of wealth or property). Islam protects those values in order to uphold justice amongst mankind.

Any contract or transaction that offends or jeopardizes any of these objectives is invalid in the *shariah*. It is pertinent to note here that the *maqasid_al-shariah* is alternately referred to as *huquq-ul-Allah* (the rights of Allah) in Islamic law. The rights of God in *Shariah* refer to everything that involves the benefit of the community at large[38]. Wealth is, a trust form God and needs to be developed and used honestly and conscientiously for removing poverty, fulfilling the needs of all, making life as comfortable as possible for everyone, and promoting equitable

[38] Dr. Muhammad Tahir Mansuri, *Islamic law of Contract and Business Transaction*, (Islamabad: Shariah Academy, international Islamic university, 3rd Ed. 2005) p.11

distribution of income and wealth. Its acquisition as well as use needs to be primarily for the purpose of realizing the *maqasid*[39].

The Islamic Law provides the believers with the modes of life, which they should follow in all matters pertaining to man's duties to God and to his fellow beings. Law is respected if its objective is fulfilled. The objective is to live in peace and be kind to the creatures of God as the Prophet (peace be upon him) reminded us to respect the law of God and be merciful to the people of God. If there is no such law or policy on competition in Islam the economic system will fail, and the problem of corruption and unhealthy economic activities will increase severely.

According to Mushtaq Ahmad "no matter what the form, the essence of disapproved business conduct comprises unjustified consumption or appropriation of others wealth and rights. This is exactly what the Quran has strictly forbidden by calling it either *akl bi al-batil* (unjustified consumption) or *zulm* (injustice). Since injustice lies at the root of all undesirable business conduct, therefore all the *Quranic* injunctions focus on the elimination of this basic evil[40].

Eating up of others property unlawfully is not allowed, as it is the violation of these basic objectives of Shariah. Unfair treatment to other person's wealth has been prohibited by Islam. Monopolization of economy, hoarding, cartels, and any other practice which become hurdle in the smooth process of competition is not owned by Islam. Islam has already laid down principles on competition, as Islam rejected total monopoly in the system of economy. The basic premise of the competition law and policy is to promote fair trade, healthy competition and ultimately

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[39] M. Umer Chapra, *The Islamic Vision of Development in the Light of the Maqasid Al-Shari'ah,* (Jeddah; Islamic Research and Training Institute Islamic Development Bank, 2008), p.47 available at http://www.mihe.org.uk/mihe/upload/documents/Seminar/IslamciEconomicsLecture/Lec1/lec1.doc visited on 21 May 2009.

[40] Mushtaq Ahmad, *Business Ethics in Islam* (Islamabad: International institute of Islamic thought and International institute of Islamic economics, 1995), p.103

consumer welfare in the market. About fairness The Holy Quran says: "God loves those who are fair and just"[41].

In *Surah Al-Nisaa* Quran clearly says; "Eat not up each other's property by unfair and dishonest means"[42].

"And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that they may eat up wrongfully and knowingly a little of (other) people's property"[43].

Earning wealth through unfair means, including unfair competitive business behaviour is also like eating up the wealth of others through unfair means. This condemnation is not only to ensure the effectiveness of economic administration but also as a basis to form a just and fair society in the light of Islamic teachings.

The be-all and end-all of Islamic economics is to achieve the maximum social advantage. Therefore, any economic activity which is likely to stand in the way of achieving this objective cannot be styled as Islamic. Judged by the standard of benevolence and care for the have-nots, we cannot encourage monopoly and speculative business in Islam. Because the monopolist generally charges a higher price for his output as monopoly suggests the idea of concentration of supply in one hand, the question of exploitation is very much connected with the idea of monopoly[44].

Competition law is embodied in the general principles of Islamic law as enshrined in the *Holy Quran* and *Sunnah* of the Holy Prophet (peace be upon him). From the other sources of Islamic law, i.e. public interest *(maslahah)*, blocking the means *(sadd-al-daria)*, prohibition the

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[41] Quran, 49; 9
[42] Quran, 4; 29
[43] Quran, 2; 188
[44] M.A.Manan, Islamic *Economics Theory and Practice (A Comparative Study)*, (Lahore; SH. Muhammad Ashraf, publishers, 2006) p.194

use of rights unfairly *(mana'a sua-istimal-al-haq)* and from the legal maxims of *Shariah (qawa'id-ai-fiqhiah)* fair competition may be proved. The principles of these sources can be applied to promote fair-trading and healthy competition.

In the next chapter we will discuss in detail, the rules and principles of these sources with reference to competition law, and its importance in *Shariah.* We will also analyze certain prohibited transactions in Islamic law relating with the unfair competition such as hoarding, prohibition of all types of monopolies, sale by a city dweller to a desert dweller, meeting merchants from neighboring village and towns and overbidding in others people's sales.

1.7 Why we need competition law?

Competition law and policy aims to tackle situations where there is a clear lack of competition in a market, or a danger that this will develop as a result of actions contemplated (such as mergers). In doing so, it commonly has two incidental positive impacts, one on productivity (because poor productivity can fester under conditions of limited competition) and one on consumers (because competition allows consumers a choice of suppliers). It also commonly has an impact upon employment, which may be either positive or negative[45].

OECD describe, that the main objective of competition law and policy, is to safeguard and encourage competition as a means of ensuring efficient distribution of resources in an economy. Competition law and policy helps to create a conducive environment for business by

[45] Michael Waterson, "Editorial", The Competition Law Review, Volume 3 Issue 2, March 2007, p.117 also available at http://www.clasf.org/CompLRev/Issues/CompLRevVol3Issue2.pdf visited on 7th July 2009.

lowering market entry barriers[46]. We may discuss the main objectives of competition law and policy in the following headings, which are derived from the above two, paragraphs:

1.7.1 Economic Efficiency

Competition law and policy generally has as its object to enhance the overall material welfare of society through maintaining rivalry and competition among firms. The ultimate goal is to increase overall economic efficiency and to provide the consumers with a fair share of this total wealth. Competition law is first and foremost concerned with economic efficiency and with the overall welfare of society, without discriminating between different classes of society.

Competition policy is an economic efficiency-oriented policy and therefore apt to target and promote the overall economic welfare of society instead of making value judgments on how such economic welfare should be distributed between different social groups[47]. The economic efficiency may be either allocative efficiency or productive efficiency.

1.7.1.1 Allocative efficiency

Under perfect competition economic resources are allocated between the different goods and services produced in precisely the quantities which consumers wish (their desires being expressed by the price they are prepared to pay on the market). This is termed as allocative efficiency[48].

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[46] Khemani R.S, "A framework for the design and implementation of competition law and policy" , (Washington: OECD, World Bank, 1998) taken from, available at http://www.unescap.org/pdd/publicatins/bulletin2002/ch7.pdf Last visited on May 26, 2009.

[47] K.J Cseres, "The Controversies of the Consumer Welfare Standard" The Competition Law Review, Volume 3 Issue 2, March 2007, p.127 available at http://www.clasf.org/CompLRev/Issues/CompLRevVol3Issue2.pdf visited on 7th July 2009.

[48] See supra note 9, p.1

From the perspective of allocative efficiency, an anti-competitive effect occurs when the challenged conduct restricts output, in a properly defined relevant market, by a material amount for a material duration. A pro-competitive effect takes place when the practice in question expands output in the relevant market by a material amount for a material duration[49]. Allocative efficiency is achieved because the producer, assuming he is acting rationally and has a desire to maximize his profits, will expand his production for as long as it is privately profitable for him to do so[50].

1.7.1.2 Productive Efficiency

Under perfect competition goods and services will be produced at the lowest cost possible, which means that as little of the society's wealth is expended in the production process as necessary. This is termed productive efficiency[51]. Productive efficiency is achieved because the producer is unable to sell above cost (if he did his customers would immediately desert him) and he will not of course sell below it (because then he would make no profit). If by chance a producer was to charge above cost, other competitors would move into the market in the hope of profitable activity. They would then attempt to produce on a more efficient basis so that they can earn a greater profit[52].

Competition law support a total welfare standard on the basis that it generates the most, for society as a whole and endeavors for the maximization of economic efficiency. The total welfare standard means to allocate the available resources to those people who value them most

[49] See supra note 45, p.148
[50] See supra note 9, p.2
[51] Ibid, p.2
[52] Ibid, p.3

and it takes account of both allocative and of productive efficiency. Competition law, furthermore, take account of the wealth distribution between consumers and producers neutrally.

1.7.2. Consumer welfare

Consumer welfare is generally defined as the maximization of consumer surplus, which is the part of total surplus given to consumers. This is realized through, 'direct and explicit economic benefits received by the consumers of a particular product as measured by its price and quality'. The consumer welfare model argues that the ultimate goal of competition law should be to prevent increases in consumer prices, restriction of output or deterioration of quality due to the exercise of market power by dominant firms[53].

The competition law aims to protect the consumer, not in the sense of maximizing consumer welfare but in the most specific sense of safeguarding the individual consumer against the power of monopolists or the anticompetitive agreements made by independent firms. Similarly the consumers may be harmed; where producer insists that all his goods should be sold at maintained prices or that the dealer should provide a combined package of goods plus after-sales services. There the consumer's choice is taken away by the producer's decision[54].

Competition policy may recognize the immediate and short-term interests of consumers or it may recognize consumer welfare as an essential long-term goal where the immediate interests of consumers are subordinated to the economic welfare of the society as a whole. The first type of interest prefers immediate short-term consumer interests to the overall social interests. This approach ignores the inherent tension between consumers' immediate interests and producers' incentives to sustain innovation and productive efficiency. It disregards efficiency

[53] See supra note 45, p. 148
[54] See supra note 9, p.12

gains and benefits that drive productivity growth and innovation and that could actually benefit consumers in the long run. The second type of interest aims at long-term consumer interests through subordinating short-term consumer interests to the overall welfare of the whole society on condition that consumers are provided with a fair share of the overall economic welfare[55].

1.7.3 Ancillary Needs for Competition Law

Apart from these core goals, some other objectives and needs of competition law and policy have been recognized. These include:

- **Employment:** Competition law and the status of employment, the protection of the labors and employees rights, in a country have also close relation. Competition law has a deep impact on those issues, which may be either positive or negative. Unemployment and regional policy are issues which sometimes influence competition law decisions.
- **Distribution of wealth:** Competition law is not only concerned with the economic efficiency but with the dispersal of power and the distribution of wealth.
- **.Protecting small businesses:** competition law should be applied in such a way to protect the small firms against more powerful rivals.
- **Regional development and environmental protection:** while making the competition policy the policy makers should keep in mind issues relating to environmental protection and regional development.

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[55] See supra note 45, p. 148

Chapter 2

The Concept of Competition law in Islam

Shariah wants the interest of humanity both here and in the hereafter. The aim of *shariah* is to preserve faith, life, intellect, progeny and property. These are the five basic interests of man. They are also called the *maqasid al-shariah* (objectives of shariah). Preservation of property being one of the fundamental interest of man and a basic objective of *shariah* occupies a vital and significant place in Islamic legal philosophy. The legal system of Islam is based upon the concepts of justice, fairness, equity, mutual respect and consideration for others and must, therefore, be integral in business and commerce dealings.

Trade and commerce played a key role in the expansion of Islam, although of course, the structure of economic relations during early Islamic history varied significantly from the modern economic order. In early centuries, economic exchange centered on principles of kinship, tradition, and communal relationships. The city of Macca, the birthplace of Islam, was a market and centre for commerce. The early Muslims were not only engaged in the local trade but they went to distant lands in connection with business. Islam, in fact, reached East and West Africa, as well as South and East Asia through merchants[1].

Business has played an important role in the economic and social life of people throughout the ages. This is equally true of our contemporary world. Since the economic strength

[1] Ajaz Ahmed Khan and Laura Thaut, "An Islamic perspective of fair trade" *Islamic Relief Worldwide Birmingham*, (August 2008). Available at http://www.islamicrelief.com/Indepth/downloads/Islam_and_Fairtrade.pdf visited on 29th July 2009.

has become synonymous with political power, the importance of business extends to all levels individual, societal, regional, national and international[2]. Since Islam advocates a complete code of human conduct, it contains a number of directives which apply to the conduct of business and administrative affairs[3].

2.1 The Holy Quran and Fairness

Islam advocates the concept of fairness, and demand from all the followers to be fair in their dealings. They are not only required to be just in their relations toward Allah, but their dealings with other human beings are also regulated by some norms. So, all types of unfairness, injustice, eating other people's wealth by unlawful means and any malicious behavior are condemned by the Holy Quran. Quran insist the Muslims to be just fair in their dealings.
Quran says: "God loves those who are fair and just"[4].

In *Surah Al-Nisaa* Quran clearly says: "Eat not up each other's property by unfair and dishonest means"[5].

"And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that they may eat up wrongfully and knowingly a little of (other) people's property"[6].

"O orphans restore their property (when they reach their age), nor substitute (your) worthless things for their good ones; and devour not their substance (by mixing it up) with your own. For this is indeed a great sin"[7].

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[2] Mushtaq Ahmad, *Business Ethics in Islam* (Islamabad: International institute of Islamic thought and International institute of Islamic economics, 1995), p.1
[3] Trevor Gambling and Rifaat Ahmad Abdel Karim, *Business and Accounting Ethics in Islam* (London and New York: Mansell publishing limited, 1993), p.22
[4] Quran, 49; 9
[5] Quran, 4; 29
[6] Quran, 2; 188

2.2 Competition Law and Policy in *Shariah*

The terminology of competition law has not been used in the *fiqh* books as such, but there are various verses of the Holy Quran, many *Ahadith* of the Holy Prophet (peace be upon him), and other sources of S*hariah*, which are perfectly applicable to the modern concept of competition law in business matters.

Shariah has prohibited all transactions through which wealth is accumulated within the hands a few people and in which, the general public either bear loss in the shape of paying excessive prices or face difficulty in purchasing the commodities. *Shariah* does not allow hoarding, cartels, fraud with all its kinds and every other practice which restrict the free competition within a particular market.

The teachings and directives of *Shariah* with reference to competition law can be traced in the general principles of Islamic law enshrined in the Holy Quran and the *Sunnah* of the Holy Prophet (peace be upon him). To discuss the Islamic law perception about the competition law and policy, we may resort to the basic Islamic principles that provide foundation to the modern competition law. In this research work, the scope of our discussion will extend to the doctrine of, objectives of *Shariah* (*maqasid shariah),* public interest *(maslahah),* blocking the means to an evil deed *(sadd zarai),* using the rights unfairly *(su isti'mal al-haq)* and Islamic legal maxims (*qawaid al-fiqh).*

2.2.1 Objectives of *Shariah (Maqasid-al- Shariah)*

Maqasid Shariah refers to the protection of the five interests of the Muslim, as I have referred to, in the beginning of this chapter i.e. *hif'z-al-din* (protection of Islamic religion), *hif'z-*

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[7] Quran, 4; 2

al-nafs (protection of soul or life), *hif'z-al-'aql* (protection of intellect), *hif'z-al-nasl* (protection of lineage) and *hif'z-al-mal* protection of wealth or property).

Any contract or transaction that offends or jeopardizes any of these objectives is invalid in the *shariah*. It is pertinent to note here that the *maqasid_al-shariah* are alternately referred to as *huquq-ul-Allah* (the rights of Allah) in Islamic law. The rights of God in *Shariah* refer to everything that involves the benefit of the community at large[8].

In the modern law the rights of Allah can be termed as the public rights, the infringement of which will affect the whole community. Islam has given great importance to the protection of these rights in the text of the Holy Quran and in the *Sunnah* of the Holy Prophet (peace be upon him). The following are some of the verses of the Holy Quran and *Ahadith* of the Holy Prophet (peace be upon him) from which the objectives of shariah may derived.

Quran says: "In the law of equality, there is saving of life to you, O men of understanding"[9].

"The woman or man guilty of adultery or fornication, flog each of them with a hundred stripes; let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the last day: and let a party of the believers witness their punishment"[10].

"On that account, we ordained for the children of Israel that if any one slew a person, unless it be for murder or for spreading mischief in the land, it would be as if he slew the whole people, and if any one saved a life, it would be as he saved the life of whole people"[11].

"O you who believe: Devour not your property among yourselves in vanities"[12].

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[8] Dr. Muhammad Tahir Mansuri, *Islamic law of contract and business transaction* (Islamabad: Shariah Academy, international Islamic university, 3rd Ed. 2005) 18 p.11

[9] Quran, 2; 179

[10] Quran, 24; 2

[11] Quran, 5; 32

[12] Quran, 4; 29

In A*hadith* the Holy prophet (peace be upon him) said: "Allah has made the life, and property and honour of each one of you unto the other sacred and inviolable like this day of this month in this territory"[13]. Holy Prophet (peace be upon him) condemned he, who accumulate wealth by unlawful means, in these words: "Wretched is the slave of *dinar, dirham* and velvet"[14].

Islam does not separate the worldly affairs of a man and his religion. Wealth is a necessary part of human survival, but it should be used as directed by *Shariah*. In this respect Dr. Muhammad Umar Chapra says; Wealth is, a trust form God and needs to be developed and used honestly and conscientiously for removing poverty, fulfilling the needs of all, making life as comfortable as possible for everyone, and promoting equitable distribution of income and wealth. Its acquisition as well as use needs to be primarily for the purpose of realizing the *maqasid*. This is where faith has a crucial role to play through its values and its motivating system. Without the values that faith provides, wealth would become an end in itself. It would then promote unscrupulousness and accentuate inequities, imbalances and excesses, which could ultimately reduce the well-being of most members of both the present and future generations. It is for this reason that the Prophet (peace be upon him) said: "Wretched is the slave of *dinar, dirham* and velvet". Therefore, faith and wealth are both extremely necessary for human well-being. None of these two can be dispensed with. While it is wealth which provides the resources that are necessary to enable individuals to fulfill their obligations towards God as well as their own selves, fellow human beings, and the environment, it is faith which helps inject a discipline and a meaning in the earning and spending of wealth and, thereby, enable it to serve its purpose more effectively[15].

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[13] Sahih Bukhari, kitab al-ilm, bab qowl al-Nabi
[14] Sahih al-Bukhari, *Kitab al- Jihad wa al-Siyar.*
[15] M. Umer Chapra, *The Islamic Vision of Development in the Light of the Maqasid Al-Shari'ah,* (Jeddah; Islamic Research and Training Institute Islamic Development Bank, 2008), p.47

Appropriation or consumption of others' wealth without justification is prohibited (*haram)*. The Quran prohibits this unjust practice and has called it *akl bi al-batil* (wrongful consumption). Usury is forbidden because it involves wrongful consumption of others' properties[16].

From the above discussion it is revealed that Islam guarantees full protection of the rights of individuals and wants justice, so that, everyone gets his due for his contribution to society and that there is no exploitation of one individual by another. No one is allowed to wrongfully consume the wealth of another. With reference to the competition law, Islam totally rejected any unfair practice through which the rights of a person or individuals as a whole (society) are violated, such as unhealthy competition.

We can trace the spirit of *maqasid-al-shariah* regarding fair competition in the principles of *Shariah* in overbidding on other people's sale. The Prophet declared this practice void by saying, *"one of you should not make offers over his brother's transaction"*. This activity refers to an intervention by a third party where the sale transaction is in progress between seller and buyer. They have agreed on a specific price but there is choice given to either party in the contract, and the parties have not yet performed their respective promises, now the third person comes and outbids the buyer with a higher price.

The Prophet (peace be upon him) clearly prohibited this activity in these words; *"Do not envy one another; do not inflate prices by overbidding against one another; do not hate one another; do not harbor malice against one another; and do not enter into commercial transaction when others have entered into that (transaction); but be you, O slaves of Allah, as brothers. A Muslim is the brother of another Muslim; he neither oppresses him nor does he look down upon him, nor does he humiliate him. Piety is here, (and he pointed to his chest three times). It is enough evil for a Muslim to hold his brother*

[16] See supra note 2 p.118

Muslim in contempt. All things of a Muslim are inviolable for his brother in-faith: his blood, his property and his honor." From this *hadith,* the policy guidelines and basic rules for fair business competition may be derived.

2.2.2 Public interest *(Maslahah)*

Literally *maslahah* means benefit or interest. It is like *manfa'ah* (benefit) in form and meaning. It applies really to benefit and figuratively to its causes. It is said that commerce is a *maslahah,* meaning that it is the cause of benefits. And that retaliation is a *maslahah,* meaning that it is the cause of benefit. When it is said that benefit and harm are contrary to each other being not combined together, then removing harm is also a *maslahah.* So, *maslahah* literally means securing benefit and removing harm[17].

Imam Sha'tibi defines *maslahah*:

"I mean by *maslahah* what concerns the substance of humane life, the completion of man's livelihood, and the acquisition of what his emotional and intellectual qualities require of him, in an absolute sense"[18]. According to Sha'tibi, the primary objective of the lawgiver is the *maslahah* (interest) of the people. The obligations in *Shariah* concern the protection of the *maqasid* of the *Shariah* which in its turn aims to protect the *maslahah* of the people. Thus *maqasid* and *maslahah* become interchangeable terms in reference to obligations in Sha'tibi's discussion of *maslahah.* In competition law perspective also the primary object of the lawgiver is the interest of the people, and concerns the protection of their property. So any practice which jeopardizes their interest is not allowed.

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[17] Aqrab al-Mawarid, s.v. "maslahah"(vol.1, p.656 Al-Qamus al-Muhit, s.v. "maslahah" (vol, 1, p.227)
[18] Abu Ishaq Al- Shatibi, *Al-Muwafaqat,* Vol.2 (Cairo: Matba'a Tijariya, Mustafa Muhammad, nd), p.25

Technically *maslahah* also refers to the need to balance between private interests and the larger public interest, which is harmonious with the objectives *(maqasid)* of the *shariah*[19]. About that Imam Ghazali says; as for *maslahah,* it is originally consist in securing benefit or removing harm and by it we do not mean that, for securing benefit and removing harm are the objectives of the people. But by *maslahah* we mean protection of the objectives of the lawgiver, and He has five objectives in respect of people: to protect for them religion, intellect, life, lineage, property. Whatever ensures the protection of these five basic things is *maslahah,* and whatever causes the missing of these basic things is a *mafsadah,* and to remove it is a *maslahah*[20].

It is a fact that the public interest intends to preserve objective of law. Such preservation is known as *maslahah* and failure to preserve is *mafsadah. Tas'ir* or price regulation by the government may be illustrated for the principle of *maslahah* relating to the competition law and policy[21]. *Tas'ir* or prices fixation by the government is one of the disapproved practices. The government has no right to fix the prices o of commodities unless it has already provided the merchants with enough quantities to be sold at the prescribed price[22]. In shariah no person or government has the right to fix the price of commodities in general circumstances. All the Imams (scholars) consider it *makrooh* (not approved)[23].

In Islam, the basic principle with regard to trade is that, the market should be left free to respond to the forces of supply and demand and natural competition. This means that price controls, tariffs and any other barriers should be removed so that trade can be free and fair. In the

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[19] Muhammad Hashim Kamali. *Principles of Islamic Jurisprudence* (Kuala Lumpur: Ilmiah Publishers Sdn. Bhd, 2nd Ed. 1998) p. 267.
[20] Dr. Hussain Hamid Hassan, *An introduction to the study of Islamic law* (Islamabad: International Islamic university Islamabad, 1997) p.201
[21] Said Sabiq. *Fiqh al-Sunnah,* Vol.3 (Beirut: Dar Fikr,1995), pp. 117-118.
[22] See, supra note 2, p.122
[23] Maulana Minhajuddin Menai, *Islami Fiqah* (Lahore: Islamic publications private limited, 5th Ed,2003), p. 541

exchange of commodities in Mecca during the time of the Prophet Muhammad (peace be upon him), prices fluctuated according to market conditions[24].

The unjust nature of price fixation becomes evident in the context of the Prophet attitude in the matter. The Prophet (peace be upon him) when approached by some of his companions with the request to fix prices, He flatly refused to do so, and said: "The fluctuation of prices is the work of Allah. I want to meet Him wronged nobody."[25] This *hadith* reveals that the governments should not interfere unnecessarily in the freedom of individuals. Such interference is injustice and a sanction on the freedom of the people, because when merchants are selling a commodity in the customary fashion without any fault and lawbreaking on their part and the price subsequently rises due to the scarcity of the commodity or due to increase in demand, in such a situation the price fixation is not allowed, because this circumstance is from *Allah.*

However, there is an important exception to the general policy of support of free trade on the ground of *maslahah.* If any artificial forces, such as hoarding and the manipulation of prices by certain merchants interfere in the operation of the free market, then public interest takes precedence over the freedom of individuals[26]. In such situation the Islamic law permits the governments to control the prices in order to meet the needs of the society and to protect the consumers from the harm of excessive pricing. The above mentioned *hadith* laid general rule regarding price fixation, there is exception to this general rule on the ground of *Maslahah*, and that is when the circumstances are such where there is the danger of great harm and injustice to the people, due to artificial forces, like hoarding and manipulation of prices, then the government may fix prices to remove that harm and injustice. Further in a situation where a merchant refuse

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[24]. See, supra note 1. Available at http://www.islamicrelief.com/Indepth/downloads/Islam_and_Fairtrade.pdf visited on 29th July 2009.

[25] See, supra note 2, p.122

[26] See supra note 1, Available at http://www.islamicrelief.com/Indepth/downloads/Islam_and_Fairtrade.pdf visited on 29th July 2009.

to sell a particular commodity, despite the fact that people are in need of it, with the intention to keep it for securing a higher price than its due value, the government is allowed to compel him to sell such commodity at a price equal to the price of an equivalent commodity.

From the above discussion it is evident that price regulation is allowed in special circumstances on the basis of *maslahah* (public interest) i.e. the need to remove the harm, exploitation and injustice inflicted to the society, because public interest takes precedence over the individual interest.

Another example of anti-competitive business practice, which was commonly prevailed in the pre-Islamic society was that, the city traders go to suburbs and villages to purchase goods from village dwellers at a cheap price, and sell to them their needs at a high price, and the village dwellers could not access to the real market, they had no knowledge of the market prices, and were ignorant of them. The city merchants were knowledgeable persons of the real market prices, who approach to the latter, at his hometown to keep them ignorant of the market prices, they used to cash the ignorance of the latter.

The shrewd city dweller goes out of town to meet the Bedouin merchant and buys his goods at a cheep rate, depriving the latter of opportunity of first surveying the market to acquaint himself of the current market rate[27]. City merchants would take advantage of the ignorance of these people and buy their goods at low price or sell the goods at unfairly high prices. The Prophet (peace be upon him) interdicted this kind of sale by saying. *"A city dweller should not sell goods. To a dessert dweller, leave people to obtain their livelihood from each other by the grace of God"*[28].

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[27] See supra note 8, p.151

[28] Syed Muhammad bin-Isma'il al-Sanani, *Subul al-Salam, translated into Urdu by Maulana Abdul Qayum.* Vol.3 (Islamabad: Shariah Academy International Islamic University Islamabad, 2004), Pp.48_49

The point behind interdicting this sale is safeguarding the interest of the Muslim community and to protect the competition in business i.e. the price of commodities shall be determined in the market and to protect the people from the fraud and cheating of unjust and unfair traders. Cartels are also prohibited in *Shariah* on this ground that the general public is kept ignorant of the real situation by the firms and unduly charging the consumers by raise in prices. It is also prohibited because it restricts the nascent traders to enter into the market, and Islam provides every one to earn his bread and butter through permissible means.

2.2.3 Blocking the means *(Sadd-Al-Darai)*

Literally *(sadd-al-darai)* means blocking the sources or means. In technical sense it means blocking the means to an evil deed[29]. The rule of the means has two parts. One of them is that means to a desired object, whether it is obligatory, recommended, or permissible, has the same legal value as the object has. It is what is expressed as opening the means *(fath al-dharai)*. The other is that the means of a forbidden thing or act is forbidden, and what leads to an evil is prohibited. This part is called blocking the means *(sadd al-darai)*[30].

Blocking the means *(sadd-al-darai)* may be evaluated on the basis of their consequences of actions and what they lead to as a whole. If those means lead towards benefits, these are desirable goals. It will be considered that how appropriate they are to chase these goals, even if they are not the same as it in the goals. If their consequences lead to an evil, they are forbidden, even if the amount of prohibition is less in the means[31].

Islam also has rejected any kind of unfair competition through the concept of blocking the means to an evil deed *(sadd al-dharai)*. We may illustrate the example of hoarding, purchase

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[29] See supra note, 19, p.311
[30] See supra note, 20. p.187
[31] Abdul Karim Zaidan. *Al-Wajiz fi Usul Fiqh.* (Beirut: Muassasah Risalah). 1994. pp. 245-247.

of food and storing it for selling at a high price in the hope of getting profit is allowed and it is a lawful trade, as it results in getting the benefits of earning and maintaining oneself and one's children. But when this hoarding results in damaging the general benefit of the community and in arbitrariness by raising the prices, it is prohibited. The prophet (peace be upon him) forbade hoarding in his saying: "No one keeps goods till the price raises but a sinner"[32].

In cartels like situation also, the colluding firms, arrange to restrict the output and create scarcity in the market, with the object to rise up prices and to get more profit. In such circumstances there are two harms to the consumers, one is that the prices go high and the second is that, they face difficulty in acquiring the commodities and daily household necessities. In cartels there is *prima facie* arbitrariness, as they will result in rising up the prices; so, according to the spirit of Islamic law these are not allowed.

Another example of anti-competitive business practice is hoarding of the commodities or *iktinaz.* It is a practice wherein the traders create an artificial shortage of goods by holding huge stock of goods; they retain its supply to the market, with the intention to create scarcity in the market. Consequently the demand will increase than supply and they will charge the consumers with a high price, and get more profit. In *hadith* Prophet (peace be upon him) said: *"He is wrongdoer who store grain to sell it at higher price".* In another *hadith* the Prophet (peace be upon him) condemned the person who is hoarding in very harsh words, He said: *"He who keeps back grain from sale for forty days only to sell it at higher prices, sale it that such a man is not aware of the existence of God or that God has cut himself off from him"*[33].

Hoarding of wealth and preventing its circulation in the society is condemned by the Holy Quran also.

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[32] See, supra note, 20, p.192

[33] Reported by Ahmad, Hakim and Ibnu Abi Syaibah quoted in Said Sabiq, *Fiqh Sunnah.* Vol.3. (Beirut: Dar Fikr. 1995) p. 119.

Says the Holy Quran: "And there are those who bury gold and silver and spend it not in the way of Allah: announce unto them a most grievous penalty on the Day, when heat will be produced out of that (wealth) in the fire of Hell, and with it will be branded their foreheads, their flanks, and their backs. This is the (treasure) which ye buried for yourselves: taste ye, then, the (treasure) you buried"[34].

According to Maulana Abual Aala Maududi, the prophet's prohibition of hoarding food grains, besides serving other purposes, was aimed also at eliminating the evil of black-marketing which usually follows hoarding. The prophet (peace be upon him) wanted to establish a free market so that a reasonable and just price could emerge as a result of competition[35].

Ibn Taymiyyah holds that if the public is in need of a commodity and some members among the public are in possession of surplus stock of the same, the ruler can force these individuals to sell their surplus stock for an equivalent price *(qimat al-mithal)*. In no case they will be permitted to exploit the situation by charging inflated prices since their entitlement is only to an equivalent price[36].

Second caliph, Umar Ibn Al-Khattab banned the storage and hoarding of any marketable commodities. No body was allowed to purchase and spend his money on food items to hoard them for selling on a higher excessive price, this decision by Saidina Umar showed that Islam always prevents any kind of deeds, which will lead to unfair competition such as economic crisis and inflation.

The doctrine of blocking the means *(sadd al-dharai)*, recognizes and provide a source to the law of competition, in Islam. The competition law prevents the harm which is inflicted to the

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[34] Quran 9; 34_ 35

[35] Abu al-A'ala Maudodi, quoted in Dr. Mushtaq Ahmad, *Business Ethics In Islam* (Islamabad: International institute of Islamic thought and International institute of Islamic economics, 1995), pp.121-122

[36] Imam Ibn Taymiyyah, quoted in Dr. Mushtaq Ahmad, *Business Ethics In Islam* (Islamabad: International institute of Islamic thought and International institute of Islamic economics, 1995), p.134

public by the unlawful behaviour of the business community. The doctrine of blocking the means *(sadd al-dharai)* closes the doors, which lead to inflict that harm. We may say that this doctrine resembles to the common idiom, "prevention is better than cure".

2.2.4 Using the right unfairly *(Su Isti'mal al-Haq)*

Recognition of right of ownership is a precondition for any legitimate dealing in any transaction of wealth. The sole ownership of this universe and of whatever it contains is with Allah the Almighty:

Quran says: "To Him belongs the dominion of the heavens and the earth; It is He Who gives life and death; and He has power over all things"[37].

"To God belong all that is in the heavens and on earth. Whatever ye show what is in your minds or conceal it, God call you to account for it"[38].

"Say "O God! Lord of power (and rule) you gives power to whom you want, and you strip off power from whom you want: you endow with honour, whom you want, and you bring low whom you want: in thy hand is all good. Over all things you have power"[39].

"Allah is He who created seven firmaments, and of the earth a similar number. Through the midst of them (all) descends His command: that ye may know that Allah has power over all things and that Allah comprehends all things in His knowledge"[40].

"They are the ones who say, "Spend nothing on those who are with Allah's Apostle, to the end that they may disperse (and quit Medina)." But to Allah belong the treasures of the heavens and the earth; but the Hypocrites understand not"[41].

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[37] Quran, 57; 2
[38] Quran, 2; 284
[39] Quran, 3; 26
[40] Quran, 65; 12

From the above verses of the Holy Quran it becomes clear that absolute ownership of wealth belongs to Allah alone. Since He created everything, hence He is the Creator-owner; and therefore to Him the absolute authority and control over everything. Allah is the giver; it is He who gives wealth to man who receives it from Allah and becomes, thereby, the recipient and possessor-owner of it[42].

Allah has created the human being who is his best creature and vicegerent on earth, whose duty is to worship him and follow all his commandments. He gave him the authority to administer this world according to Allah's desire. Allah created every thing of the universe for his benefit, and gives him the right over these things to use them for his benefit and fulfill his needs. But these rights (*haquq)* are not absolute in nature. In Islam, even though the property may be privately owned by the individuals but this ownership is not absolute, it is to be considered as trust from God. The absolute ownership of every thing of the earth and even of the universe belongs to the sole ownership of Allah. When the man retains the worldly things and wealth as trust for Allah, then he is morally bound to refrain from misuse of these things, and to avoid any kind of anti-competitive and unlawful practice.

In the Holy Quran in several places the unfair use of right is condemned. Quran says; "And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that they may eat up wrongfully and knowingly a little of (other) people's property.[43] "O orphans restore their property (when they reach their age), nor substitute (your) worthless things for their good ones; and devour not their substance (by mixing it up) with your own. For this is indeed a great sin"[44].

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[41] Quran, 63; 7
[42] See supra note 2 p.45
[43] Quran, 2; 188
[44] Quran, 4; 2

Islam does not proscribe the prosperity of man in this world, even in a Quranic prayer *(dua'a)* the worldly prosperity has mentioned prior to that of the prosperity of the life hereafter. *"And there are men who say: Our Lord! Give us good in this world and good in the Hereafter, and defend us from the torment of the Fire"*[45].

But this prosperity should be achieved within the parameter laid down by Quran and *Sunnah.* It is for this reason that the Prophet (peace be upon him) said: *"A person will not be able to move on the Day of Judgment until he has been asked four questions: about his knowledge, how much he acted upon it; about his life, how he utilized it; about his wealth, how he earned it and where he spent it; and about his body, how he wore it out"*[46].

Shariah promotes and encourages the fair use of right and prohibits its unfair use *(su isti'mal al-haq),* which means prohibition of any exercise of rights that lead to the infliction of real harm to others. Islam discourages and condemns any act of abusing of rights. It is against the principle of Islamic justice, if someone monopolizes some business whereas the others are suffered because of it. Al-Khafif, a Hanafi scholar refers *su isti'mal al-haq* as to the cases where the exercise of the rights itself *per se* valid and lawful but may cause harm and damage to others[47].

Here also we may refer to the Prophet's advice to his companion on the issue of the city merchants who meet the neighboring village producers and local small merchants who could not access to the real market. Because the city big merchants approach them, at their hometown and buy their commodities on a comparative low price and sell his goods to the city dwellers on an unfairly high price. The Prophet prohibited such transaction in his statement: *"Do not go out to*

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[45] Quran, 2, 201
[46] Abu Yusuf, quoted in *Kitab al-Kharaj*, p. 4
[47] Ida Madieha Abdul Ghani. *"Some Thoughts on the Interface between Copyright and Competition Policy: The Malaysian Perspective,"* CLJ 2003. Vol. 2 p. 33

meet riders (merchant from villages) and a city dweller should not sell things to a dessert dweller". Such a sale transaction is voidable at the option of seller, and that after knowing the real market price, if he wants to continue the contract then such sale is valid, otherwise not. The prophet says: *"the owner of the goods has the choice to cancel the transaction when he comes to the market place"*. The aim of this policy of the Prophet (peace be upon him) was to protect the ignorant people from the deception of shrewd traders and to provide a policy guideline for the protection of fair economic dealings.

The prohibition of *al-najish* or *tanajush* is also based on the unfair use of right. Islam has allowed everyone to make a transaction but when this right is used to harm another or give unfair advantage to someone then it is prohibited. Dr. Mushtaq Ahmad writes in "Business Ethics in Islam" that *al-najish* is the evil practice of offering a higher price just to induce others to raise their offers, with no intention of buying the commodity. Besides being a form of fraud (which itself is forbidden) the practice of *al-najish* raises the prices for the needy buyers. The Prophet (peace be upon him) has forbidden this practice saying, *wa la-tanajashu* (do not commit *al-najish*)[48].

Cartels are like the false bidding *(al-najish),* is a practice which has the consequences of raise in the price like false bidding, and it is the unfair use of right. In the case of cartels also, the colluding firms enter into a contract secretly that they will keep the price at such and such level, or limit the production of the commodities to hike the prices and gain more profit. An another form of cartels is, that the colluding firms contract with the intention to keep out of the market an existing firm or to block the entry a new firm by keeping the price unfairly low. When their aim is achieved by the new or existing firm remains out of the market, now they charge the prices of their choice unfairly high.

[48] See supra note, 2 pp.123-124

2.2.5 Islamic Legal Maxim (Qawaid al-Fiqhiah)

A *"Qa'edah"* (maxim) literally means base of a thing[49]. Technically it is defined as "a general rule which applies to all of its related particulars"[50].

Legal maxims *(qawa'id al-kulliyah al-fiqhiyyah)* are comprehensive theoretical concepts, in the form of a short statements, like idioms, which words are few but convey a full theory regarding the goals and objectives of the *Shari'ah*. These maxims are derived from the main sources of shariah and the detailed readings of the *fiqh* literature regarding different issues.

Qawaid fiqhiah (legal maxim) are the basic policy rules for the Muslims to determine certain issues about their daily life. These *qawaid fiqhiah* are originally derived from the spirit and understanding of Quran. There are some legal maxims relevant to the competition law and policy, for example, *(al dharar yuzal),* any harm, which come about, need to be removed[51].

From this maxim we may infer that what is harmful for the society that should be redressed. In competition law perspective this maxim is applicable very much i.e. every act which is harmful that must be circumvented and be redressed. So any anti-competitive practice which restrict trade to a particular group or class, and which has adverse effect on the society at large is prohibited and the same must be redressed.

An another legal maxim states that if there are two harms one is specific and the other is general in nature, the specific harm is to be tolerated in order to prevent a more general one. *(Yutahammal ad-darar al-khaas li-daf'al-darar al'aam)*[52]. In competition law perspective we may deduce that we will look to the effects of an act. If its effects are harmful for the general public, we must avoid that even if it is beneficial to a particular class.

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[49] Maj-maa-al-lughat-al-arabiah , *Al-muj'am al-waseeth*, vol,2 (Tehran), s.v. "qa'edah" p.755
[50] Az-Zarqa', Shaykh Muhammad, *Sharh al-Qawa'id al-Fiqhiyyah*, (Damascus: Dar al-Qalam, 3rd Ed., 1414/1993), p. 33.
[51] Abdul Karim Zaidan. *Al-Wajiz fi Usul Fiqh*, (Beirut: Muassasah Risalah. 1998). p.383
[52] Ibid, p. 384

In the case of cartel the business behavior of the colluding firms is obviously advantageous for them but it adversely affects the interest of general public and overall trade activity. So, in the light of the above mentioned legal maxim *(qa'edah al-fiqhiah)*, such practice must be avoided.

The same concept has taken from a different angle in another maxim i.e. *(Taqdim al maslahah al ammah ala almaslahah al khassah)* or general or unspecified benefit should be given priority to specific benefit[53].

The competition law of Islam can be founded on the basis of these legal maxims. These maxims provide a base for the states in legislating, their domestic competition laws and make their competition polices in the light of the principles given by these maxims. These legal maxims also provide us clear guidelines in respect of enforcement of competition law and policy.

To conclude the above discussion we may say that Islam has not remained silent about the contemporary legal issues. In competition law also it provides clear guidelines and principles. Islam evaluated both the physical and spiritual aspects of economic activity and ensured to maintain justice and fairness in it, and the ultimate object of this is the protection of the interests of man. Shariah recommends the competition law and policy to maintain and promote fair business for the development of the society. The problem of unfair competition can be eradicated totally when the hearts of businessman and consumers are full of the fear of Allah that they will have to answer in front of Almighty Allah on the Day of Judgment. There is no stronger tool than the fear of Allah to control the unlawful attitude of the people.

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[53] Ibid, p. 236

Chapter 3

Competition law in Pakistan: The present scenario

3.1 Current Law Regime

Today in Pakistan the competition policy is governed by the competition ordinance 2007, which substituted the "Monopolies and Restrictive Trade Practices (control and prevention) Ordinance 1970. The competition ordinance 2007 created commission called the competition commission of Pakistan, which replaced the Monopoly Control Authority. To discuss the current legal regime of competition policy in Pakistan it will be pertinent to discuss briefly the previous law also.

3.1.1 The Monopolies and Restrictive Trade Practices Ordinance, 1970

The Monopolies and Restrictive Trade Practices Ordinance 1970 was quite an up-to-date piece of legislation at the time of its enactment. Its main objectives were to provide legal measures to control: (1) undue concentration of economic power; (2) monopoly power; and (3) restrictive trade practices. It spelled out the activities and behaviors that were considered to result in undue concentration of economic power, unreasonable monopoly power or unreasonably restrictive trade practices. It prohibited these activities and behaviors as clearly provided by the law, and empowered the Monopoly Control Authority to gather information relevant to these anti-competitive situations through the process of registration.

3.1.2 The Monopoly Control Authority

The Monopoly Control Authority was established under the Monopolies and Restrictive Trade Practices Ordinance 1970 to implement the Ordinance. The major functions of the Monopoly Control Authority include; to register undertakings, individuals and agreements; to conduct inquiries into the general economic situation of the country, specially the concentration of economic power and the existence of monopoly power and restrictive trade practices; to conduct inquiries in specific cases; and to give advice to individuals or undertakings on whether or not a certain business behaviour was consistent with the provisions of the law. The Authority also had legislative, investigative, discretionary and recommendatory powers. When proceeding with an inquiry, the Monopoly Control Authority had the powers of a civil court. In its recommendatory powers it was also able to make suitable recommendations to the central or provincial Governments with respect to those actions that might affect the concentration of economic power, monopolies, or restrictive trade practices"[1].

But despite of these provisions in the 1970, Ordinance the MCA played no important role, as was expected from it, to effectively implement the law and ensure fair competition in the trade activity. In its initial years and its last year it succeeded in some partial attempt against anti-competitive practices, but in the remaining duration of about 25 years, it remained ineffective. The Competition Commission report on the state of competition 2008 states that the nationalization process that started in 1972 limited the scope of the MRTPO as the law had no provision to deal with public sector organizations. Consequently, during the 1970s and 1980s, the MCA's emphasis was on the diversification of the capital resources of undertakings. To this

[1] "The state of competition in Pakistan 2008", Report of the Competition Commission of Pakistan, p 21, available at http://mca.gov.pk/Downloads/State%20of%20Competition.pdf visited on 28 August, 2009.

end, a few private companies were converted into public limited companies[2]. The government became aware of the fact that the MCA remained ineffective and could not achieve its goals. In international level the global trends have also been changed as the institutions like MCA were being replaced by the competition agencies that were more powerful to implement the competition laws and had a broader and progressive mandate. So the government formulated a new competition law with assistance from the World Bank. The Competition Ordinance 2007 was issued which replaced the MRTPO. Under the new law Competition Commission was established on 12 November 2007 to implement the new competition law.

3.1.3 The Competition Ordinance, 2007

As the MCA could not achieve its goal of ensuring fair competition, therefore the government issued the new Competition Ordinance, 2007 which is greatly influenced by the principles of the Treaty of Rome that established the European Union. The Ordinance also brings together the principles of best practices regarding competition law of other international organizations that address the competition law issues, like the United Nations principles and rules for the control of restrictive trade practices, the OECD's recommendations for best practices on competition law and the policy guidelines of the World Bank for competition law.

OECD describe, that the main objective of competition law and policy, is to safeguard and encourage competition as a means of ensuring efficient distribution of resources in an economy. Competition law and policy helps to create a conducive environment for business by lowering market entry barriers[3]. These principles were tried to include in the Competition

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[2] Ibid

[3] Khemani R.S, "A framework for the design and implementation of competition law and policy", (Washington: OECD, World Bank, 1998) taken from, http://www.unescap.org/pdd/publicatins/bulletin2002/ch7.pdf visited on 30th August 2009.

Ordinance, 2007 to achieve its goal of safeguarding and promoting fair competition. The main features of the Competition Ordinance 2007 are as under;

(1) According to sub section 1 of section 3 of the Ordinance no person shall abuse dominant position. What is abuse of dominant position? That is defined by section 2 of the same section. It states that the abuse of dominant position shall be deemed to have been brought about, maintained or continued if it consists of practices which prevent, restrict, reduce or distort competition in the relevant market[4]. Although the law indicates certain minimum market share beyond which there will be a presumption of dominance – 40 per cent - this is by no means definitive; nor does a presumption (or finding) of dominance suggest in any way that the dominance is being abused. Also, depending on the facts, the new law does not rule out either dominance or abuse at lower levels of market share[5].

(2) Under the new law any agreement which prevents or reduces competition within a particular market, whether that agreement is unreasonably restrictive or not is prohibited. Sub section 1 of section 4 states that no undertaking or association of undertakings shall enter into an agreement or in the case of an association of undertakings, shall make a decision in respect of the production, supply, distribution 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[6]. The ordinance also prohibits the unfair business practices and provides a detailed procedure for review and clearance of mergers and acquisition.

[4] Section 3 competition ordinance, 2007.
[5] See supra note 1 p 22
[6] Section 4 competition ordinance, 2007.

(3) The Competition Ordinance, 2007 in section 5 and section 7 empowered the Competition Commission to grant individual and block exemptions to certain agreements from the prohibited agreements provided for in section 4, on the grounds of efficiency and economic merit.

(4) The Competition Ordinance 2007 under section 29 require the Commission to arrange in house studies and research for promoting competition in all important sectors of the economy. The Ordinance also requires the Commission to promote competition through advocacy, for which different means and methods can be used, to create awareness in the public regarding competition issues and to develop a culture of competition. The Ordinance provides for the CCP to hold open hearings on any matter disturbing the competitive environment in Pakistan.

(5) Under section 34 and section 35 of the Ordinance, the CCP may authorize its officers to enter and search any premises, place accounts and computers etc. It also allows forcible entry if required, under appropriate safeguards provided in the law. Section 39 provides for Leniency and reprieve which is to be granted if the Commission considers it advantageous, because this tactic is useful and considerably supportive for the investigators to trace secret arrangements.

(6) The commission shall consist of not less than five and not more than seven members; the federal government may increase or decrease this number. One of the members shall be appointed as the chairman of the commission. The chairman together with members shall be responsible for the administration of the affairs of the commission. This law gives the members of the CCP security of tenure in order to preserve the independence of the CCP.

(7) Under section 20 of the Ordinance there shall be established a fund known the "CCP fund" to meet charges and expenditures of the commission. The fund shall consist of allocation by the government, charges, fees, and penalties levied by the commission, and contribution from the donors. Furthermore there is also a provision for the accounts and audits of the commission. There shall also be an annual report prepared for every year on the activities of the commission.

(8) The Competition Ordinance provides for higher penalties as compared to MRTPO, there is also provision to vary these penalties, which shall be notified in the Official Gazette with the approval of the federal Government. Section 38 subsection 2 describes the rates of these penalties; the commission may impose a penalty on an undertaking upto fifty millions rupees, or upto an amount of fifteen percent of the annual turnover of an undertaking. The Ordinance allows the CCP to penalize for breach of the competition law as well as for any disregard of its orders. The CCP has also power to take appropriate measures for the recovery of the penalties including the attachment of property, appointment of a receiver etc.

(9) The 2007 Ordinance provides that the orders of a Member or officer of the CCP will be appealable to appellate bench of the CCP. The appellate bench will comprise on at least two Members of the commission who have not been involved in the original decision. There is a right of second appeal available to a party aggrieved by the order of the appellate bench of the CCP, which may be preferred to the Supreme Court.

3.2 Cartels in Different Economic Sectors in Pakistan

One of several elements that have worked against achieving higher levels of efficiency and have resulted in the ensuing lack of international competitiveness of the Pakistan economy has been an anti-competition business culture in which the powers that be have tended to acquiesce. Business firms have been allowed to collaborate by forming cartels and by adopting practices such as fixing market prices to secure higher profits and consumers have been left at an obvious disadvantage. Likewise, powerful companies have held sway in their relevant markets, leaving competitors and new entrants to struggle for growth and space. In the process both consumer welfare and the growth of the economy have suffered[7].

In this part of research work, "the state of competition in Pakistan", will be analyzed from the perspective of the cartel situation found in different sectors and industries. To go through the history of these sectors and the government attitude towards them, it may be said that the government involvement in these sectors was very high from the beginning and continued till 1990's, when at a large scale privatization process started and continued for the last decade or more. But till now more of these sectors resort to the government for support either in the shape of price determination or through other ways, and want to evade the market competition. The following is the sectors specific study of cartels and anti-competitive behaviour in different industries in Pakistan.

[7] See supra note 1, introduction p.vi available at http://www.mca.gov.pk/Downloads/State%20of%20Competition%20Report%202008.pdf visited on 28th August 2009.

3.2.1 Cement

Cement comprises 4.1 per cent of the total manufacturing in Pakistan[8]. There are 29 operational units in the sector ranging from small (i.e., producing around 100,000 tonnes per annum) to fairly big even by international standards (i.e., producing more than 2.5 million tonnes per annum). In terms of its concentration ratio, it can be described as moderately concentrated. By and large, only a few (perhaps 4 or 5) units operate with up to date technology[9]. The resultant economies of scale (in the production process) can confer a cost advantage to the very large manufacturer[10]. This cost difference can be advantageous for the consumer in shape of low prices, and good quality of products, but, in most of the cases, the producers monopolized the market. When their monopoly has established, they raise prices, and earn above normal profit. The cement industry all over the world is thought to be oligopolistic in its behaviour, with a trend towards cartelization.

In Pakistan, in the early nineties most of the cement plants owned by the State Cement Corporation (SCC) were privatized in 1992, when the re-construction and rehabilitation work started with full swing, it provided an opportunity to cement manufacturers, to make cartels and earn more returns. At this stage the MCA undertook extensive investigation and found cartel like situation in the industry. Accordingly the State Cement Corporation Units were directed to open their retail shops at important points in major cities and sell cement at a rate approved by the Economic Coordination Committee (ECC). Private cement companies were ordered to break the cartel. With these actions the cartel was successfully broken[11].

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[8] *Quantum index of manufacturing 1999/00*
[9] See Supra note 1. p. 41
[10] Ibid
[11] OECD Global Forum on Competition, *"How Enforcement against Private Anticompetitive Conduct has contributed to Economic Development"* contribution from Pakistan, session IV, held on 12 and 13 February 2004, see http://www.oecd.org/dataoecd/19/44/23734902.pdf visited on 29th August 2009.

In October 1998, the second cartel like behaviour came to the notice of MCA, when cement manufacturers concurrently increased prices about Rs. 100/bag. At the same time output was also decreased. Investigation was conducted which concluded that cartel has established in the industry. In February 1999 the MCA directed the manufacturers to break it up and restore the pre-cartel prices and to remove the restrictions and capacity utilization. This time the cement manufacturers failed to comply with the orders of the MCA. The MCA imposed penalties of Rs.100,000 on individual units and in case of continued non-compliance another penalty of Rs.10,000 per day. Only one company (out of sixteen) paid the penalty. The others ignored it and appealed the decision of MCA in the High court.

On 15th April 1999, the ECC, acting on the advice of the Ministry of Industries and Production (MOIP), reduced the excise duty in order to facilitate the manufacturers, and agreed to the price of Rs 200 per bag, in a compromise deal that negated MCA's efforts. The Government's decision also rendered the Court proceedings infructuous. Despite this reversal, the MCA once again took *suo moto* notice in June 2003 when there was a public outcry (especially in the national press) against another price hike (overnight increase of Rs 35 per bag) by the cement manufacturers[12].

It has come to light now (in April 2008) that this price hike may possibly have been the consequence of an agreement concluded in May 2003 by all 21 member companies of APCMA essentially to fix their quotas in respect of the production and supply of cement. This agreement has apparently remained in force all these years. Significantly, it makes provision for the dispatch of cement to be monitored by a company of chartered accountants. In addition, the agreement stipulates the setting up of regional price monitoring committees in each of the provinces to enforce the cartels "marketing arrangements" and targeted price levels. The

[12] See Supra note 1. p. 42-43

existence of this cartelization agreement was not known to MCA at that time. Nor was MCA in a position to inspect, or call for the record of the manufacturers association (it did not have legal jurisdiction over company associations) or seize a company's records[13]. To handle the situation of cartel, in 2003, MCA took *suo moto* notice of the national press against the cement price increase in mid May. It decided in June 2003 to conduct special enquiry under Section 14(1) of the MRTPO[14]. So, in September 2003 it issued Show Cause Notices to 18 cement companies and held hearings in the next 2 years. As a result, in October 27, 2005 MCA passed an order directing 18 cement factories to lower the prices and break the cartel. The cement companies did nit complied the order; consequently, penalties were imposed as per law. But these penalties could not be enforced, as the cement companies filed appeals in the High Courts of Sindh, Lahore and Peshawar, against the penalty order of the MCA. Lahore High Court accepted the appeal of the cement companies and set aside the decision of the MCA. The court in its ruling stated, "the MCA had no authority to control the prices of cement, issuing the orders of reducing the price was beyond its jurisdiction". The MCA issued show cause notices in 2003 but the orders were issued with a considerable delay in 2005. The government reduced central excise duty in the 2003 budget but the relief was not passed on to consumers due to cartel.

There was another price increase in cement industry, when prices reached to Rs 350 per bag in April 2006. The government took a short-term measure and subsidized the cement imports. That was a temporary, very costly and ineffective intervention. "Although the prices reduced from Rs 353 to Rs 195 in January 2007, but in February 2007 they rose again, quite suddenly, by Rs 60, to a new high price of Rs 255 per bag. The government was under high pressure from business councils, management associations and from general public to compel the

[13] Ibid, p.43

[14] http://www.reseauinternationaldelaconcurrence.org/media/library/unilateral_conduct/questionnaire/PakistanQuestionnaireResponse_revised.pdf visited on 31 August 2009.

cement manufacturers to reduce the prices. Due to the pressure the government directed the MCA to enquire the matter"[15].

MCA had neither the investigative tools to prove a cartel formation in a court of law, neither the powers to inspect records, nor the power to induce a whistle blower. Hence no meaningful action could be taken by MCA for a year. All this changed with the promulgation of the new law. Armed with the aforementioned powers that MCA was lacking, the CCP conducted a surprise inspection on 24th April 2008 to recover the documentary proof that had eluded it for five years[16].

The MOIP complained, to the Prime Minister on behalf of APCMA, the action of CCP, and alerted him to the risk that the action of CCP might corrode the investors, particularly the foreign investors. This attitude of the MOIP encouraged the cement manufacturers, who raised prices from Rs 275 per bag in April 2008 to a price of Rs 375 per bag subsequently. At the same time, MOIP has arranged negotiations for the cement industry on cement prices and begun a process of reconciliation of cost differences. CCP pointed it out to the Government, on 3 September, 2008, that it should not take any step that might encourage the cement manufacturers to collude cartels. The suspected cartel situations resulting from the "marketing arrangements" gained favor of the MOIP. Costly measures taken by the Government in the shape of subsidies to stabilize prices have failed, because they negate the very spirit of competition.

It is critically important that the government does not, directly or indirectly, assist or encourage collusive behaviour by the cement industry that is detrimental to both productive efficiency and the interests of the consumer. Instead, the government must support and assist the CCP in its efforts to establish competitive norms so that a more efficient cement industry

[15] http://www.brecorder.com/index.php?id=930318&currPageNo=1&query=&search=&term=&supDate= visited on 31 August 2009.
[16] See Supra note 1, p.44

emerges in the country in the future. The government could unwittingly encourage cartelization by using the APCMA's good offices in such matters as the determination of costs, prices and capacity utilization in the sector[17].

3.2.2 Sugar

The sugar sector constitutes 4.2 per cent of manufacturing in the country. Although the same size as cement its many backward (sugarcane growers) and forward (food processing) linkages in the economy indicate that its indirect socio-economic impact in overall terms is significantly larger than its direct contribution to GDP. In terms of concentration it is deemed to be competitive[18].

In 2005 the prices of sugar raised about 40 per cent, on this the MCA issued show cause notices to 72 sugar mills. Several hearings were held; as a result the MCA issued an order on 23 September 2005 directing the mills to discontinue and not to repeat the practice of withholding of stock to create artificial shortage of the commodity in the market. Against this order the mills went to the Lahore High Court in appeal, where the case pending for about three years. Eventually the Islamabad High Court accepted the appeal, in July 2008, on the ground that MCA could not provide sufficient criteria to establish that any unreasonable restrictive trade practices has occurred. The MCA also have no evidence to prove in the court that sugar stocks had been withheld by mills from dealers upon demand.

The CCP does not have compelling evidence of a sugar cartel, which is a pre-condition for taking legal action. However, the existence of parallel pricing is evident. The Pakistan Sugar

[17] Daily Times, CCP seeks ECC's nod to unearth cartelization. Report by Sajid Chaudhry, August 21,2009
[18] See Supra note 1. p.49

Mills Association (PSMA), a powerful lobby, representing the interest of sugar factory owners, has often made common cause against sugarcane growers[19].

In 2006, 42 mills were alleged that they released less stock than the stipulated provincial average. This behaviour created severe shortage of the sugar in the market, therefore the MCA issued show cause notices under section 11 of the Monopolies and Restrictive Trade Practices ordinance 1970, to all these mills. During the hearing they pleaded that the provincial average was not a reasonable benchmark. This argument was accepted and monthly consumption of 8.33 percent was stipulated as a benchmark, but the sugar mills did not adhere to this benchmark also. On 9th May 2006 the MCA passed order directing the concerned undertakings to discontinue restrictive business practice, by releasing sugar and to abstain from such practices in future. The undertakings were required to submit compliance of the order by end of May 2006. 22 mills went to the High court in appeal, where the MCA order was suspended and the mills were ordered to bring sugar to the market. According to the CCP report "state of competition in Pakistan 2008" all 22 of them were represented by the same legal consultant, in itself an indication possibly of a cartel[20].

About the current sugar crisis and the possible cartel like situation the chairman of CCP said while speaking to the members of the Lahore Economic Journalists Association on 20 August 2009 that no proof had been brought to the notice of the CCP about any collective malpractice by sugar mills. Sugar prices in Pakistan were in line with the global market and if proof of a cartel were provided the CCP would promptly take action against the mills. The only hint of a cartel was noted when the Pakistan Sugar Mills Association's chairman for Punjab

[19] See Supra note, 1 p.49-50
[20] Ibid, footnote p.50

chapter threatened the government at a press conference the other day that they would not crush sugarcane if the crackdown against the mills was not stopped[21].

3.2.3 Banking Sector

More than 53 per cent of Pakistan's GDP originates in services of which banking constitutes over 8 per cent. More strikingly, gross value added in banking accounts for much of the overall GDP growth in the last few years, perhaps as much as two-thirds. Its importance in the economy in intermediating between savers and investors is substantial and growing, serving both the largest corporate customers and the smallest individual account holders[22].

Pakistan Banks Association (PBA) is incorporated as a private limited company and gives membership to banks and all other financial institutions working in Pakistan. At present, it has 49 members. All these banks are working under the control of The State Bank of Pakistan, as a regulator. CCP is concerned only with the enforcement of competition norms and dealing with the competition issues in the banking sector and not with the regulation of its business. Although banking sector in Pakistan is deemed to be relatively competitive, yet there are some competition issues found in this sector.

On 5th November, 2007 the Pakistan Banking Association (PBA), announced that all the banks had mutually decided to fix rates of profit and other terms and conditions of a new deposit account, including the fixation of maximum profit rates, ceilings of categories of accounts and the rates to be charged on such accounts, and restriction on the number of transactions. The Competition Commission took suo moto notice of this announcement and issued a show cause notice on 24 December 2007, and initiated proceedings under section 30 read with section 31(b)

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[21] The News, 21st August 2009.
[22] See Supra note 1, p. 47

the Ordinance against the PBA and all its member banks (except Development Financial Institutions (DFIs) who do not operate deposit accounts[23].

In fact, the banks were seemed to collude, to compel the small account holders whose deposits are under 5,000, rupees to pay the administrative expense of larger account holders. This policy will be resulted in transferring resources from the poorest clients to the richer ones. In this policy it was stipulated to levy 600 rupees per annum (Rs 50 per month), compulsorily, on a balances below Rs 5000. about this the Competition Commission report states, "Thus a small account holder of Rs 2,500 would end up being charged 24 per cent on his account. A simple calculation showed that even if one fourth of the enhanced saving accounts (ESA) account holders had balances below Rs 5,000 the service charge recovered from these smaller depositors would equal (and cover) the 4 per cent interest paid out to the remaining three-fourths of the somewhat larger customers. The ESA scheme covered 45.12 per cent of the total 25 million account holders. A large number of depositors appeared thus to have been adversely affected[24].

This led CCP to take action against those banks, in the commission decision the banks were divided into five categories. First was the strong group of the seven large banks who implemented the scheme, they were fined Rs 25 million each, and PBA that was fined Rs 30 million. Second category was, those banks that were members of the PBA cartel but did not implemented the cartel scheme they were reprimanded. The third category was of those banks that had not participated in the PBA's scheme. Fourth category was Islamic banks who opposed the scheme; therefore no action was taken against them. The last category was of DFIs to whom this scheme did not apply.

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[23] http://mca.gov.pk/Downloads/Order_of_Banks.pdf visited on 10 September 2009.
[24] See Supra note 1, p. 48

This case was a serious situation of cartel which had very disturbing and serious effects against the interests of the public, intended to adversely affect the rights of customers. A study conducted by The Consumer Right Commission and the Asia Foundation, has observed the behaviour of banks in these words." Depositors are not getting due returns due to high difference between lending and deposit interest rates. Further, the volume of consumer complaints is rising day by day due to processing delays, service inefficiencies, hidden charges, and poor disclosure practices... As the consumer financing portfolio is increasing, quality of related banking services is becoming a serious issue"[25]. This behaviour of the banks causes the transfer of wealth from poor people to the richer segments of the society.

3.2.4 Fertilizer

This sector constitutes around 3.4 per cent of manufacturing in Pakistan. The imperatives that determine its degree of concentration are primarily technological as, given the size of Pakistan's overall fertilizer market; only a few units could satisfy the entire demand. Smaller units are neither technically nor commercially viable. In terms of its concentration ratio the sector is considered to be highly concentrated[26].

In the regime of controlled prices (fixed by Government until 1987 for urea, and until much later for other products) monopoly pricing ensured very high profitability to all industry participants – at a cost to the national exchequer and to the consumer[27]. Subsidies on fertilizers

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[25] Consumer Rights Commission of Pakistan (CRCP) *"Consumer financing in Pakistan issues, challenges and way forward"*. Available at http://www.crcp.org.pk/PDF%20Files/Consumer%20Finance%20Report%20%2029.07.2008.pdf visited on 12th September 2009.

[26] See supra note 1, p. 45

[27] Ibid, p.46

were withdrawn gradually – nitrogenous fertilizers in 1984-85 and Phosphate and potash in 1989-90[28].

It has become evident from CCP's investigation into the fertilizer industry that it has always been a closely-knit oligopoly with one dominant industry leader (first NFC, then FFC). There has been no product innovations in this industry for several decades, even though there have been new types of fertilizers introduced in many parts of the world. Hardly any attempt has been made in Pakistan to open up new market segments[29]. Although prima facie there seems no cartelization in this industry, but there is rigidity that may affect the market efficiency and consumer welfare, there is also monopoly in the industry, the FFC enjoy 58 percent share of the market. A thorough study of the industry is required to inject competition in it.

3.3 The impact of anti-competitive business practices

Competition law and consumer protection are interlinked with each other. It is not possible to talk about one ignoring the other. Basically, both of them are complementary to each other, and both are concerned with the common social issue of public interest. Competition law by maintaining and preserving competition ensure the protection of consumer interest. On the other hand, consumer policies enhance competition between firms, so these are interdependent fields.

Competition law is an economic law; it is about the behavior of economic agents. Economics provides a theoretical basis for the law; it also provides the tools with which to

[28] Ministry of Food Agriculture and Livestock *"Agriculture prospective and policy, 2004"* available at, http://www.pakistan.gov.pk/ministries/food-ministry/media/Policy.pdf visited on14th September 2009.
[29] Supra note, 1 p.47

analyze markets and competition within them[30]. The consumer protection is the primary goal of competition law. Competition law, through the preservation and promotion of competition, in the market ensure and enhance the consumer welfare. Prof. Timothy Muris stated: "Policies that we traditionally identify separately as 'antitrust' and 'consumer protection' serve the common aim of improving consumer welfare and naturally complement each other"[31]. As competition law can promote and protect the consumer's welfare and can reduce the need for direct consumer policy interventions, on the other hand consumer policy also strengthens competition in markets. So they are complementary to each other.

3.3.1 The adverse effects of anticompetitive business practices on the consumer welfare

The benefits of fair competition in a relevant market is two folded for the consumers, one is the lower prices of the commodities and the other is the availability of new and better quality products. About this a UNCTAD report states, competition among enterprises benefits consumers whether it comes in the form of price competition or non-price competition. Price competition benefits consumers since it involves an attempt to win customers by offering them a product at a lower price than the competitors. The consumer therefore benefits from the resultant lower prices. Non-price competition benefits the consumer since competitors go for sales promotion, advertising, quality upgrading, and offer of after-sales service and so forth to increase

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[30] Doern. G. Bruce and Stephen Wilks, *Comparative Competition Policy –National Institutions in a Global Market,* Oxford University Press, 2001, quoted in UNCTAD, Geneva, report on "*the effects of anti-competitive business practices on developing countries and their development prospects". "Competition law and consumer protection insights into their interrelationship" article* by Vindo Dhal. (Geneva: UNICTAD, 2008) p.4 available at http://www.unctad.org/en/docs/ditcclp20082_en.pdf visited on 4th September 2009.

[31] Timothy J. Muris, Chairman, Federal Trade Commission, "*The Interface of Competition and Consumer Protection*" his remarks at The Fordham Corporate Law Institute's Twenty-Ninth Annual Conference on International Antitrust Law and Policy, New York City, October 31, 2002, quoted in UNCTAD, Geneva, report on "*the effects of anti-competitive business practices on developing countries and their development prospects". "Competition law and consumer protection insights into their interrelationship" article* by Vindo Dhal. (Geneva: UNICTAD, 2008) p. 14 available at; http://www.unctad.org/en/docs/ditcclp20082_en.pdf visited on 20th September 2009.

their share of the market. Again, consumers benefit from better quality products and after-sales service.[32] Besides causing consumer welfare, competition policy and law also directly concerned to consumer protection. So, the consumers are the main losers of anti-competitive business conduct in a market. Consumers in this way need the protection of competition law the most, as the adverse effects of anti-competitive practices are excessively harsh for them.

Firms will often be tempted to ensure increased profits by restricting the process of competition. When competitors agree to fix prices, rig bids or allocate customers, or otherwise operate as monopolies, consumers lose the benefits of competition. Consumers also lose the advantage of choice of shopping around and freely choosing the products and businesses that best meet their needs. The prices that result when competitors agree to collude are in most cases artificially high. Such prices do not accurately reflect the cost of production and distribution, and therefore distort the allocation of society's resources. The result is a loss not only to individual consumers but also to the economy as a whole[33].

It has also been observed that businesses will have less incentive, to trade fairly when competitors can obtain a short-term advantage by misleading consumers, supplying unsafe goods or acting in a grossly unfair way. The costs of such short-term advantages will fall on both consumers and legitimate traders, often to the long-term detriment of consumers as the increased risks of doing business discourages changes to entrenched buying and investing behavior.[34]

In short the consumers are undeniably the major and utmost beneficiaries of the effective implementation of competition policy and law, not only from lower prices advantage, better

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[32] Alexander J. Kubaba, "Anti competitive practices and their adverse effects on the consumer welfare: The Zimbabwean experience" UNCTAD, Geneva, report on "the effects of anti-competitive business practices on developing countries and their development prospects". (Geneva: UNICTAD, 2008) p. 14. Available at http://www.unctad.org/en/docs/ditcclp20082_en.pdf visited on 20th September 2009.

[33] Ibid, p.91-92

[34] Ibid, p.97

quality of products and greater choice of goods and services that result from competitive economic efficiency and innovation, but also from the protection advantage that they get from the prohibition and control of anti-competitive business conduct.

3.3.2 The effects of anticompetitive business practices on the economic development

OECD describe, that the main objective of competition law and policy, is to safeguard and encourage competition as a means of ensuring efficient distribution of resources in an economy. Competition law and policy helps to create a conducive environment for business by lowering market entry barriers[35]. Competition law and policy generally has as its object to enhance the overall material welfare of society through maintaining rivalry and competition among firms. The ultimate goal of competition policy is to increase overall economic efficiency.

Under perfect competition economic resources are allocated between the different goods and services produced in precisely the quantities which consumers wish (their desires being expressed by the price they are prepared to pay on the market). This is termed as allocative efficiency. Apart from allocative efficiency many economists and non-economists too think that under perfect competition goods and services will be produced at the lowest cost possible, which means that as little of the society's wealth is expended in the production process as necessary. This is termed productive efficiency[36].

Making economic efficiency the principal objective of competition law supports consistent application of policies and is more likely to limit lobbying by vested interests. In some countries, however, competition law has multiple goals under the rubric of "public interest,"

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[35] Khemani R.S, "A framework for the design and implementation of competition law and policy", (Washington: OECD, World Bank, 1998) taken from, available at http://www.unescap.org/pdd/publicatins/bulletin2002/ch7.pdf Last visited on 26th May 2009.

[36] Richard Wish, *Competition Law,* (London: Butterworths, 1985) pp.1-2

including fairness, regional development or employment, and pluralism or diffusion of economic power through promotion of small and medium-size businesses. Multiple objectives invite lobbying by different stakeholders in the economy and can lead to inconsistent application of competition law, so that governments end up protecting some firms from competition. That result is at odds with the basic aim of competition law — to protect the competitive process and not competitors[37].

For economic development also, the impact of restrictive trade practices, anti-competitive business behaviour and monopolizing the market is very harmful and bring adverse effects for economic growth. In such anti-competitive environment small firms may not survive in the market because the big ones create their monopoly and keep the nascent and small firms out of the market. In other word we may say that these practices cause market entry barriers. Wish has rightly said that, "under conditions of monopoly the position is very different. The monopolist is in a position to affect the market price. Since he is responsible for all the output, and since it is aggregate output that determines price through the relationship of supply to demand, he will be able to increase price by reducing the volume of his own production"[38]. Further the monopolist may not feel the need to innovate he does not feel the constant pressure to go on attracting custom by offering better, more advanced products[39].

Cartels are cancers on the open market economy, which forms the very basis of our Community. By destroying competition they cause serious harm to our economies and

[37] R. Shyam Khemani, article *"competition policy and economic development"* available at http://www.irpp.org/po/archive/oct97/khemani.pdf visited on 31 August 2009.
[38] See Supra note 36, p.3
[39] Ibid, p.4

consumers. In the long run cartels also undermine the competitiveness of the industry involved, because they eliminate the pressure from competition to innovate and achieve cost efficiencies[40].

3.4 Hurdles in the implementation of competition law

Implementation of competition laws means to keep a close eye on the tendency of individual firms not to abuse their dominant position or make cartels and not cause exploitation of the consumers or excludes other competitor. The implementation of competition law also includes the prohibition of anti-competitive agreements such as cartels and other collusive arrangements. Supervising mergers and acquisitions, assessing their influence on limiting competition and restricting deceptive marketing practices all are aims that are governed by the competition law. But these aims need to be supported by a pro-competition political and cultural attitude.

The Monopoly Control Authority which has been succeeded by the Competition Commission of Pakistan (CCP), the later is supposed to promote competition and act strongly against the restrictive trade practices. But it is facing immense hurdles and problems in the implementation of the law due to a number of reasons. In Pakistan major hurdles in the implementation of competition law are:

1. The first hurdle in the implementation of competition law in Pakistan is the interest problems. According to The News article an official of the competition commission confided that CCP is under pressure from some officials and business quarters to prevent it from carrying any investigation against wheat, sugar cement, pharmaceutical and other

[40] Mr. Mario Monti, "Fighting Cartels Why and How" (STOCKHOLM: Konkurrensverket SE-103 85, 2001) p.14 available at http://www.kkv.se/upload/Filer/ENG/Publications/3rdnordic010412.pdf visited on 10th September 2009.

industries commonly believed to have been involved in anti-competitive practices[41]. The officials say that CCP inquiries and decisions against banks, cement and fertilizers companies involved in cartelization were creating more and more problems for the CCP, including the non implementation of the competition law[42]. The commission is under pressure from various government and private lobbies[43].

2. Competition law and policy could not only be implemented by those who are directly assigned the task of implementation of the law, but there must be a culture of competition. This can only be obtained through public awareness and this culture has not yet taken deep roots in Pakistan. In policy making, consumers are normally not considered, while the interests of businessmen are protected. This is because the business community in Pakistan is well organized and well connected. Therefore they influence the policies. While the consumers are unaware and disorganized to have such influence. This public unawareness is also a big hurdle in the effective implementation of competition law. On this point the CCP report on "the state of competition in Pakistan" gives stress in these words: The CCP has to create and sustain credibility for itself and its work and it has to nurture an environment within which it can depend on support for its work from both its stakeholders and ordinary citizens. At a mundane level advocacy might be viewed as merely a complement to policy implementation but indirectly it plays an essential role in the establishment and propagation of a pro-competition culture in the country[44].

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[41] Nadeem Iqbal, "colluding with cartels" The News July 27, 2008, p.30
[42] Ibid
[43] Sabihuddin Ghausi, "Cartel, production cost and cement prices" Dawn Economic & Business Review, August 18-24, 2008 p.vi
[44] See Supra note 1, introduction p. vii

3. The lack of financial resources for the Competition Commission is also a hurdle in the proper implementation of competition law. The CCP has not been allocated any fund in the 2008-2009 and its succeeding budgets due to which it can not carry out its investigations and probes effectively. The Chairman CCP in an article states as follow: The government realizes that the resources made available for enforcing the competition law will be a key factor. It is quite possible to have everything else in place but still have a weak competition regime because of inadequate enforcement resources. Even with a fairly generous budget, a new enforcement agency will need to set priorities for its enforcement goals[45].

4. The effective implementation of competition law is not an easy task. To trace the anti-competitive practices, the investigators are required to have sufficient relevant knowledge and expertise. Due to this lake of knowledge and expertise, many developing and established market economies face a significant anti-competitive disadvantage, and could not implement the competition laws properly. For proper investigation of anti-competitive behaviors the competition investigators should be properly trained to get the tangible results. In Pakistan the untrained and unequipped competition functionaries are also a hurdle in the way of effective implementation of competition law.

5. The banking sector has already thrown up many issues. Complaints against the banks abound, especially before the Banking Ombudsman. The Consumer Rights Commission and other consumer protection agencies have also highlighted public grievances primarily relating to the poor quality of service provided by banks and apparent overcharging of

[45] Khalid A Mirza and Faisal K Daudpota, "competition In Pakistan The New Regime" Competition Law Insight, 20th November 2007. p. 9

customers. The CCP is concerned only with the enforcement of competition norms and not with the regulation of banking business.[46] The sources in CCP are claiming that the State Bank of Pakistan wrote a letter to the ministry of finance demanding to keep the banks outside the purview of CCP[47].

It is clear from these facts that the competition laws in Pakistan are not fully applied to banking sector, or if applied then the decisions of CCP are not effectively implemented. The Pakistan economy will keep losing its competitiveness and the issues of inflation, scarcity crisis of different commodities and development will become more intractable then they are if these hurdles are not overcame.

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[46] See Supra note, 1 p.48
[47] See Supra note 43

Chapter 4

Conclusions and recommendations

4.1 Conclusions

Competition policy and law primarily aims to pursue public interest. It concentrates on those areas of economic activity which have important impacts on society as a whole. In developing countries, the anticompetitive practices like abuse of dominant position and colluding with cartels, adversely affect the interest of consumers and businesses activity as a whole. Supply of goods and services that are common necessities of life are subject to anticompetitive practices which resulted in market access barriers for nascent business competitors and raise in prices for consumers. This situation reduces market energy and the economic mobility of manpower and businesses.

From the discussion in the previous chapters, it is concluded that any anti competitive practice including cartels is against the law as well as the sprit of Shariah. Both the modern law and Shariah want the wellbeing of the humanity and ensure the security of their interests. The approach of the two sets of laws might be different but their goal is the same, the welfare and protection of interests of the whole society. Therefore every practice which endangers this welfare and harms this common interest is condemned by law as well as by Shariah.

Cartels are the most deliberate form of anti-competitive practice in which the business competitors agree not to compete with each other. They intentionally reduce output and raise prices, which by their very nature restrict or eliminate competition. In this way they harm

consumers both by upward movement in prices and unavailability of commodities. The allied Companies in a cartel produce less and earn higher profits. The whole society is suffered, resources are misallocated, economic efficiency is disturbed and consumers' welfare is reduced. For these reasons cartels are almost universally condemned.

Fighting cartels is one of the most important areas of activity of any competition authority and a clear priority of the Commission. Cartels are cancers on the open market economy, which forms the very basis of our Community. By destroying competition they cause serious harm to our economies and consumers. In the long run cartels also undermine the competitiveness of the industry involved, because they eliminate the pressure from competition to innovate and achieve cost efficiencies[1].

As for as the Pakistani competition law is concerned, it has not used the term cartel explicitly, but section 4 of the competition ordinance 2007 deals with cartels like agreements. It prohibits all type of agreements in which the undertakings or association of undertakings shall make 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[2]. There is an exemption provided by the Ordinance to those agreements which are contributing to improve production or distribution and promote technical or economic progress, while allowing consumers a fair share of the resulting benefit. If an agreement fulfills these criteria the same will not be prohibited by the Ordinance[3].

In Islamic law there is no terminology used for cartels and even for the competition law also, but the Muslim scholars derived the rules of fair business and transparent trade from the

[1] Mr. Mario Monti, "Fighting Cartels Why and How" (STOCKHOLM: Konkurrensverket SE-103 85, 2001) p.14 available at http://www.konkurrensverket.se/eng/publications/pdf/3rdnordic010412.pdf visited on 14th September 2009.

[2] Section 4 competition ordinance, 2007

[3] For details see Competition Ordinance, 2007. section 9

verses of the Holy Quran, *Ahadith* of the Holy Prophet (peace be upon him), and other sources of shariah, which are perfectly applicable to the modern competition law. In addition to the rules of the Holy Quran and the *Ahadith* of the Holy Prophet (peace be upon him) Islamic law of competition is contained in the doctrines of, objectives of Shariah (*maqasid shariah),* public interest *(maslahah),* blocking the means to an evil deed *(sadd darai),* using the rights unfairly *(su isti'mal al-haq)* and Islamic legal maxims (*qawaid al-fiqh).* All these sources of Shariah stipulate that every anticompetitive business practice including cartels is prohibited, because it is harmful to the society and is against the public interest.

The first competition law in Pakistan after its independence was the Control Act, 1947. The Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970was the first specific anti-monopoly law to which certain amendments were brought in 1970 and 1980. This law remained intact till 2007, when it was superseded by the Competition Ordinance 2007. The Monopoly Control Authority which was established under the previous law was also replaced by the Competition Commission of Pakistan.

The current situation of competition in Pakistan is not satisfactory; the competition culture in Pakistan economy has not flourished well. Business firms have been allowed to make alliances by secretly colluding cartels and by adopting practices such as fixing market prices or reducing supply to get higher profits and consequently consumers have been left at an obvious disadvantage. About this situation the competition Commission report states in these words. "Restrictive practices are of course, accompanied by, and gain wider currency in, rigid market structures obtaining across the board. Whether it is in large scale manufacturing (cement, fertilizer), processing (sugar), or the service sector (banking), the market remains confined to commodities and products. Lack of product differentiation inhibits consumer choice, leaves no

room for innovation and suggests the inherent danger of perpetuating a static market structure with high entry and exit barriers. Worse still, price competition which could provide some consumer benefit, has also been absent in these industries in Pakistan"[4]. Cartels have been reported in many industries in Pakistan, e.g. cement, sugar, fertilizers, banking etc. in many cases the authorities conducted investigations and inquiries, but except in a few cases[5] it could not reach at any tangible result[6].

The massage came out of the discussion in the previous chapters is that there is still a vacuum in the affective implementation of competition law as well as the government competition policy. There are shortcomings in the administrative tools for the enforcement of the decisions of the competition commission. The government influences the proceedings of the Competition Commission, and the Commission's functionaries are not free to investigate the cases of anti-competitive practices independently. Recommendations in this regard, are chalked out in the following lines of this chapter.

4.2 Recommendations

To control the practice of cartels and get the benefits of competition law in the shape of healthy competition, several factors and actions should be considered by the competition

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[4] "The state of competition in Pakistan 2008" Report of the Competition Commission of Pakistan, p 51. Electronic version can be seen on http://www.mca.gov.pk/Downloads/State%20of%20Competition%20Report%202008.pdf visited on 19 September 2009.

[5] A famous case of cartel breaking in cement industry was in 1992 when the cement manufacturers made a cartel. The MCA investigated the matter and found the cartel like situation in the industry. The MCA directed the State Cement Corporation units to open there retail shops in different places in the country and sell cement at a price approved by the Economic Coordination Committee (ECC). The ECC ordered the cartel members to break the cartel which was successfully broken.

[6] In 1998, 1999, and 2003 there was a price hike and alleged cartelization in the cement market, the authority tried to investigate the matter but due the government intervention it could not reached to a fruitful result. In 2005 in sugar industry the sugar price was raised about 40 per cent, this was also a suspected cartel like situation but this time the authority action could not succeeded due to the court proceedings.

commission and by the government in making its competition policy and also in its implementation, for this purpose the following recommendations are suggested.

4.2.1 Public Awareness

The task of competition agencies becomes harder with the lack of public awareness about cartels harm. Considering the importance of public awareness, the OECD in its Anti-cartel Recommendations, 1998 stressed especially on "Competition Advocacy"[7]. The Competition Ordinance also state that the commission shall promote competition through advocacy which, among others, shall include: creating awareness and imparting trainings about competition issues and taking such other actions as may be necessary for the promotion of competition culture[8].

Public awareness can be made through a variety of methods such as seminars, bulletins, videos, enforcement guidelines, warning letters and advisory opinions. Although in law there is a provision about this issue but effective practical steps have not been taken for it. The Commission placed important announcements guidelines and bulletins on its website, but the general public may not access to internet. Therefore proper coverage should be given to these issues in print and electronic media. The commission's different guidelines, bulletins, warning letters and advisory opinions should also be published in the newspapers.

4.2.2 Independence of the Competition Commission

Although the commission has given vast powers to handle anti-competitive practices under chapter IV of the Competition Ordinance, as it state: The functions and powers of the commission shall be:

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[7] See Richard Wish, *Competition Law,* (London: Butterworths, 2001) p.83 describes the European Commission's Dyestuffs case that found a price fixing agreement on the basis of various evidences.

[8] Competition Ordinance 2007, section 29(a)

(a) To initiate proceedings in accordance with the procedure of this ordinance and make orders in cases of contraventions of the provisions of this ordinance.

(b) To conduct studies for promoting competition in all sectors of commercial economic activity.

(c) To conduct inquiries into the affairs of any undertaking as may be necessary for the purpose of this ordinance.[9]

Despite this provision in the law at several times the commission functions were intervened by the government ministries.[10] According to The News article an official of the competition commission confided that CCP is under pressure from some officials and business quarters to prevent it from carrying any investigation against wheat, sugar cement, pharmaceutical and other industries commonly believed to have been involved in anti-competitive practices.[11] The officials say that CCP inquiries and decisions against banks, cement and fertilizers companies involved in cartelization were creating more and more problems for the CCP, including the non implementation of the competition law.[12] The commission is under pressure from various government and private lobbies.[13]

In such circumstances the commission's proceedings and decisions go infructuous and the fruits of fair competition could not be achieved. Therefore the commission must be allowed to perform its functions and exercise its powers independently without any influence or intervention from the government ministries and bureaucracy. To be truly effective, the

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[9] Competition Ordinance 2007, section 28

[10] In April 2008 when the CCP take action against the cement industry and conducted a surprise inspection to recover the documentary proof of the suspected cartel, that caused the price hike of cement, at this stage, the MOIP intervened, and the attempts of the CCP brought no fruits.

[11] Nadeem Iqbal, "colluding with cartels" The News July 27, 2008, p.30 available at http://jang.com.pk/thenews/jul2008-weekly/nos-27-07-2008/dia.htm visited on 17th September 2009.

[12] Ibid

[13] Sabihuddin Ghausi, "Cartel, production cost and cement prices" Dawn Economic & Business Review, August 18-24, 2008 p.vi

government's other policies i.e. economic, trade and industrial policies must also be based on the principles of competition.

4.2.3 The Commission should conduct in house research

To make the Competition Commission more effective in the future, it should build strong in-house research and investigative capacity to handle the cartel cases and maintain the fair competitive environment in the country economy. Obviously for this purpose resources will be required, so it is suggested that the government should allocate adequate funds in the budget, as the commission own resources may not meet these expenses. For this subsection 2(a) of section 20 of the Competition Ordinance provides that the commission fund shall be consisting of (a) allocations by the government[14]. But till now the government has not contributed to the Commission's Fund in its budget.

4.2.4 Effective Investigative Tools

Effective investigative tools mean that there should be properly trained, dedicated and well equipped investigators, to reach into the roots of any unlawful and anti-competitive business activity. Once the public realizes the benefits of successful investigation they may join hands with the investigation teams in collecting evidence. An important factor that may be very effective to check and control the cartels is the proper and frequent monitoring of market. For this purpose special cartel department within the Competition Commission is suggested, which can facilitate the Commission. Its workforce should be given necessary trainings.

[14] Competition Ordinance 2007, subsection 2(a) of section 20

For investigation of cartels, the use of formal power to collect evidence, such as in particular unannounced searches or raids, is required. Unannounced searches are generally considered as a science, involving warrants, mandates, judicial authorization etc. Practical expertise and specialist skills regarding the constitution of teams, coordination with other agencies, prevention of and dealing with obstruction, destruction of evidence, etc are also required[15].

Detecting a cartel require breaking the secrecy of the cartel members. For this purpose a useful tactic may be used i.e. to persuade a cartel member to plead guilty and expose his co-conspirators in consideration of a promise from the competition enforcement authority, to impose a smaller fine, shorter sentence, or complete amnesty. Through this leniency package the investigation teams may collect sufficient evidence, as the firm presenting such information considers that it has been given concession, it will furnish true evidence of facts. Sections 39 of the ordinance provide for this leniency package, but the Competition Commission should make this provision workable, for this purpose the commission requires:

1. To set up an "Office of Leniency" that receives and evaluates leniency requests.
2. To promote leniency policy in its different seminars.
3. To place leniency persuasive material on its website
4. To encourage the leniency policy through media channels.

[15] *'Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties, Building Blocks for Effective Anti-cartel regimes'*, vol. 1, Report prepared by the ICN Working Group on Cartels in June 2005. Available on http://www.internationalcompetitionnetwork.org/boon/cartels_WG/SGI_General_Framework/Effective_Anti-Cartel_Regimes_Bulding_Blocks.pdf visited on 22 September 2009.

4.2.5 To Treat the Cartel as a Serious Crime

As the cartels have a criminal tendency because the cartel members collude for the simple reason to earn more through unlawful means, and The Pakistan Penal Code declares wrongful gains an offence. Section 23 of the PPC defines wrongful gain: Wrongful gain is gain by unlawful means of property to which the person gaining is not legally entitled[16]. In case of cartel, its members are also not entitled to the profit they are gaining, through unlawful and anti-competitive means. The penalty for cartel behavior should fit the crime, it should be deterrent one. It should reflect the fact that cartels caused consumer harm and affected the society as a whole.

Section 38 of the Competition Ordinance provides for fine penalty up to fifty millions rupees or an amount up to fifteen percent of the annual turnover of the undertaking. But it should take into account the facts that cartelists' motivation is financial and they are capable of making the intended profit. Therefore, cartel penalties not only should be large enough to remove financial incentives, but also should look to the past financial incentives of the cartelists affect them directly: cartel penalties should include substantial imprisonment punishment for responsible individuals.

4.2.6 The competition authorities should publicize their efforts

It is a rule of law that deterrence is preferable to prosecution, in this regard it is equally important for the competition authorities to publicize their anti-cartel efforts. Deterrence requires that the cartelists know the consequences of their anti-competitive behavior. This can only be possible when they see that the other offender has also been punished. Therefore the anti-cartel

[16] The Pakistan Penal Code, Section 23

efforts should be publicized to achieve the goal of destabilizing cartels through the fear of severe punishments.

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