

**2021 C L D 214**

**[Lahore]**

**Before Ayesha A. Malik, Muhammad Sajid Mehmood Sethi and  
Shahid Jamil Khan, JJ**

**LPG ASSOCIATION OF PAKISTAN through Chairman---Petitioner**

**Versus**

**FEDERATION OF PAKISTAN through Secretary, Ministry of  
Petroleum and Natural Resources, Islamabad and others---  
Respondents**

W.P. No. 9518 of 2009, decided on 26th October, 2020.

Per Ayesha A. Malik, J; Shahid Jamil Khan and Muhammad Sajid Mehmood Sethi, JJ. concurring on the issues of "Appellate jurisdiction of Supreme Court" and "Validation clause in the Competition Act, 2010" but disagreeing with the findings on "Federal and Provincial competence to legislate on Competition laws" and "the nature of Competition Appellate Tribunal"

**(a) Constitution of Pakistan---**

---Art. 142, Pt. II, Chapt. 1 & Fourth Sched.---Federation/ Parliament---Legislative competence---Scope---Legislative competence for Parliament came from several sources; firstly the Federal Legislative List ('the FLL') of the Constitution; secondly express provisions of the Constitution; and finally on subjects which related to the Federation---Legislative competence could not be restricted to just the entries in the FLL, because the entries in the FLL were not sources of power, rather a list of subject matters on which Parliament could legislate---Federation was not absolved of its duty to enforce fundamental rights notwithstanding the 18th Amendment to the Constitution or the fact that the subject was not listed in the FLL, as enforcement of fundamental rights was the duty of the State, which included the Federal Government.

Lahore Development Authority through D.G. and others v. Ms. Imrana Tiwana and others 2015 SCMR 1739; Sindh Revenue Board through Chairman, Government of Sindh and another v. The Civil Aviation Authority of Pakistan through Airport Manager 2017 SCMR 1344; Pakistan Flour Mills Association and another v. Government of Sindh and others 2003 SCMR 162; Fiaqat Hussain and others v. Federation of Pakistan through Secretary, Planning and Development Division, Islamabad and others PLD 2012 SC 224; Government of Sindh

through Secretary Health Department and others v. Dr. Nadeem Rizvi and others 2020 SCMR 1 and Sui Southern Gas Company Ltd. and others v. Federation of Pakistan and others 2018 SCMR 802 ref.

### **(b) Constitution of Pakistan---**

---Fourth Sched.---Federal Legislative List ('the FLL')---Entries in the FLL---Interpretation---Entries in the FLL should be given the widest of meaning and should be liberally construed as the Constitution was a living document and should be interpreted with the widest possible meaning to ensure continuity and balance amongst the organs of the state---So an Entry in the FLL should be given the widest possible meaning and include all ancillary and subsidiary matters so as to give meaning to the legislative power and the fact that there may be an overlap would not preclude the Federation from having legal competence.

Pir Rashid-ud-Daula and 3 others v. The Chief Administrator of Auqaf, West Pakistan PLD 1971 SC 401; Fauji Foundation and another v. Shamimur Rehman PLD 1983 SC 457; Allah Ditta and 2 others v. The State 1997 SCMR 891; Messrs Elahi Cotton Mills Ltd and others v. Federation of Pakistan through Secretary, Ministry of Finance, Islamabad and 6 others PLD 1997 SC 582 and Sui Southern Gas Company Ltd. and others v. Federation of Pakistan and others 2018 SCMR 802 ref.

### **(c) Competition Act (XIX of 2010)---**

---Preamble---Competition Ordinance (XVI of 2010) [since repealed], Preamble---Competition Ordinance (XLVI of 2009) [since repealed], Preamble---Competition Ordinance (LII of 2007) [since repealed], Preamble---Constitution of Pakistan, Arts. 18, 141, 142, 151 & Fourth Sched. Pt. 1, Entries Nos. 3, 27, 32, 58 & 59---Federation/Parliament and Provinces---Legislative competence to enact competition laws---Scope---Competition Act, 2010, the Competition Ordinance, 2010, the Competition Ordinance, 2009, and the Competition Ordinance, 2007, vires of---[Per Ayesha A. Malik, J: On the basis of Art. 18 of the Constitution regulating competition was a constitutional command to the Federal Government---Article 18 read with Art. 151 and Entry 58 of the Federal Legislative List ('the FLL') of the Constitution gave Parliament the authority to legislate on the class of economic activities which fell under trade, commerce, industry and intercourse for the benefit of the national economy---As per the constitutional mandate, the subject of trade, commerce, industry and intercourse between Provinces was related to the Federation---Article 151(1) & (2) of the Constitution, which propounded the constitutional mandate of a national economy and a free market, was not limited to

interprovincial trade and commerce as stated in Entry 27 of the Federal Legislative List ('the FLL') as its application was beyond interprovincial acts, transaction and conducts within the ambit of trade, commerce and intercourse---Competition Act, 2010 ('the 2010 Act') by its very nature was federal in character because it was not confined to any territorial limits---Purpose of the 2010 Act was federal and its enforcement was related to the Federation as the said Act was promulgated for the benefit of the national economy---Since requirement of maintaining free competition throughout the country was beyond the territorial limits of the Province, the subject matter of 'competition' fell within the federal domain---Consequently Parliament/Federation was competent to legislate on the subject of competition as the very purpose of the said subject related to the Federation since it impacted and benefited the national economy and consumers at large---Furthermore Entries 3 and 32 of the FLL, which dealt with implementing international treaties, conventions and agreements, created an obligation on the Federation to make laws on the subject of competition as Pakistan was a signatory to several international agreements on ensuring free and fair competition within its borders]---[Per Shahid Jameel Khan, J with whom Muhammad Sajid Mehmood Sethi, J concurs reaching the same conclusion but with his own reasons: Joint reading of Arts. 18 & 151(2) of the Constitution with Entries 27 and 59 of the Federal Legislative List ('the FLL'), made it clear that the Parliament/Federation had the power to legislate on competition laws---However the Constitution did not suggest, in FLL or elsewhere, that "trade and commerce" was exclusively a Federal subject---If any anticompetitive behaviour did not affect the trade and commerce of another Province, it did not come within the phrase 'interprovincial trade and commerce', as used in Entry 27 of the FLL and discernible in Art. 151 of the Constitution---Conversely, if any act or omission, causing anticompetitive behaviour, was committed within geographical boundaries of a Province, but had its effect beyond such territorial limits, it would be subject of a Federal legislation and within its executive competence---Entries 3 and 32 of Part I of the FLL which dealt with implementing treaties, agreements and conventions, could not take away legislative competence of a Provincial Assembly (to enact competition laws), unless the subject matter related to an inter provincial matter or foreign affairs---Parliament had the power to legislate for ensuring "free competition" through the Competition Act 2010 ("the 2010 Act") but only to the extent of 'Inter Provincial Trade and Commerce'---While the Provinces had legislative power to ensure free competition within their territorial limits, either through provisions in existing general laws or through special legislation]---Competition Act, 2010, the Competition Ordinance, 2010, the Competition Ordinance, 2009, and the

Competition Ordinance, 2007 were not ultra vires the Constitution for want of legislative competence---Constitutional petition were allowed with relevant directions.

Per Ayesha A. Malik, J.

Article 18 of the Constitution imposed a duty on the Federation to enforce the fundamental rights and consequently required Parliament to regulate trade, commerce and industry to ensure free competition. Hence regulating competition became a matter related to the Federation which falls under Entry 58 of the Federal Legislative List ('the FLL'). This in itself was an independent source of legislative competence as the subject matter related to the Federation. On the basis of Article 18 of the Constitution regulating competition was a constitutional command to the Federal Government.

Sub-clause (1) of Article 151 of the Constitution prescribes a constitutional command that subject to clause (2), trade, commerce and intercourse throughout Pakistan shall be free. Sub-clause (2) authorized Parliament to impose restrictions on the freedom of trade, commerce or intercourse between one Province and another or within any part of Pakistan, in the public interest. This constitutional command was to Parliament because Article 151(1) required trade, commerce and intercourse throughout Pakistan to be free and Article 141 of the Constitution gave Parliament the authority to make law for the whole of Pakistan. Essentially Article 151(1) of the Constitution was a command to remove all barriers to free trade, commerce and intercourse throughout Pakistan and prevented the Provinces from creating any hurdle in the way of trade, commerce and intercourse throughout Pakistan. While Article 151 of the Constitution cast a duty on the Federal Government to ensure that trade, commerce and intercourse throughout Pakistan was free, it also prohibited legislative or executive actions by the Province which may prevent free exchange and free movement of articles of trade and commerce throughout Pakistan. Any constraints on these subjects by the Province would be in derogation to the constitutional guarantee of free trade, commerce and intercourse throughout Pakistan. The emphasis on the term 'intercourse throughout Pakistan' in Article 151(1) of the Constitution was also significant as it entailed a broad spectrum of commercial activities throughout Pakistan and not just between Provinces.

Article 151(1) and (2) of the Constitution balanced the power between the Federation and the Provinces giving the Federation control over a set of economic activities which had a direct nexus or effect on the national economy, in the public interest.

Furthermore, Article 151(1) of the Constitution declared that trade, commerce and intercourse must be free throughout Pakistan which meant that the command was not limited to any territorial boundaries, but must be effective throughout the country. Therefore, Article 151(1) and (2) of the Constitution was not limited to inter provincial trade and commerce as stated in Entry 27 of the FLL as its application was beyond inter provincial acts, transaction and conducts within the ambit of trade, commerce and intercourse.

The requirement that the specified class of economic activity be free, essentially means free from all barriers, structural and behaviour, free from any interference and restraints and includes free exchange and movement of goods, persons and things (tangible or intangible). Article 151(2) of the Constitution provides that if at all any restrictions are to be imposed on the declared freedom, it can only be by Parliament. Hence the Constitution gave Parliament the authority to restrict the freedoms declared in Article 151(1), but only in the public interest. The word 'restrictions' relates directly to the declared freedom meaning thereby that Parliament can impose limitations or prohibitions on the freedom, if required.

Where any behaviour was seen as being anti-competitive, it would be seen in the context of the relevant market, be it product or geographic. In this context the application of the Competition Act, 2010 ('the 2010 Act') was not limited to inter-provincial disputes but disputes where anti-competitive behaviour would impact the relevant market. One of the key features of competition law was market integration by protecting market structures and economic freedom. Hence the 2010 Act could not be restricted in its application to inter-provincial issues as the 2010 Act applied to the whole of Pakistan.

The 2010 Act aimed to promote free competition between undertakings and to remedy structural and behavioural problems and it advanced an economic policy aimed at protecting consumer interests. This in turn meant that the behaviour sought to be controlled and its effects were not contained in any one territory as the impact was based on the market and the market players had presence based on the market they served. Consequently, the structures and behaviour sought to be regulated had its nexus with trade, commerce, industry and intercourse throughout Pakistan. Therefore, the 2010 Act by its very nature was federal in character because it was not confined to any territorial limits since it regulated the market, which could be geographic or based on the product. The 2010 Act also ensured that trade, commerce and intercourse were free as required under Article 151(1) of the Constitution and allowed the freedom under Article 18 of the Constitution to be effectively enforced.

Competition as a subject could not be effectively regulated if it was confined to territorial boundaries. Therefore the purpose of the 2010 Act was federal and its enforcement was related to the Federation as the 2010 Act was promulgated for the benefit of the national economy.

Parliament was competent to legislate on the subject of competition as the very purpose of the said subject related to the Federation since it impacted and benefited the national economy and consumers at large. Not only was this in furtherance of the fundamental right under Article 18 of the Constitution, it was also in furtherance of Article 151 of the Constitution that is to ensure that trade, commerce and intercourse throughout Pakistan was free. This mandate travelled beyond the territorial limits of the Provinces and was a specific command to the Federation. Since the requirement of maintaining free competition throughout Pakistan was beyond the territorial limits of the Province, the subject matter of 'competition' fell within the federal domain.

Entry 3 and Entry 32 of the FLL also created an obligation on the Federation to make law on the subject of competition. Entry 3 related to external affairs which included implementing treaties and agreements and Entry 32 was the subject of international treaties, conventions and agreements as well as international arbitration. Pakistan had signed several international agreements in which it had committed to ensure free and fair competition within its borders. Therefore, the Federation is obligated to fulfill its commitments under international treaties and agreements and since the subject of competition is the subject matter of international agreements and treaties, Parliament can make law on the subject of competition.

Per Shahid Jameel Khan, J.

Though Article 151(2) of the Constitution itself gave legislative power to the Parliament for imposing restriction, to regulate or ensure 'freedom of trade, commerce and intercourse throughout Pakistan', yet if it was read with Entry 27 of Part I of the Federal Legislative List ('the FLL'), the legislative power of the Parliament over 'inter-provincial trade and commerce' becomes absolute. Entry 59 of Part I of the FLL and Article 18 of the Constitution, if read together, would enhance the scope of Parliament's legislative power over inter-provincial trade and commerce, for ensuring free competition. To conduct a lawful trade and business was a fundamental right guaranteed in Article 18, along with lawful profession or occupation. This right was eclipsed through "regulation of trade, commerce and industry in the interest of free competition" i.e., this fundamental right could be restricted if it was tainted with any anticompetitive behaviour under the law. Free competition was, in a way, a 'fundamental right in contrast' to

safeguard the consumers and small business entities from anticompetitive behaviour, therefore, it was to be read in or along with the phrase 'trade and commerce' being ancillary or incidental, if mandate of Entry 59 was invoked. Consequently Parliament/Federation had the power to legislate on competition laws.

Entry 27 of Part 1 of the FLL empowered the Parliament to legislate over "inter-provincial trade and commerce", along with 'import and export', 'trade and commerce with foreign countries' and 'standard of quality of goods to be exported'. Similar subject was found in Article 151 of the Constitution, which ensured 'freedom of trade, commerce and intercourse throughout Pakistan', which necessarily included inter provincial trade and commerce, but did not include 'intra provincial trade and commerce' by any stretch of interpretation. The Constitution did not suggest, in FLL or elsewhere, that "trade and commerce" was exclusively a Federal subject.

Though Article 151 of the Constitution envisioned one national economy by ensuring free trade, commerce and intercourse, yet it did not obliterate existence of regional or local economies. Trade and commerce could be limited; within territory of a local government which may not necessarily affect a comparatively bigger economy. Such trade and commerce at its lowest level had to be governed and controlled by the local government, by imposing licence fee, local taxes or fine etc. Any anticompetitive behaviour within local government's limit had to be restricted by it. However, trade and commerce having regional effect, beyond territorial limits of a local government, would become a provincial subject. Any administrative object or subject, effect of which spilled over the local government's geographical limits shall be within legislative and executive authority of the Province.

Lahore Development Authority through D.G and others v. Ms. Imrana Tiwana and others 2015 SCMR 1739 ref.

If an anticompetitive behaviour did not affect the trade and commerce of another Province, it did not come within the phrase 'inter provincial trade and commerce', as used in Entry 27 of the FLL and discernible in Article 151 of the Constitution. Conversely, if any act or omission, causing anticompetitive behaviour, was committed within geographical boundaries of a Province, but had its effect beyond such territorial limits, it would be subject of a Federal legislation and within its executive competence.

Sui Southern Gas Company Ltd. and others v. Federation of Pakistan and others 2018 SCMR 802 ref.

Entries 3 and 32 of Part I of the FLL which dealt with implementing treaties, agreements and conventions, could not be used to take away legislative competence of a Provincial Assembly, unless the subject matter related to an interprovincial matter or foreign affairs. For legislation on competition law in the light of an international treaty, distribution of legislative powers between the Federation and Provinces could not be compromised.

Parliament had the power to legislate for ensuring "free competition" through the Competition Act 2010 ("the 2010 Act") but only to the extent of 'Inter Provincial Trade and Commerce' [Entry 27 of Part I of the FLL]. Any anticompetitive behaviour, within the territory of the country, affecting national trade and commerce beyond territorial limits of a Province, shall be cognizable by the Competition Commission of Pakistan under provisions of the 2010 Act. Provinces had legislative power to ensure free competition within the territorial limits of the Province, either through provisions in existing general laws or through a special legislation. If such law was enacted or existed, the executive authority shall not be exercised by a Province on a matter, cognizance of which was taken by the Competition Commission under the 2010 Act and if cognizance was taken by both, Provincial and Federal authorities, the proceedings initiated by Federal authorities shall prevail, unless it was established that the anticompetitive behaviour did not have the spillover effect. High Court directed that every notice under the 2010 Act should contain the reasons disclosing that effect of the anticompetitive behaviour was spilling over territorial limits of respective Province, and that for the notices that were already issued, and were under challenge, the proceedings shall continue, however, the issue of jurisdiction shall be decided at first instance.

The Competition Act, 2010, the Competition Ordinance, 2010, the Competition Ordinance, 2009, and the Competition Ordinance, 2007 were not ultra vires the Constitution for want of legislative competence.

Per Ayesha A. Malik, J.

**(d) Constitution of Pakistan---**

---Fourth Sched.---Federal Legislative List ('the FLL')---While interpreting the Constitution, its application and meaning could not be limited on account of an Entry in the FLL. I

**(e) Competition Act (XIX of 2010)---**

---Ss. 11, 12, 28, 29, 31, 38, 41 & Chapt. II---Constitution of Pakistan, Art. 175---Competition Commission of Pakistan ('the Commission')--- Whether the Commission and its Appellate Bench performed judicial functions and were a court in terms of Art. 175 of the Constitution--- [Per Ayesha A. Malik, J; Shahid Jameel Khan and Muhammad Sajid Mehmood Sethi, JJ. agreeing (Majority view): Commission was a regulatory authority, with a regulatory objective and its purpose was not to exercise judicial power---Commission did not perform judicial functions akin to a 'court'; it was a regulatory authority with administrative functions which included giving advice, creating awareness, impart training, review of policy frameworks to foster competition as well as decision making to enforce the regulatory policy---While exercising its functions under the 2010 Act the Commission did discharge quasi-judicial functions with the sole objective to regulate anti-competitive behavior, but it was not a 'court' under Art. 175 of the Constitution]---[Per Shahid Jameel Khan, J (Majority view): Commission and its Appellate Bench performed administrative functions, therefore, they were not covered under Art. 175(3) of the Constitution]

Per Ayesha A. Malik, J.

Purpose of the Competition Commission of Pakistan ('the Commission') was to ensure that fair competition was maintained by regulating the prohibitions set out in Chapter-II of the Competition Act, 2010 ('the 2010 Act'). Therefore, the 2010 Act had a regulatory objective, to promote free competition and prevent anti-competitive behaviour and prescribe enforcement mechanisms to ensure compliance. The Commission's legal framework was such that it involved some decision making process when behaviour became anti-competitive, that is behaviour was against the provisions of the 2010 Act. Therefore, the Commission was a regulatory authority, with a regulatory objective and its purpose was not to exercise judicial power.

Nature of the orders which the Commission could issue under section 31 of the 2010 Act established that its scope was limited to being preventive and restorative. The Commission sought compliance of the prohibitions and where there was a violation, it sought to restore competition and ensure that the prohibited behaviour was not repeated. Even for mergers the Commission was concerned with the effect of the merger on competition as to whether it would lessen competition by creating or strengthening a dominant position in the relevant market. This showed that the nature of the orders were not judicial per se rather it involved a more technical understanding of the market, economics, commerce and finance, amongst others. By its very

nature the Commission did not perform judicial functions akin to a 'court'. It was a regulatory authority with administrative functions which included giving advice, creating awareness, impart training, review of policy frameworks to foster competition as well as decision making to enforce the regulatory policy.

The Commission was not established as part of the judicial hierarchy of courts nor were its function to exercise judicial power. It was established to carry out the administrative function of the executive to ensure economic efficiency and promote consumer welfare and in doing so it discharged quasi-judicial functions with the sole objective to regulate anti-competitive behaviour. Although the process followed by the Commission while hearing cases must follow due process, they were not bound by the formal laws of evidence and procedure. Furthermore, the members of the Commission were not necessarily trained in law, as they required expertise in economic, commerce, finance and industry. The Commission was established under the 2010 Act, with the intent to ensure free competition and economic efficiency, so the function of hearing and deciding issues only occurred where the prohibitions had been violated, that to with the intent to restore competition in the relevant market. Hence while exercising its functions under the 2010 Act the Commission was not a 'court' under Article 175 of the Constitution.

Sh. Riaz-ul-Haq and another v. Federation of Pakistan through Ministry of Law and others PLD 2013 SC 501 ref.

Per Shahid Jameel Khan, J.

Competition Commission of Pakistan ('the Commission') and Appellate Bench of the Commission performed administrative functions, therefore, they were not covered under Article 175(3) of the Constitution.

Per Ayesha A. Malik, J.

**(f) Competition Act (XIX of 2010)---**

---Ss. 43 & 44---Constitution of Pakistan, Arts. 18, 142, 175(2), 184(3), 185, 212 & Fourth Sched. Pt. I, Entry No. 55---Competition Appellate Tribunal ('the Tribunal')---Function and scope---Appeal against order of Tribunal to be filed directly before the Supreme Court---Constitutionality---Sections 43 & 44 of the Competition Act, 2010, vires of---Whether the Tribunal performed judicial functions and was a court or tribunal in terms of Art. 175 or 212 of the Constitution---[Per Ayesha A. Malik, J (Minority view) Competition Appellate Tribunal ('the Tribunal') exercised quasi-judicial functions but it was neither a 'court' as contemplated under Art. 175 of the Constitution nor a

tribunal as provided under Art. 212 of the Constitution--Subject of enlargement of jurisdiction of the Supreme Court under the Federal Legislative List ('the FLL'), was a subject which exclusively fell within Parliament's domain, so Parliament could confer jurisdiction on the Supreme Court, by law, if the Constitution permitted it--If Parliament could make a law on the subject of competition to regulate trade, commerce and industry, it could also confer appellate jurisdiction on the Supreme Court on the said subject--Joint reading of Arts. 175(2) & 184(3) of the Constitution with Entry 55 of Part I of the FLL, showed that Ss. 43 & 44 of the 2010 Act were not ultra vires the Constitution--Federal Government should take all necessary steps to issue the required rules as per S. 43(3) of the 2010 Act with respect to the terms and conditions of service of the members of Tribunal---[Per Shahid Jameel Khan, J; Muhammad Sajid Mehmood Sethi, J agreeing (Majority view): Jurisdiction of Competition Appellate Tribunal ('the Tribunal') was to determine disputes relating to rights and liabilities, recognized by the Constitution and law, by discovering the relevant facts in light of the evidence produced by the parties in their presence, therefore, it was a judicial tribunal, and its separation and independence from the Executive was mandatory under the constitutional command--Provisions of S. 43 of the Competition Act, 2010, to the extent of appointment of Chairperson, Members and financial control by the Executive, were ultra vires the Constitution.

Per Ayesha A. Malik, J (Minority view)

As the nature of the orders passed by the Competition Commission of Pakistan were preventive and corrective, aimed at restoring competition, the nature of the order remained the same in the appellate process. Consequently, the Competition Appellate Tribunal ('the Tribunal') was not a 'court' established under the law as contemplated under Article 175 of the Constitution.

Article 212 of the Constitution established administrative courts or tribunals to exercise jurisdiction in respect of matters enumerated under the said Article. The Competition Appellate Tribunal ('the Tribunal') was not an Administrative Tribunal as contemplated under Article 212 of the Constitution as it did not decide upon any of the stated matters in the said Article. Hence it did not fall under the mandate of Article 212 of the Constitution.

Army Welfare Trust (Nizampur Cement Project), Rawalpindi and another v. Collector of Sales Tax (Now Commissioner Inland Revenue), Peshawar 2017 SCMR 9 ref.

The Competition Appellate Tribunal ('the Tribunal') was established under the 2010 Act in furtherance of the regulatory objective. As it was

a specialized area of law which called for corrective and restorative action, the appellate forum i.e. the Tribunal heard appeals in the same context as the Commission, meaning thereby that it too exercised quasi-judicial functions.

When Articles 175(2) and 142 of the Constitution were read with Entry 55 of the First Part of the Federal Legislative List ('the FLL'), it was clear that the Parliament was competent to make law enlarging the jurisdiction of the Supreme Court and conferring supplemental powers, where it was provided by or under the Constitution meaning that the constitutional jurisdiction of the Supreme Court could not be taken away but where the Constitution authorized Parliament on jurisdiction it could be enlarged. Subject of enlargement of jurisdiction of the Supreme Court under the FLL was a subject which exclusively fell within Parliament's domain, so Parliament could confer jurisdiction on the Supreme Court, by law, if the Constitution permitted it.

The Province of Punjab and another v. National Industrial Cooperative Credit Corporation and another 2000 SCMR 567 ref.

Where the Constitution declared Parliament competent to make law which regulated jurisdiction, Parliament could confer jurisdiction on the Supreme Court through a law as per Entry 55 of the FLL.

Parliament was competent to make law to regulate trade, commerce or industry in the interest of free competition under Article 18 of the Constitution. The power to regulate the fundamental rights included the jurisdiction of the court because the Supreme Court had jurisdiction to ensure the enforcement of fundamental rights in the public interest under Article 184(3) of the Constitution. So, if Parliament could make a law on the subject of competition to regulate trade, commerce and industry, it could confer appellate jurisdiction on the Supreme Court, as the Supreme Court was already vested with the jurisdiction to enforce any of the fundamental rights mentioned in the Constitution.

Baz Muhammad Kakar and others v. Federation of Pakistan through Ministry of Law and Justice and others PLD 2012 SC 923 ref.

Hence based on a joint reading of Articles 175(2) and 184(3) of the Constitution with Entry 55 of Part I of the FLL, sections 43 and 44 of the 2010 Act were not ultra vires the Constitution.

Her Ladyship directed that in terms of section 43(3) of the 2010 Act, the Federal Government was required to make rules with respect to the terms and conditions of service of the members of Tribunal, which rules had still not been made; that in order to ensure that the process

of consultation with the Chief Justice of the Supreme Court was undertaken before appointing the Chairperson and Members of the Tribunal and that the terms and conditions were provided for, the Federal Government shall take all necessary steps to issue the required rules as per section 43(3) of the 2010 Act within six months which should provide for consultation with the Chief Justice of the Supreme Court in the appointment of the judicial members of Tribunal and should require the selection process of the technical members to be done through a selection committee.

Per Shahid Jameel Khan, J (Majority view)

Any tribunal, performing judicial functions had to be independent and separated from the influence of Executive. Control of the Competition Appellate Tribunal ('the Tribunal') i.e., appointments of its Chairperson and members and their financial dependency laid with the Executive (Ministry of Law) and not the authorities under the statute i.e the Competition Act, 2010. Said Tribunal was a judicial tribunal hence it had to be separated from Executive influence. Tribunal's jurisdiction was to determine disputes relating to rights and liabilities, recognized by the Constitution and law, by discovering the relevant facts in light of the evidence produced by the parties in their presence, therefore, it was a judicial tribunal, and its separation and independence from the Executive was mandatory under the constitutional command. High Court declared the provisions of section 43 of the Competition Act, 2010, to the extent of appointment of Chairperson, Members and financial control by the Executive, as ultra vires the Constitution and directed that if the relevant directions contained in the case of Sh. Riaz-ul-Haq and another v. Federation of Pakistan through Ministry of Law and others (PLD 2013 SC 501) were not complied with in 60 days from the date of present judgment, the Tribunal shall cease to have effect along with Executive actions thereunder.

Sh. Riaz-ul-Haq and another v. Federation of Pakistan through Ministry of Law and others PLD 2013 SC 501 ref.

Per Ayesha A. Malik, J

### **(g) Constitution of Pakistan---**

---Arts. 175 & 212---Courts and Tribunals---Judicial and quasi-judicial functions---Scope---Forum was a 'court' under Art. 175 of the Constitution if it had been established as part of the judicial hierarchy, to adjudicate upon disputes as per the law---However there could be other forums which exercised quasi-judicial functions, which were not 'courts' under Art. 175 of the Constitution and were not tribunals under Art. 212 of the Constitution but may perform functions similar

to judicial functions---Specifically a regulatory authority, created under a statute, to carry out its objectives could exercise quasi-judicial functions---In such regard, the ultimate authority was with Parliament which could establish a regulatory authority to achieve its administrative objectives.

Dr. Zahid Javed v. Dr. Tahir Riaz Chaudhary and others PLD 2016 SC 637 and Shafaatullah Qureshi v. Federation of Pakistan PLD 2001 SC 142 ref.

#### **(h) Constitution of Pakistan---**

---Arts. 175, 212, 225 & Fourth Sched., Pt. I, Entry No. 14--- Administrative courts and tribunals established by Parliament under Entry 14 of Part I of the Federal Legislative List ('the FLL')---Scope--- [Per Ayesha A. Malik, J; Shahid Jameel Khan and Muhammad Sajid Mehmood Sethi, JJ. agreeing (Majority view): Establishment of administrative courts and tribunals for federal subjects was provided for in Entry 14 of Part I of the FLL of the Constitution which authorized Parliament to establish administrative courts and tribunals in relation to federal subjects---Tribunals established pursuant to Entry 14 of Part I of the FLL were distinct from 'courts' under Art. 175 of the Constitution---Consequently administrative tribunals could be established for any other purpose other than Art. 212 of the Constitution---[Per Shahid Jameel Khan, J (Majority view): Legislature had the authority to establish Administrative Courts and Tribunals for federal subjects [Entry 14 of the FLL], other than tribunals under Arts. 212 & 225 of the Constitution.

#### **(i) Competition Act (XIX of 2010)---**

---Ss. 61 & 62---Competition Ordinance (XVI of 2010) [since repealed], Ss. 1(3), 59 & 60---Competition Ordinance (XLVI of 2009) [since repealed], Preamble---Competition Ordinance (LII of 2007) [since repealed], S. 59---Constitution of Pakistan---Time gaps between the promulgation of Competition Ordinances of 2007, 2009 and 2010 and the Competition Act, 2010 without any savings or continuance or revival clause---Whether S. 62 of the Competition Act, 2010 ('the 2010 Act') which was a validation clause effectively covered the time gaps or saved the proceedings under the Competition Ordinances of 2007, 2009 and 2010---[Per Ayesha A. Malik, J; Shahid Jamil Khan and Muhammad Sajid Mehmood Sethi, JJ agreeing (Majority view): Continuity remained with the repeated promulgation of the Competition Ordinances of 2007, 2009 and 2010, but there was a gap of 50 days between the lapse of Competition Ordinance, 2010 ('the 2010 Ordinance') and the promulgation of the Competition Act, 2010 ('the 2010 Act')---However validation section of the 2010 Act was S. 62 which

deemed to validate everything from 02.10.2007, which was the date of promulgation of the Competition Ordinance, 2007---Section 62 supported the intent of Parliament by deeming everything to be validly done as of 2.10.2007 and by declaring that the 2010 Act shall have, and shall be deemed always to have had effect accordingly---Legislature by way of a deeming provision had declared that actions, proceedings orders etc. which were not saved due to the defect caused by the gaps and lack of a saving clause, would deem to exist by way of legal fiction.

The Competition Ordinance, 2007 ('the 2007 Ordinance') was promulgated on 2.10.2007 and lapsed on 02.02.2008. However, in terms of the judgment reported as Sindh High Court Bar Association through Secretary and another v. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others (PLD 2009 SC 879) ('Sindh High Court Bar Case'), the time was extended with effect from 31.07.2009 for 120 days, until 30.11.2009. The 2007 Ordinance was initially covered under the Provisional Constitution Order 2007 as a saved Ordinance and the judgment in Tika Iqbal Muhammad Khan v. General Pervez Musharaf and others (PLD 2008 SC 178) and then the 'Sindh High Court Bar Case'. The 'Sindh High Court Bar Case' extended the time to place the 2007 Ordinance before Parliament and gave legal cover for the extended period. The 2007 Ordinance was not placed before Parliament, rather was re-promulgated as the Competition Ordinance, 2009 ('the 2009 Ordinance') on 26.11.2009. The 2009 Ordinance was made applicable with effect from 02.10.2007, hence covered the gap period including the period covered under the 'Sindh High Court Bar Case' with retrospective effect. This meant that proceedings, orders and actions under the 2007 Ordinance continued under the 2009 Ordinance till its lapse on 25.03.2010. The Competition Ordinance, 2010 ('the 2010 Ordinance') was promulgated on 20.04.2010 and lapsed on 18.08.2010. As per the Repeals and Savings section of all three Ordinances of 2007, 2009 and 2010, all suits and other legal proceedings instituted by or against the Monopoly Control Authority before the commencement of the Ordinances were deemed to be suits and proceedings by or against the Competition Commission of Pakistan ('the Commission'), as the case may be, and may proceed and be dealt with accordingly. Section 60 of the 2010 Ordinance validated all actions taken, orders passed and proceedings initiated on or after 02.10.2007 and section 1(3) of the 2010 Ordinance provided that it shall be deemed to take effect from 26.03.2010. Hence section 1(3) of the 2010 Ordinance gave retrospective effect to the 2010 Ordinance from the date of lapse of the 2009 Ordinance. The gap period was therefore covered by the deeming provision of section 1(3) of the 2010

Ordinance. Hence the claim of continuity remained with the repeated promulgation of the 2007, 2009 and 2010 Ordinances.

The Competition Act, 2010 ('the 2010 Act') was promulgated on 06.10.2010 and came into force at once. The 2010 Ordinance lapsed on 18.08.2010, hence there was a gap of 50 days between the lapse of 2010 Ordinance and the promulgation of the 2010 Act. There was no savings section or continuation of earlier proceedings, actions and orders under the Repeals and Savings Section of the 2010 Act. The validation section of the 2010 Act was section 62 which deemed to validate everything from 02.10.2007, which was the date of promulgation of the 2007 Ordinance.

Section 62 of the 2010 Act gave the clear intent of Parliament to give continuity and permanence to the actions, proceedings and orders, amongst others of the Commission under the 2007, 2009 and 2010 Ordinances which suggested that the intent was there to give continuity to the exercise of power by the Commission. Section 62 supported the intent of Parliament by deeming everything to be validly done as of 02.10.2007 and by declaring that the 2010 Act shall have, and shall be deemed always to have had effect accordingly. So the legislature by way of a deeming provision had declared that actions, proceedings, orders, show cause notices etc. which were not saved due to the defect caused by the gaps and lack of a saving clause, would deem to exist by way of legal fiction.

Federation of Pakistan and others v. M. Nawaz Khokhar and others PLD 2000 SC 26; Mehreen Zaibun Nisa v. Land Commissioner, Multan PLD 1975 SC 397; East End Dwelling Company Ltd. v. Finsbury Borough Council (1952) AC 109; Begum B.H. Syed v. Mst. Afzal Jahan Begum and another PLD 1970 SC 29; Molasses Trading and Export (Pvt.) Limited v. Federation of Pakistan and others 1993 SCMR 1905; Muhammad Mubeen-us-Salam and others v. Federation of Pakistan through Secretary, Ministry of Defence and others PLD 2006 SC 602; Federation of Pakistan and others v. Mian Muhammad Nawaz Sharif and others PLD 2009 SC 644; All Pakistan Newspapers Society and others v. Federation of Pakistan and others PLD 2012 SC 1; The Central Bank of India and others v. Their Workmen and others AIR 1960 SC 12; M. Venugopal v. Divisional Manager, Life Insurance Corporation of India, Machilipatnam, A.P. and another 1994 2 SCC 323; Commissioner of Income-Tax, Bombay Presidency v. Bombay Trust Corporation, Ltd AIR 1930 PC 54; Consolidated Coffee Ltd and another v. Coffee Board Bangalore (1980) 3 SCC 358 and State of Maharashtra v. Laljit Rajshi Shah (2000) 2 SCC 699 ref.

#### **(j) Interpretation of statutes---**

---Statute, vires of---Maxim "ut res magis valeat quam pereat"---  
Meaning and scope---While looking at the vires of a statute all effort must be made to protect the statute and preserve the intent of the legislature---Statute always had a presumption of its constitutionality and a more liberal interpretation could be given in order to uphold the vires of the statute---Statute must be construed to preserve its intent, "ut res magis quam pereat"---Said legal maxim required courts to make legislation operative, given reasonable intendment and construction---  
Meaning of said maxim that a deed should never be avoided where the words may be applied to make it good, required that every effort be made by the court to find a meaning capable of interpretation to uphold the vires of the law because it was better for a law to have effect than be void---Said maxim was a rule of construction which required the Court to give effect to the law and not destroy it, so if two constructions were possible, the court should always adopt that construction which would uphold the law and not the one which would render the law a nullity.

Sardar Farooq Ahmad Khan Leghari and others v. Federation of Pakistan and others PLD 1999 SC 57 and Lahore Development Authority through D.G and others v. Ms. Imrana Tiwana and others 2015 SCMR 1739 ref.

Per Shahid Jamil Khan, J; Muhammad Sajid Mehmood Sethi, J agreeing [Majority view]

### **(k) Constitution of Pakistan---**

---Arts. 7, 141, Pt. II, Chapt. 1 & Fourth Sched.---Federation/ Parliament--  
Legislative competence---Scope---Federation could always legislate for enforcement of constitutionally recognized Fundamental Rights, even in absence of any Entry in the Federal Legislative List ('the FLL') or competence in the Constitution, if Province lacked competence to enforce it due to geographical limit on its legislative power---Such interpretation was in conformity with basic rule of legislative competence under Art. 141 of the Constitution---Where other components of State [as provided under Art. 7 of the Constitution] lacked legislative competence, the Federation had legislative power to enforce fundamental rights.

Uzair Karamat Bhandari, Mian Muhammad Kashif, Imran Iqbal, Ali Sibtain Fazli, Hasham Ahmad Khan, Abad ur Rehman, Eisa Jalil, Salman Akram Raja, Tariq Bashir, Arslan Riaz, Imtiaz Rashid Siddiqui, Shehryar Kasuri, Jamshaid Alam, Raza Imtiaz Siddiqui, Ijaz Ahmad Awan, Shahzad Ahmad Cheema, Barrister Muhammad Umer Riaz, Muhammad Waqas Umar, Barrister Ahmed Pervaiz, Javed Ahmed Tarar, Syed Hassan Ali Raza, Asad Javed, Sikandar Abbas Jajja, Omer

Tariq Gill, Abad ur Rehman, Mansoor Usman Awan, Mohsin Mumtaz, Ms. Shazeen Abdullah, Mohammad Azhar Siddique, Mian Shabir Ismail, Mian Asghar Ali, Ms. Salma Riaz, Muhammad Raza Qureshi, Asad Hussain, Qadeer Ahmad Kalyar, Zaki ur Rehman, Zaheer A. Cheema, Muhammad Jawwad Khan Lodhi, Asad Raza, Muhammad Yasin Hatif, Ms. Seemab Aslam, Raja Muhammad Bashir, Sardar Shahbaz Ali Khan Khosa, Rai Mudassir Iqbal, Sikandar Bashir Mahmand, Afnan Karim Kundi, Tariq Kamal Qazi, Ali Raza Kabir, Fahad Malik, Mujtaba Jamal, Mian Hamid Ullah Khan, Syed Shahid Hussain, Haseeb Zafar, Muhammad Haroon Mumtaz, Ghulam Mujtaba, Ahmad Raza, Asad Ahmad Ghani, Asad Abbas Butt and Muhammad Azam Jan Leghari for Petitioner.

Barrister Khalid Jawed Khan, Attorney General for Pakistan, assisted by Ms. Amber Lakhani, Ch. Ishtiaq Ahmad Khan, Additional Attorney General for Pakistan, Asad Ali Bajwa, DAG, Ms. Ambreen Moeen, DAG, Azmat Hayat Khan Lodhi, Assistant AGP, Monim Sultan, Assistant AGP, Ms. Zarish Fatima, Assistant AGP and Zahid Sikandar, Assistant AGP for the Federation.

Akhtar Javed, Additional Advocate General, Punjab for the Province of Punjab.

Azid Nafees, Barrister Waqqas Ahmad Mir, Muqtedir Akhtar Shabir; Dr. Azeem Raja, Muhammad Ahmad Qayyum, Rizwan Mushtaq, Ashfaq Qayyum Cheema; Morris Nadeem, Salman Mansoor, Ahmad Hassan Anwari, Babur Suhail, Imran Muhammad Sarwar, Ahmed Hassan Khan, Mehr Muhammad Iqbal; Imran Khan Klair, Nasir Mahmood Qureshi, Amjed Hameed Ghauri, Sultan Qamar Afzal Ms. Shaista Bano, Chairperson, CCP, Ms. Bushra Naz Malik, Member CCP and Noman Amir Farooqi, Legal Advisor for Respondent CCP for the Competition Commission of Pakistan.

Mrs. Samia Khalid, Haroon Duggal and Muhammad Akram Khawaja for OGRA.

Asim Akram Khan for PTA.

Aurangzeb Mirza for GEPCO.

Hasan Irfan Khan and Ms. Khadija Yasmin Bokhari for Applicant (in C.Ms. Nos.7339 and 3/2015 in W.P. No.24863/2015).

Dates of hearing: 19th, 24th, 25th, 30th June, 1st, 7th, 8th, 9th, 13th, 15th and 16th July, 2020.

## **JUDGMENT**

**AYESHA A. MALIK J.**---This judgment decides upon the issues raised in the instant Petition as well as connected Petitions detailed in Schedule "A" as all Petitions raise common constitutional issues. The Petitioners lay challenge to the legislative competence of Parliament to legislate the Competition Ordinance, 2007 ("2007 Ordinance"), the Competition Ordinance, 2009 ("2009 Ordinance"), the Competition Ordinance, 2010 ("2010 Ordinance") ("Collectively referred to as the Ordinances") and the Competition Act, 2010 ("Act"). The Petitioners also challenge the vires of sections 43, 44 and 62 of the Act for being unconstitutional and they also challenge the Ordinances and the Act on the ground that the Competition Commission of Pakistan ("CCP") exercises judicial power which is ultra vires the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution").

2. The instant Petition has been filed by the LPG Association of Pakistan through its Chairman, on account of Show Cause Notice No.51 dated 20.3.2009 issued under Section 30 of the 2007 Ordinance, alleging cartelization and exclusionary conduct in the liquefied petroleum gas ("LPG") sector by the Liquefied Petroleum Gas Association of Pakistan ("LPGAP") and its members. They have challenged the show cause notice and the proceedings thereafter which resulted in an order dated 14.12.2009 by the CCP. By way of background the instant Petition was filed before this Court on 18.5.2009 and notices were issued for 27.5.2009. On 27.5.2009 notice was issued to the Attorney General for Pakistan ("AGP") and the operation of the impugned show cause notice was suspended. The issue of jurisdiction of this Court was raised and in terms of the order dated 2.7.2009, it was decided that the High Court has jurisdiction in the matter. Thereafter the case was taken up on 5.8.2009 with respect to the constitutional issues raised by the Petitioners as well as the objections of the Respondents on maintainability and it was directed that in the meanwhile no adverse action be taken against the Petitioners. By order dated 3.7.2015 this Petition was referred before the then Hon'ble Chief Justice for placing the matter before a Full Bench and since then arguments have been made before the Full Bench. In the meanwhile several Petitioners filed similar petitions, raising the same constitutional issues before this Court, which are before us on the vires of the Ordinances and the Act.

3. The Petitioners before this Court do business in different sectors and hence challenged orders of the CCP, show cause notices, inquiry proceedings, details of which are given herein below:

Oil and Gas

4. Connected to the issue of the Petitioners in the same sector against the same show cause notices W.Ps. Nos.15493/09 and 14287/09 were filed. It is important to note that these Petitions have been filed against show cause notice dated 20.3.2009 under the 2007 Ordinance wherein it was alleged that the Petitioners abused their dominant position by excluding Progas from competing in the relevant market; that they formed a cartel engaged in price fixing and that they are charging premium and third party commission from marketing companies without allocations. The relevant market for the purposes of these cases is Pakistan. In the case of W.P. No.14287/09, the Petitioner has challenged exemption proceedings.

#### Fertilizer

5. Similarly Petitioners from the Fertilizer Sector have challenged show cause notices alleging abuse of dominant position for which the relevant market is Pakistan.

#### Power

6. The Petitioners from the Power Sector have challenged show cause notices where the allegation is of bid rigging as these companies procure High and Low Tension Concrete Poles. It is alleged that they intentionally reduced the price in the bidding process for the High Tension Pre-stressed Concrete Poles and Low Tension Pre-stressed Concrete Poles. In these cases, the CCP has passed order dated 13.5.2011 which is appealable under the Act. The relevant market for this is also Pakistan.

#### Healthcare

7. The Petitioners from the Healthcare Sector have challenged show cause notices in which the allegation is of price fixing and cartel like behaviour under the Act and the CCP passed order dated 29.6.2012 for which appeals are pending before the Competition Appellate Tribunal ("CAT"). In these cases the relevant market is Pakistan.

#### Cement

8. A large number of Petitions have been filed by the Cement Sector where the allegation is of price manipulation and cartel like behaviour where the relevant market is Pakistan. It is noted that in these petitions show cause notices have been challenged even though the CCP has passed the order dated 27.8.2009 under the 2007 Ordinance which is appealable. Writ Petition No.4574/12 has been filed by APCMA against inquiry proceedings with reference to its members.

#### Oil Refinery

9. Four Petitions have been filed by oil refineries who have been issued show cause notices on the allegation of their refusal to deal with bitumen, where the relevant market is Pakistan. They have also filed petitions in relation to filing of pre-merger applications.

#### Sugar

10. Some Petitioners own sugar mills and have been issued show cause notices for cartelization, price fixing and collusive bidding in tendering process. The relevant market is the product market where refined sugar is sold which is essentially throughout Pakistan.

#### Telecom

11. Petitioners from the telecom sector have challenged show cause notices alleging violation of section 4 of the 2009 Ordinance for price manipulation with respect to the balance inquiries services, SMS rate and call charges. The relevant market again is Pakistan, AJK and the Northern Areas where PTA has its jurisdiction as regulator. Writ Petition No.13892/12 has been filed by the PTCL wherein the matter was referred to the CCP by the august Supreme Court of Pakistan vide order dated 21.2.2013 passed in CPLA No.102-L/2013. The allegation against them was cartel like behaviour for fixing the rate of incoming traffic and quota allocation of revenues to be shared and no new entrant was allowed. The relevant market is Pakistan as it was alleged that they are distorting competition in Pakistan not only amongst LDI Operators but other related markets as well. In W.P. No.221542/18 the Petitioner Transworld Associates (Private) Limited has challenged inquiry proceedings.

#### Educational

12. There are some Petitioners representing different schools where the CCP took notice of unreasonable increase in fee by private educational institutions and also practices of bundling of uniforms and school books. Hence the allegation of abuse of dominant position were raised. In these petitions inquiry proceedings have been impugned.

#### Paints, Infant Milk, Juices

13. The Petitioners who manufacture paint, infant milk and juices have also filed Petitions. These Petitioners are all multinationals who supply products throughout Pakistan. The allegation against these Petitioners is of deceptive marketing practices and abuse of dominant position. Show cause notices have been impugned in these Petitions.

#### Real Estate

14. Some of the Petitioners are in the real estate business who have been issued show cause notices for deceptive marketing practices in

the real estate sector.

#### Arguments of the Petitioners

15. The common ground taken by the Petitioners in this Petition as well as in the connected Petitions is that the Act and the Ordinances are ultra vires the Constitution as Parliament lacks legislative competence to enact a statute on the subject of competition. The Petitioners also allege that the Act and the Ordinances create a parallel judicial system in violation of Articles 175 and 203 of the Constitution by creating an authority which is to exercise judicial powers but is not a court. Consequently the right of fair trial and due process and the right to access justice has been infringed, hence violative of the Constitution. In this regard, the Petitioners have also argued that the Act provides for a right of appeal before the august Supreme Court of Pakistan which is in violation of Article 185 of the Constitution which envisions an appeal to the august Supreme Court of Pakistan only against judgments, decrees and orders of the High Courts. Hence it is their case that there is nothing in the Constitution which will justify a direct appeal to the august Supreme Court of Pakistan from orders, judgments of CAT. The Petitioners have also argued that Section 62 of the Act does not save or give continuance to any of the proceedings, decisions, orders and actions taken under the Ordinances. Further that the lapse of one Ordinance cannot be extended by another Ordinance. Hence all show cause notices and orders passed by the CCP cease to exist as they were never saved by the Ordinances or the Act.

#### Arguments of the Respondent Federation

16. Notices under Order XXVII-A of C.P.C. were issued to the AGP to respond to the constitutional questions arising out of these Petitions. In response thereto, report and parawise comments have been filed on behalf of the Federation along with written submissions. Barrister Khalid Jawed Khan, AGP argued that constitutional goal is to provide free trade and commerce throughout Pakistan and not locally. That competition law by its very nature and scope is national in character as the geographic stretch of the market extends beyond territorial limits of any particular area or Province. He argued that a cumulative reading of several Articles of the Constitution and Entries in the Federal Legislative List in the Fourth Schedule to the Constitution ("FLL") gives Parliament competence to enact the Ordinances and the Act. That section 62 of the Act should be read in the form of a declaratory statement by the legislature to give legal cover to actions, proceedings, orders etc. by the CCP during the period 2.10.2007 to 5.10.2010 which includes the gap periods upto the promulgation of the Act. On the exercise of judicial power by the CCP, he states that this is in line with the work of regulatory authorities, created in terms of

Entry 14 of the FLL of the Constitution. He also argued that an appeal before the Supreme Court of Pakistan is permissible under Article 175 read with Entry 55 of the FLL of the Constitution against any order by CAT. Therefore he argued that Act and the Ordinances are not ultra vires the Constitution as the Parliament is competent to promulgate an Act.

17. A preliminary objection was also raised in terms of order dated 5.1.2010 passed in W.P. No.9518/2009 that on account of order dated 14.12.2009 passed by the CCP, the cartel issue has been decided by the CCP and remedy of appeal is available to the Petitioner under the law, therefore the present petition is not maintainable. At this stage we were informed by the Counsel for CCP that the position is similar with reference to several Petitions before this Court where the CCP has passed an order which is appealable under the Act. It was also clarified that all proceedings have stopped on account of the interim orders passed by this Court. The second objection raised is that the instant Petition has been filed by an Association of LPG Dealers through their Chairman, which is not a registered body and therefore not a legal entity who can agitate the grievances of its members before this Court. This objection has been raised with respect to other Petitions as well which have been filed by Associations on behalf of their members. Reliance was placed on *Anjuman Araian Bhera v. Abdul Rashid and 5 others* (PLD 1973 Lahore 500) and *Pakistan Steel Re-Rolling Mills Association v. Province of West Pakistan* (PLD 1964 Lahore 138). It was also argued that independent members of the Association have also filed Petitions which are pending before this Court on the basis of their independent rights, hence the Association cannot take up the matter on behalf of its members.

#### Arguments of the Respondent CCP

18. Report and parawise comments have also been filed on behalf of the CCP along with written submissions. Learned Counsel adopted the arguments of the AGP with reference to the constitutional challenge and stated that there can be no effective regulation of trade and commerce in Pakistan unless competition is free and fair throughout Pakistan. They argued that regulation of inter-provincial trade and commerce would in itself be meaningless as a free market throughout Pakistan is at the heart of the concept of freedom of trade and commerce and its regulation, in the interest of free competition, is exactly what the competition law aims at achieving. Learned Counsel argued that CCP was established by the 2007 Ordinance, continued through the 2009 and 2010 Ordinances and was given permanence through the Act. During this time the CCP has taken effective action against anti-competitive practices in sugar, cement, telecom, banking,

fertilizer, paints, automotive industry and other major sectors. Learned Counsel argued that across all spheres of commercial and economic activity, CCP acts to ensure free and fair competition. The law aims to protect consumers by prohibiting anti-competitive behaviour. Competition law checks and regulates market conduct in order to ensure that market forces allow for healthy competition to ensure economic efficiency. They explained that there are four main categories of market conduct that the Act aims to regulate:

- (a) Abuse of dominant position. This is covered by section 3 of the Act. The said section offers illustrative instances of abuse of dominant position (such as unreasonable increase in prices by a dominant market actor, refusal to deal, boycotts etc) but the list of abusive conduct does not claim to be exhaustive.
- (b) Prohibited agreements. Section 4 of the Act prohibits collusive conduct between two or more market actors who enter into an agreement that as its object (i.e purpose) or effect (i.e is result), adversely affects competition. This includes but is not limited to horizontally placed market actors agreeing to engage in price fixing, limiting output, division of markets and bid rigging. Horizontally placed competitors mean those operating at the same level of the supply chain.
- (c) Deceptive marketing. Section 10 of the Act prohibits false or misleading information about the quality, characteristics, suitability of use, method of production etc, of goods and services. The aim is to ensure that false or misleading information does not prejudice consumer sovereignty.
- (d) Merger control. Unlike other provisions of the Act which kick into effect after particular conduct takes place, merger control ensures that transactions where size of the parties involved (their turnover, assets) and size of the transaction (percentage of shareholding, value of assets involved) meet certain prescribed thresholds, the market actors apply to the CCP for clearance of the transaction.

19. The Counsel for the CCP argued that competition law only comes into action when market actors violate clearly defined standards of prohibited conduct. There is no on-going regulation of daily activities and no burden is placed on market actors. However, when their market conduct falls on the wrong side of clearly defined legal provisions (sections 3, 4, 10 and 11 of the Act) CCP conducts inquiries, issues show-cause notices, provides opportunity of hearing as well as written responses and then passes speaking orders imposing penalties which commensurate with the violation. In addition, the CCP is also

entrusted with other functions to promote competition, through various means such as to conduct studies and training for promoting competition in all sectors of commercial and economic activity; to give advice to the undertakings, asking for the same, as to whether any action proposed to be taken by such undertakings is consistent with the provisions of the Act; to engage in competition advocacy by creating awareness and imparting training; to review the policy frameworks and recommend amendments in the Act and other laws to the Federal or Provincial Governments, holding open hearings on any matter affecting the state of competition in Pakistan or affecting the Country's commercial activities.

20. Finally they explained that Pakistan is a member of the United Nations which established the Set of Principles and Rules on Competition. All Member States agreed to establish a domestic regime which would ensure free and fair competition within their systems. The Act is in line with the UN Set of Principles and similar to the regulatory regimes promoting free and fair competition around the world. Pakistan is also a member of the World Trade Organization and signatory to the Doha Declaration, the Agreement on South Asian Free Trade Area ("SAFTA") for promoting conditions of fair competition in the Free Trade Area ("FTA"). Hence in order to fulfill its international commitments the Federal Government is responsible to ensure compliance of its Federal obligations.

21. The Counsel also informed the Court that in several Petitions the Petitioners have challenged the vires of the Act and have also filed appeals against the order of the CCP. The detail of appeals is given in Schedule B, which are also pending before this Court. As per their contention which supported by the AGP, the appeals should be sent to CAT which is the competent forum to hear the appeals. That against the decision of CAT the Petitioners have the right to appeal before the august Supreme Court of Pakistan. Hence no right is prejudiced if the proper forum under the Act hears the appeals.

Issues before the Court

22. Based on what has been argued before us the following issues require our deliberation:

- A) Whether Parliament has legislative competence to enact the Act and the earlier Ordinances?
- B) Whether the Act and the Ordinances create a parallel judicial system in violation of Articles 175 and 203 of the Constitution such that the CCP and CAT exercise judicial power which is in violation of the Mehram Ali and others v. Federation of Pakistan and others (PLD 1998 SC 1445) (Mehram Ali Case)?

- C) Whether sections 43 and 44 of the Act are unconstitutional as they provide for an appeal before the august Supreme Court of Pakistan which is in contravention to Article 185 of the Constitution?
- D) Whether the proceedings and orders etc. under the Ordinance have been saved revived or continued pursuant to section 62 of the Act; and whether section 62 of the Act is unconstitutional?

### Opinion of the Court

#### (A) Legislative Competence

23. The Petitioners' case is that there is no entry in the FLL which allows Parliament to enact law on the subject of competition. They argue that Parliament does not have the power to make laws on matters which are not enumerated in the FLL as all residue power is vested with the Provinces after the Eighteenth Amendment to the Constitution vide the Constitution (Eighteenth Amendment) Act, 2010 ("18th Amendment"). That the FLL does not contain any entry on the subject of competition or monopolies or in any manner with reference to anti-trust restrictions. The counsel argued that the Constitution of the Islamic Republic of Pakistan, 1956 ("1956 Constitution") contained a specific entry with reference to commercial and industrial monopolies in Entry No.10 of the Concurrent List. Furthermore the Constitution of the Islamic Republic of Pakistan, 1962 ("1962 Constitution") provided in Article 131 that the Central Legislatures shall have exclusive powers to make laws with respect to any matter enumerated in the Third Schedule and Article 131(2) of the 1962 Constitution provided that the Central Legislature can make laws in national interest in relation to economic and financial stability of Pakistan, planning or coordination or for the purposes of achievement of uniformity as required. That the Monopolies and Restrictive Trade Practices (Control and Prevention Ordinance), 1970 ("MRTPO") was promulgated specifically with reference to the powers conferred on Parliament under Article 131(2) of the 1962 Constitution. However there is no similar provision under the Constitution and in the absence of any similar Article or Entry in the Constitution, competition law is specifically and intentionally excluded from the legislative domain of Parliament. That the omission of these provisions from the Constitution is deliberate so as to confer power on the Provinces. Hence the Ordinances and the Act are ultra vires the Constitution as Parliament does not have legislative competence to legislate on this subject. Further that Article 151 of the Constitution does not give legislative authority to Parliament as the said Article relates to the movement of goods and allows Parliament to impose restrictions on trade and commerce between the Provinces. They argue that on its

own, it is not an independent source of legislative authority as the only source of legislative authority under the Constitution is Article 142.

24. Conversely the AGP argued that there are various legislative entries in the FLL as well as specific Articles of the Constitution which when read cumulatively empowers Parliament to legislate law which regulates and controls anti-competitive behaviour and ensures free competition. He argued that the very nature of the Act is to ensure free competition by regulating anti-competitive behaviour throughout Pakistan as the Act is national in character and in its reach. The AGP explained that the Act aims to protect consumers and the public at large and is directly related to the national economy hence falls within the domain of Parliament. He explained that historically Parliament has always legislated on the subject of competition and that throughout this time the Provinces have neither questioned the laws nor enacted one. Even throughout the history of this case the Provinces have not come forward to state otherwise. That legislative entries must be read liberally and it is not necessary that the subject matter falls in any one distinct entry but can be read into several entries. So far as the relevant legislative entries are concerned, he relied upon Entries Nos.3, 27, 32, 58 and 59 of Part-I of the FLL and Entries Nos.6, 7 and 13 of Part-II of the FLL. He also relied upon Articles 18, 142 and 151 of the Constitution in support of his arguments in favour of Parliament's competence to legislate on the subject of competition. The AGP argued that regulating anti-competitive behaviour so as to ensure free competition falls within the legislative domain of Parliament, hence the Ordinances and the Act are not ultra vires the Constitution.

25. On behalf of the CCP it was argued that the parties before the Court in many cases are Associations, who have filed petitions on behalf of their members who have business all over the Pakistan. This fact alone suggests that the argument of the Petitioners that Parliament is not competent to make law is flawed as the nature of the dispute has crossed Provincial borders and the relevant market in all the cases before this Court is Pakistan and not confined to any market within the Province of Punjab. They argued that the Constitution envisages economic unity through a national economy under Article 151 of the Constitution which requires a free market throughout Pakistan and carries a constitutional mandate to Parliament to remove barriers to free trade and commerce so as to ensure free competition. By way of Article 151(2) of the Constitution only Parliament can legislate to impose restrictions on the freedom of trade, commerce or intercourse between the Provinces. The Counsel explained that the object of the Act and the CCP is to remove all barriers to free

competition and maintain free competition in all commercial and economic activity.

26. For ease of reference, the relevant provisions of the Constitution are reproduced hereunder:-

Article 18	Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business: Provided that nothing in this Article shall prevent- (a) the regulation of any trade or profession by a licensing system; or (b) the regulation of trade, commerce or industry in the interest of free competition therein; or (c) the carrying on, by the Federal Government or a Provincial Government, or by a corporation controlled by any such Government, of any trade, business, industry or service, to the exclusion, complete or partial, of other persons.
Article 142	Subject to the Constitution (a) [Majlis-e-Shoora (Parliament)] shall have exclusive power to make laws with respect to any matter in the Federal Legislative List; (b) Majlis-e-Shoora (Parliament) and a Provincial Assembly shall have power to make laws with respect to criminal law, criminal procedure and evidence;] (c) Subject to paragraph (b), a Provincial Assembly shall, and Majlis-e-Shoora (Parliament) shall not, have power to make laws with respect to any matter not enumerated in the Federal Legislative list;] (d) [Majlis-e-Shoora (Parliament)] shall have exclusive power to make laws with respect to all matters pertaining to such areas in the Federation as are not included in any Province]
Article 151	(1) Subject to clause (2), trade, commerce and intercourse throughout Pakistan shall be free. (2) [Majlis-e-Shoora (Parliament)] may by law impose such restrictions on the freedom of trade, commerce or intercourse between one Province and another or within any part of Pakistan as may be required in the public interest. (3) A Provincial Assembly or a Provincial Government shall not have power to: (a) make any law, or take any executive action, prohibiting or restricting the entry into, or the export from, the Province of goods of any class or

description, or (b) impose a tax which, as between goods manufactured or produced in the Province and similar goods not so manufactured or produced, discriminates in favour of the former goods or which, in the case of goods manufactured or produced outside the Province discriminates between goods manufactured or produced in any area in Pakistan and similar goods manufactured or produced in any other area in Pakistan. (4) An Act of a Provincial Assembly which imposes any reasonable restriction in the interest of public health, public order or morality, or for the purpose of protecting animals or plants from disease or preventing or alleviating any serious shortage in the Province of any essential commodity shall not, if it was made with the consent of the President, be invalid.

Federal Legislative List:- (Part-I) Entry No.3. External affairs; the implementing of treaties and agreements, including educational and cultural pacts and agreements, with other countries; extradition, including the surrender of criminals and accused persons to Governments outside Pakistan. Entry No.27. Import and export across customs frontiers as defined by the Federal Government, inter-provincial trade and commerce, trade and commerce with foreign countries; standard of quality of goods to be exported out of Pakistan. Entry No.32. International treaties, conventions and agreements and International arbitration. Entry No.58. Matters which under the Constitution are within the legislative competence of [Majlis-e-Shoora (Parliament)] or relate to the Federation. Entry No.59. Matters incidental or ancillary to any matter enumerated in this Part. Legislative Entries:- (Part-II). Entry No.6. All regulatory authorities established under a Federal Law. Entry No.7. National planning and national economic co-ordination including planning and co-ordination of scientific and technological research. Entry No.13. Inter-provincial matters and co-ordination.

27. With reference to legislative competence, the Petitioners have stressed on the historical context stating that the Constitution does not have any provision similar to the 1956 Constitution or the 1962 Constitution which authorizes Parliament to legislate on the subject of competition. They argued that the subject of competition is expressly missing from the FLL which means that it cannot be implicitly interpreted, as such interpretation takes away the fundamental scheme of the Constitution, especially after the 18th Amendment to the

Constitution which gave greater authority to the Provinces. They stated that historically there were entries and provisions in the constitutions which have been deliberately omitted from the Constitution, meaning thereby that the intention of the framers of the Constitution was to exclude the subject of competition from the legislative domain of Parliament. As regard this contention, it is necessary to look at the historical context of the legislative power of Parliament to make law on free trade and competition under the different constitutions.

28. Section 297 of The Government of India Act, 1935 is reproduced hereunder:

Section 297 - Prohibition of certain restrictions (1) No Provincial Legislature or Government shall-- a) by virtue of the entry in the Provincial Legislative List relating to trade and commerce within the Province, or the entry in that list relating to the production, supply, and distribution of commodities, have power to pass any law or take any executive action prohibiting or restricting the entry into, or export from, the Province of goods of any class or description; or b) by virtue of anything in this Act have power to impose any tax, cess, toll, or due which, as between goods manufactured or produced in the Province and similar goods not so manufactured or produced, discriminates in favour of the former, or which, in the case of goods manufactured or produced outside the Province, discriminates between goods manufactured or produced in one locality and similar goods manufactured or produced in another locality. (2) Any law passed in contravention of this section shall, to the extent of the contravention, be invalid.

Article 119 of the 1956 Constitution is reproduced hereunder:

Article 119 - Inter-Provincial Trade. No Provincial Legislature or Provincial Government shall have power (a) to pass any law, or take any executive action, prohibiting or restricting the entry into, or export from, the Province of goods of any class or description; or (b) to impose any taxes, cesses, tolls or dues which, as between goods manufactured or produced in the Province and similar goods not so manufactured or produced, discriminate in favour of the former, or which, in the case of goods manufactured or produced outside the Province, discriminate between goods manufactured or produced in any locality and similar goods produced in any other locality: Provided that no Act of a Provincial Legislature which imposes any reasonable restriction in the interest of public health, public order or morality shall be invalid under this Article if it is otherwise valid under the Constitution; but any Bill for this purpose passed by the Provincial Assembly shall be reserved for the assent of the

President, and shall not become law unless the President assents thereto.

Entry No.4 of the Federal List of the 1956 Constitution Trade and commerce between the provinces, and with foreign countries; import and export across customs frontiers.

Entry No.10 of the Concurrent List of the 1956 Constitution Commercial and industrial monopolies, combines and trusts.

Articles 131 and 142 of the 1962 Constitution are reproduced hereunder:

Article 131. Central law-making powers-(1) The Central Legislature shall have exclusive power to make laws (including laws having extra-territorial operation) for the whole or any part of Pakistan with respect to any matter enumerated in the Third Schedule. (2) Where the national interest of Pakistan in relation to- (a) the security of Pakistan, including the economic and financial stability of Pakistan; or (b) planning or co-ordination; or (c) the achievement of uniformity in respect of any matter in different parts of Pakistan, so requires, the Central Legislature shall have power to make laws (including laws having extra-territorial operation) for the whole or any part of Pakistan with respect to any matter not enumerated in the Third Schedule. (3) If- (a) it appears to the Assembly of a Province to be desirable that a matter not enumerated in the Third Schedule should be regulated in the Province by an Act of the Central Legislature; and (b) a resolution to that effect is passed by the Provincial Assembly, the Central Legislature shall have power to make laws having effect in the Province with respect to that matter, but any law made in pursuance of this power may be amended or repealed by an Act of the Provincial Legislature. (4) The Central Legislature shall have power (but not exclusive power) to make laws for the Islamabad Capital Territory and the Dacca Capital Territory with respect to any matter not enumerated in the Third Schedule. (5) The Central Legislature shall have power to make laws for any part of Pakistan not forming part of a Province with respect to any matter. Article 142. Inter-Provincial Trade-(1) Subject to clause (2) of this Article, the Legislature of a Province shall not have power- (a) to make any law prohibiting or restricting the entry into, or the export from, the Province of any goods or; (b) to impose a tax which, as between goods manufactured or produced in the Province and similar goods not so manufactured or produced, discriminates in favour of the former goods or which in the case of goods manufactured or produced outside the Province, discriminates between goods manufactured or produced in any locality in Pakistan and similar goods produced in any other locality in Pakistan. (2) No Provincial Law which imposes any reasonable restriction in the

interest of public health, public order or morality or for the purpose of protecting animals or plants from disease or preventing or alleviating any serious shortage in the Province of any essential commodity shall, if it was made with the consent of the President, be invalid by reason of this Article.

1972 Interim Constitution of Islamic Republic of Pakistan No provision on inter-provincial trade and commerce existed in the 1972 Interim Constitution.

Parliamentary Debates on Article 151 of the Constitution, 1973 The 1972 Interim Constitution did not include a clause regarding inter-provincial trade. Mr. Abdul Hafeez Pirzada, expressed regret over this omission and explained the significance and purpose of this provision while addressing the National Assembly:- "Mr. Abdul Hafeez Pirzada: sir, this is an extremely import Article. We were guilty of certain omissions in a similar Article under the Interim Constitution which resulted in some very serious troubles between the Province. Goods manufactured in one Province were put at disadvantage by imposition to taxes so as to destroy the market for those goods in a particular Province. It makes the price so high and incompetitive that people would refrain from buying those goods. In one country, with one economic system and with one economy, this Article is absolutely necessary, and I am glad to see that there is no serious resistance to this Article inasmuch as mere nominal amendments have been suggested by one or two persons, a few amendments which were not even moved. Now here, Sir, I consider it appropriate because this has been an important matter and a very important matter dealing with the Federation-Provinces relationship and also the distribution to power and check authority that is to be exercised by the Federation over the Provinces. I would like to read from paragraph 9 of the Charter of Demands submitted by Prof. Ghafoor Ahmad on behalf of the so-called United Democratic Front to the President of Pakistan, and I would like this to go on record, because Opposition are failing in their duty to come and participate in the task of Constitution- making and in their absence, it is my duty to inform the House what the Opposition, or certain members of the National Assembly sitting across the floor, think about these provisions and what there so-called supporters, political supporters outside the House, under the name of the so-called United Democratic Front also think. This is all that has been said in respect of the relations between the Centre and the Provinces in the Charter of Demands, and I would not have made in public, but since they have themselves made it public in their press conference on the 24th, I will be justified in reading out before this august House, "No

change in the Legislative List both Federal and Concurrent is desired". This is the stand taken by them. Only minor procedural adjustments are suggested. That is all that they have to say with regard to the distribution of power and division of subjects between the Centre and the provinces and inter-Provincial or Federation-Provinces relationship. They have only suggested very very minor amendments of procedure and legislation and that particular Article has been deferred and no discussion has taken place. Therefore, if no amendments are coming forward on this part of the Constitution, it is understandable because only deduction that we can draw is that no one has any serious objection on this very tricky and sensitive part."(Emphasis added)

Section 297 of the Government of India Act, 1935 imposed restrictions on the Provincial Legislature and Government from making law which will restrict entry into or export from the Province, of goods of any class or description. It also restricted the Provincial Assembly and Government from imposing any tax, cess, which discriminates in favour of the Province. Similar provisions were also seen in the 1956 Constitution in Article 119 and Article 142 of the 1962 Constitution. These Articles are similar to Article 151(3) of the Constitution where similar limitations have been placed on the Provincial Assembly and Provincial Government. Accordingly the relationship between the Provinces and the Federation with reference to inter-provincial trade and commerce was governed by these provisions. There was no such provision under the 1972 Interim Constitution. This led to the Parliamentary Debates on Article 151 of the Constitution. As per the Debates, Article 151 of the Constitution was necessary to define the relationship between the Federation and the Provinces and also to maintain some check by the Federation on the Province. The Debates also highlight the intent of the framers of the Constitution to have one economic system with one economy. This goes to the essence of Article 151 of the Constitution which is federalism as it sets out a national objective for a national economy. Article 151 was introduced in the Constitution where Sub-Clauses 1 and 2 of the said Article were in addition to Sub-Clause 3 which is similar to the earlier provisions setting restrictions on the Provincial Assembly and Provincial Government. Article 151(1) and (2) of the Constitution requires trade, commerce and intercourse to be free throughout Pakistan. Only Parliament has the authority to impose restrictions on free trade and commerce between Provinces or within any part of Pakistan, that too in the public interest. We note that Entry 10 of the Concurrent List in the 1956 Constitution specifically provided for the subject of commercial and industrial monopolies, combines and trust. Historically, this is the only Entry which mentioned the subject of monopoly however no law was made pursuant to this entry. In the

1962 Constitution there was no such Entry, however Article 131(2) specifically gave the central legislature authority to make law on economic and financial matters to achieve uniformity throughout Pakistan. The Petitioners rely on Article 131(2) of the 1962 Constitution to urge the point that the central legislature was authorized to make laws related to the economy of Pakistan and that the MRTPO was promulgated in terms thereof. This reliance of the Petitioners testifies to the fact that the MRTPO being a law to prevent the growth of monopolistic power and restrictive trade practices was in the national interest for economic stability, consequently it required federal legislation. This was the first legislation relating to competition in Pakistan. We have gone through the provisions of the MRTPO and find that the preamble to the MRTPO clearly states that the Ordinance is to provide for measures against undue concentration of economic power, growth of unreasonable monopoly power and restrictive trade practices which are injurious to the economy of Pakistan. This means that regulating monopolistic power and restrictive trade practices is for the economic welfare of the country, hence it was considered a federal subject falling under Article 131 of the 1962 Constitution which authorized the central legislature to make laws in the national interest, for the economic and financial stability of Pakistan. So while Entry No.10 of the Concurrent List in the 1956 Constitution was directly on the subject of monopolies, combines and trust, Article 131(2) of the 1962 Constitution referred to the more general legislative power of the Central Legislature to make law on matters of national interest which included the economic and financial stability of Pakistan. Consequently even in the historical context, having a free market and regulating monopolistic behaviour was a federal subject as it was in the national interest of the country. The objective of the MRTPO came up before the august Supreme Court of Pakistan in *Sanaullah Woolen Mills Ltd. and another v. Monopoly Control Authority* (PLD 1987 SC 202) while hearing an appeal against an order under the MRTPO wherein the august Supreme Court of Pakistan held that:

This legislation is the first of its kind in Pakistan and was intended to provide measures against undue concentration of economic power, growth of unreasonable monopoly power and unreasonably restrictive trade practices to secure national interest of Pakistan in relation to its economic and financial stability. It was enacted before the Constitution, but is now referable to Article 38(a) of the Constitution of the Islamic Republic of Pakistan, in Chapter 2, relating to Principles of Policy.

Such legislations became an important aspect of economic policies of almost all the western countries.

Economic power belonging to the genus monopoly was commonplace with the economy but the enacting sections of our Ordinance regulating the undertaking's undue concentration of power has no analogous in the world, and should, therefore, be regarded exceptional in the context of monopoly or antitrust legislations in the various countries of the world. (Emphasis added)

As per the Supreme Court judgment the MRTPO was promulgated so as to promote economic welfare, financial stability and to prevent the concentration of economic power in the hands of a few. The constitutional backing given to the MRTPO was in Chapter 2 under Principles of Policy, now referable to Article 38(a) of the Constitution which requires the State to provide for the well being of the people by preventing concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest. But the MRTPO proved to be ineffective and was considered obsolete given the changing economic dynamics around the world. The global focus had shifted from curbing monopolies to promoting free and fair competition, hence the same focus was considered necessary for Pakistan. This led to the promulgation of the 2007 Ordinance, which established the CCP in place of the Monopoly Control Board and set its regulatory objective as maintaining free competition in all spheres of commerce and economic activity to improve economic efficiency and protect the consumer from anti-competitive behaviour. This objective was maintained in the 2009 and 2010 Ordinances and the Act. Consequently the Ordinances and the Act are broader in scope when compared with the MRTPO as the law aims to create a healthy market which serves the consumers interest and structures behaviour so as to encourage economic activity for a more equal distribution of resources and wealth. Hence even in the historical context the MRTPO was a federal law, enacted in the national and economic interest of Pakistan.

29. Now coming to the present Constitution, the scheme of the Constitution on Federal-Provincial relationship is set out in Part V being Articles 141 to 159. Article 141 provides for the jurisdictional extent that Parliament and the Provincial Assemblies can make law. Accordingly Parliament can make law for the whole of Pakistan whereas the Provincial Assembly can make law for the Province. This means that the Province cannot make law which operates beyond its territorial limits. Article 142 gives legislative competence to Parliament and the Provincial Assemblies by setting out the subject matters which fall under the Federal and Provincial domain. As per

the Article, Parliament has exclusive power to make law on subjects enumerated in the FLL and Parliament shall not make laws with respect to matters not enumerated in the FLL. The Petitioners argued that competition is not a specified subject under the FLL, hence it does not fall in legislative domain of Parliament. The AGP argued that competition is a federal subject and falls within Parliament's legislative authority under the provisions of the Constitution. Hence the question before us is can Parliament make law on matters not provided in the FLL? The answer to this question is in the Constitution itself, which can mandate legislative competence through specific provisions, as is evident from the opening lines of Article 142 which states 'Subject to the Constitution' meaning that the legislative powers as distributed in Article 142 of the Constitution are subject to other provisions of the Constitution and not limited to Article 142 of the Constitution. This Article has come up before the august Supreme Court of Pakistan in several cases as detailed hereinafter:

In the case Lahore Development Authority through D.G. and others v. Ms. Imrana Tiwana and others (2015 SCMR 1739), the august Supreme Court of Pakistan while interpreting Article 142 of the Constitution held that where the Constitution itself creates a bar on the exercise of legislative authority by the Province, then it must be exercised in the manner prescribed by the Constitution. The august Supreme Court of Pakistan held that:

52. The words "Subject to the Constitution" in Articles 142 and 137 of the Constitution simply mean that where the Constitution itself places a bar on the exercise of legislative or executive authority by the Province such authority cannot be exercised in spite of its conferment by these Articles. For instance, while the Province has executive authority under Article 137, this authority must be so exercised so as to secure compliance with federal laws, which apply in that Province [Article 148(1)]. It must also be so exercised so as not to impede or prejudice the executive authority of the Federation [Article 149(1)]. Likewise, the legislative authority of the Province under Article 142 of the Constitution can be conferred on the Federation under Article 144. Further, neither the executive nor the legislative authority of a Province can be exercised in a manner which violates Fundamental Rights. Any such exercise would fall foul of Article 8 of the Constitution.
53. The words "Subject to the Constitution" do not, therefore, make Article 137 or 142 subservient to the remaining provisions of the Constitution. All that these mean is that where the Constitution creates a specific bar to the exercise of such executive or

legislative authority or provides a different manner for such exercise then that authority must either not be exercised at all or exercised in such manner as the Constitution permits. It does not mean that the provision prefaced with such words is a subordinate constitutional provision. It also cannot mean that once the Province has devolved certain powers on the Local Government, its legislative and executive authority is effaced by that of the Local Government. The said provisions are not subordinate, but provisions, the exercise of authority under which, is untrammelled except where the Constitution itself creates a specific and overriding bar. (Emphasis added)

In *Sindh Revenue Board through Chairman, Government of Sindh and another v. The Civil Aviation Authority of Pakistan through Airport Manager* (2017 SCMR 1344), the august Supreme Court of Pakistan while deliberating over the imposition of sales tax by the Province discussed legislative domain of the Federation and the Provinces and concluded that the pith and substance of a subject should be looked at. The Court held that:

37. The Constitution, which is characterized as a living and organic thing, is not to be interpreted narrowly or restrictively, and a pedantic interpretive approach is to be avoided. Whilst the provincial legislatures are independent, they must operate within the sphere allotted to them and within their prescribed limit. Neither the Federation nor the provinces should invade upon the rights of the other nor encroach on the other's legislative domain. The pith and substance of the legislated subject is to be examined to determine in whose legislative sphere a particular subject comes under. And above all a reasonable interpretation which does not produce impracticable results should be adopted. (Emphasis added)

In the judgment reported as *Pakistan Flour Mills Association and another v. Government of Sindh and others* (2003 SCMR 162), while deliberating on Entry 49 and 54 of the FLL of the Constitution, the august Supreme Court of Pakistan examined Article 142 of the Constitution prior to the 18th Amendment, and observed that Parliament can make laws on matters in the FLL or the Concurrent Legislative List whereas in view of Article 142(c) of the Constitution, the Provincial Assembly can legislate with respect to matters not enumerated in the FLL or the Concurrent Legislative List. However, after the 18th Amendment in *Fiaqat Hussain and others v. Federation of Pakistan through Secretary, Planning and Development Division, Islamabad and others* (PLD 2012 SC 224), the august Supreme Court of Pakistan, while answering the question as to whether after abolishing the Concurrent Legislative List the Federation is empowered to make

legislation on the subject of education, held that fundamental rights are to be enforced by the State and the word 'State' includes the Federal Government. In this case the issue was of the right to education and whether the Federation is empowered to make legislation relating to the subject of education. The august Supreme Court of Pakistan concluded that the Federal Government is responsible to enforce the fundamental right to education under Article 25A of the Constitution notwithstanding the 18th Amendment and it cannot be argued that because the Concurrent Legislative List has been omitted through the 18th Amendment and education has devolved on the Provinces that the Federation cannot legislate on the matter. Hence the Federal Government is not absolved of its duty to ensure that this fundamental right is duly enforced.

In *Government of Sindh through Secretary Health Department and others v. Dr. Nadeem Rizvi and others* (2020 SCMR 1), the august Supreme Court of Pakistan while interpreting 'Subject to the Constitution' in Article 142 of the Constitution reiterated the duty of the Federal Government is to enforce fundamental rights, which gives it legislative competence with respect to the respective fundamental rights under Article 9 of the Constitution. In this case the august Supreme Court of Pakistan read the right to healthcare in the fundamental right to life and placed an obligation on the Federal Government to carry out all necessary steps to ensure the enforcement of this right. The Court also clarified that the intent of the 18th Amendment was not to curtail the powers of the Federation under the Constitution simply because the Concurrent Legislative List had been deleted under the 18th Amendment. The august Supreme Court of Pakistan held that:

26. This Court in the foregoing cases has to a great extent examined and laid down the constitutional contours of the legislative competence of the Federal and Provincial Legislatures which in turn determines the executive authority of the Federal and Provincial Governments respectively as per Articles 97, 137 and 142 of the Constitution read with the Federal Legislative List. However, we find it pertinent to clarify that in the broader scheme of things, notwithstanding the fact that it has been held in the earlier portion of this opinion that the various institutions involved in this matter fall within the respective entries of the Federal Legislative List, these institutions draw constitutional and legal validity from a very significant and core feature of our democratic constitution, i.e. fundamental rights. With respect to the medical institutions in particular, i.e. JPMC, NICVD, NICH and SZPMI, the relevant fundamental right is the right to life enshrined in Article 9 of the Constitution which provides that

"No person shall be deprived of life or liberty save in accordance with law." As highlighted above in the case of Province of Sindh supra, this Court held that the right to life is a positive right thereby entitling the holder of such right to provision of some good or service; and being a positive right, it placed a positive duty on the state to act. Therefore the State, which undoubtedly includes the Federal Government as per Article 7 of the Constitution, is duty-bound and is under an obligation to guarantee the enforcement of the fundamental rights enshrined in the Constitution, with the most important one being the right to life. The significance of such right cannot be overstated and the plethora of Pakistani judgments on the various shapes and forms this right can take is evidence of such fact. The right to life undoubtedly entails the right to healthcare which means that everyone has the right to the highest attainable standard of physical and mental health and this comprises of access to all kinds of medical services including but not limited to hospitals, clinics, medicines and services of medical practitioners which must not only be readily available and easily accessible to everyone without discrimination, but also of high standard. As the State, the Federal Government has an obligation to carry out all necessary steps to ensure realization of this goal.

27. As held by this Court in Liaqat Hussain's case supra, the Federal Government is not absolved from conferring the fundamental rights contained in the Constitution upon its citizens and the State is required to enforce such rights. We find that this duty prevails, notwithstanding the respective domain of Federal and Provincial executive authority as determined by the respective Federal and Provincial legislative competence in light of the provisions of Articles 97, 137 and 142 of the Constitution read in conjunction with the Federal Legislative List. It is a duty that transcends and surpasses other provisions of the Constitution and cannot, in any circumstance whatsoever be curtailed or abridged. The more one scrutinizes the argument that the Federal Government cannot set up and run hospitals or similar facilities/institutions providing medical and healthcare services in any of the Provinces, the more unsustainable and flawed it becomes. Surely, the intention behind the 18th Amendment could not have been to prevent the Federal Government from opening healthcare facilities in any of the Provinces of Pakistan, for concluding so would be tantamount to attributing absurdity to a constitutional provision, something which we are not prepared to do bearing in mind the well known canons of statutory and constitutional interpretation. (Emphasis added)

In *Sui Southern Gas Company Ltd. and others v. Federation of Pakistan and others* (2018 SCMR 802), the august Supreme Court of Pakistan held that Entries 58 and 59 which fall at the end of Part 1 of the FLL are independent sources of legislative competence for Parliament with respect to matters which under the Constitution are within the legislative competence of Parliament or relate to the Federation. The august Supreme Court of Pakistan held that:

Thus, from the above provisions of the Constitution it is clear that the Federal Legislature has extra-territorial authority to legislate, but no such extra-territorial authority has been invested with the Provincial Legislature. Thus, the Provincial Legislature has no legislative competence to legislate law regulating the trade unions functioning at trans-provincial level. Needless to observe that to deal with such a matter, the Constitution itself has provided a mechanism i.e. entries Nos.58 and 59 in Part-I of FLL, whereby the Federal Legislature has been mandated to legislate in order to preserve and regulate a right, which in its exercise transcends provincial boundaries, especially one guaranteed under Article 17 of the Constitution. The scope of Entries Nos.58 and 59 shall be discussed in detail at the latter part of the judgment, considering the scope of the Entries in the FLL.

17. Additionally, Entries Nos.58 and 59, which fall at the end of the Part-I of the FLL, have their own significance. These two entries are independent and unfettered. Entry No.58 *ibid* covers the "Matters which under the Constitution are within the legislative competence of Majlis-e-Shoora (Parliament) or relate to the Federation". Further, Entry No.59 deals with the "Matters incidental or ancillary to any matter enumerated in this Part". From the plain reading of these two Entries, it is clear that besides the subjects enumerated in the previous Entries, these Entries provide extended powers to the Federal Legislature; inasmuch as, by means of these Entries, the legislative competence of the Federal Legislature extends not only to the matters which under the Constitution are within the legislative competence of the Parliament but also to the matters which relate to the Federation and also the matters incidental or ancillary thereto. Thus, in addition to the matters specifically enumerated in any of the Entries in Part-I of the FLL, the matters which in some way relate to the Federation would also fall within the legislative competence of the Parliament. This interpretation also finds support from the fact that in terms of Article 141 of the Constitution, a Provincial Legislature does not possess extra-territorial legislative competence and therefore,

cannot legislate with regard to a subject which in its application has to transcend the provincial boundaries. It is to be noted that as clarified by the learned High Court the resort to Entry No.58 ibid could only be made to deal with an extra-ordinary situation i.e. when a matter may fall within the legislative competence of the Province but when it comes to its application it has to travel beyond the territorial boundaries of the Province, bringing it into the domain of the Federal Legislation. Thus, it is held that the federal legislature has the competence to legislate relating to the Establishment/Trade Unions functioning at the Federal as well as trans-provincial level. (Emphasis added)

30. In the above cited cases the august Supreme Court of Pakistan while interpreting 'Subject to the Constitution' in Article 142 has declared that legislative authority can be derived from the provisions of the Constitution stating that legislative authority is to be exercised in a manner the Constitution permits and is not limited to Article 142 of the Constitution. The august Supreme Court of Pakistan declared that 'matters related to the Federation' under the Constitution would give legislative competence to Parliament by way of Entry 58 of the FLL. They used the pith and substance test on the subject matter legislated when examining legislative competence to determine if the subject matter relates to the Federation or the Province. The august Supreme Court of Pakistan has held that where a subject has application beyond provincial boundaries, the Provinces could not legislate on such subjects, as the subject would fall within the Federal domain. The above cited cases highlight the fact that legislative competence for Parliament comes from several sources; firstly the FLL of the Constitution; secondly express provisions of the Constitution; and finally on subjects which relate to the Federation. In this regard, we also note that legislative competence cannot be restricted to just the entries in the FLL, because the entries in the FLL are not sources of power, rather a list of subject matters on which Parliament can legislate. This is why the august Supreme Court of Pakistan has repeatedly held that Entries in the FLL should be given the widest of meaning and should be liberally construed as the Constitution is a living document and should be interpreted with the widest possible meaning to ensure continuity and balance amongst the organs of the state. Reliance is placed on *Pir Rashid-ud-Daula and 3 others v. The Chief Administrator of Auqaf, West Pakistan* (PLD 1971 SC 401), *Fauji Foundation and another v. Shamimur Rehman* (PLD 1983 SC 457), *Allah Ditta and 2 others v. The State* (1997 SCMR 891), *Messrs Elahi Cotton Mills Ltd and others v. Federation of Pakistan through Secretary, Ministry of Finance, Islamabad and 6 others* (PLD 1997 SC 582). In 2018 SCMR 802 (supra) the august Supreme Court of Pakistan

held that after considering the legislation as a whole in pith and substance, it has to be seen to which category or topic the legislation relates, whether substantially or directly and not whether it would in actual operation affect an item in the prohibited fields in an indirect way. So an Entry should be given the widest possible meaning and include all ancillary and subsidiary matters so as to give meaning to the legislative power and the fact that there may be an overlap will not preclude the Federation from having legal competence.

31. We now proceed to examine whether Parliament can legislate on the subject of competition. Article 18 of the Constitution provides for the fundamental right of every citizen to enter upon any lawful profession or occupation to conduct any lawful trade or business. This right is subject to the regulation of trade, commerce or industry in the interest of free competition therein. So the right to enter into lawful trade, business or profession is subject to regulations against anti-competitive behaviour which will ensure that competition is free. The question arises who can make these regulations, that is who can regulate trade, commerce or industry in the interest of free competition. As per the dicta of the Supreme Court laid down in PLD 2012 SC 224 (supra) and in 2020 SCMR 1 (supra), the Federation is not absolved of its duty to enforce fundamental rights notwithstanding the 18th Amendment or the fact that the subject is not listed in the FLL, as enforcement of fundamental rights is the duty of the State, which includes the Federal Government. Therefore, Article 18 imposes a duty on the Federation to enforce the fundamental right and consequently requires Parliament to regulate trade, commerce and industry to ensure free competition. Hence regulating competition becomes a matter related to the Federation which falls under Entry 58 of the FLL and as per the dicta of 2018 SCMR 802 (supra). This in itself is an independent source of legislative competence as the subject matter relates to the Federation. On the basis of Article 18 of the Constitution regulating competition is a constitutional command to the Federal Government. Interestingly Article 18(b) of the Constitution was introduced for the first time in the Constitution as the freedom of trade, business or profession were never made subject to the regulations in the interest of free competition in any of the previous constitutions.

32. We are fortified in our view while reading Article 151 of the Constitution. Sub-clause (1) of the said Article prescribes a constitutional command that subject to clause (2), trade, commerce and intercourse throughout Pakistan shall be free. Sub-clause (2) authorizes Parliament to impose restrictions on the freedom of trade, commerce or intercourse between one Province and another or within any part of Pakistan, in the public interest. To our mind, the

constitutional command is to Parliament because Article 151(1) requires trade, commerce and intercourse throughout Pakistan to be free and Article 141 of the Constitution gives Parliament the authority to make law for the whole of Pakistan. Essentially Article 151(1) of the Constitution is a command to remove all barriers to free trade, commerce and intercourse throughout Pakistan and prevents the Provinces from creating any hurdle in the way of trade, commerce and intercourse throughout Pakistan. While Article 151 of the Constitution casts a duty on the Federal Government to ensure that trade, commerce and intercourse throughout Pakistan is free, it also prohibits legislative or executive actions by the Province which may prevent free exchange and free movement of articles of trade and commerce throughout Pakistan. Any constraints on these subjects by the Province would be in derogation to the constitutional guarantee of free trade, commerce and intercourse throughout Pakistan. In this context the use of the words 'trade, commerce and intercourse' are important as is the concept of 'throughout Pakistan' and the use of the word 'free' in Article 151(1) of the Constitution. 'Trade, commerce and intercourse' refers to a class of economic activities which includes buying, selling, transport, distribution and consumption. Essentially it includes acts, transactions and conduct related to these activities. The emphasis on the term 'intercourse throughout Pakistan' in Article 151(1) of the Constitution is also significant as it entails a broad spectrum of commercial activities throughout Pakistan and not just between Provinces. The definition of 'intercourse' in Basus's Commentary on the Constitution of India (8th Edition Reprint 2012) is as follows:

The expression 'intercourse' means commercial intercourse. According to eminent juris H.M. SEERVAI, since Art. 301 is a fetter on legislative power, it must follow that there was some legislative power which required a fetter. In none of the legislative lists is "intercourse" by itself a subject of legislative power, although trade and commerce appear in all legislative lists. Therefore, "intercourse" must mean "commercial intercourse" and is covered by the legislative entries relating to trade and commerce.

So commercial intercourse may cover all activities which are not included in the ambit of trade and commerce, being instrumentalities of trade and commerce. Furthermore, Article 151(1) of the Constitution declares that trade, commerce and intercourse must be free throughout Pakistan which means that the command is not limited to any territorial boundaries, but must be effective throughout the country. Therefore, Article 151(1) and (2) of the Constitution is not limited to interprovincial trade and commerce as stated in Entry 27 of

the FLL as its application is beyond interprovincial acts, transaction and conducts within the ambit of trade, commerce and intercourse. The term 'free' in Article 151(1) and 'freedom' in Article 151(2) means not only should there be no barriers, hurdles or interference but the right to exercise the freedom is also without any constraints. The significance of trade, commerce and intercourse being free is that it calls for unification and promotes a national interest as these activities are a part and parcel of the national economy. Article 151(1) and (2) of the Constitution therefore propounds the constitutional mandate of a national economy and a free market. The intent of the framers of the Constitution is clear from the debates on Article 151 of the Constitution which calls for one economic unit, one economic system. The requirement that the specified class of economic activity be free, essentially means free from all barriers, structural and behaviour, free from any interference and restraints and includes free exchange and movement of goods, persons and things (tangible or intangible). Article 151(2) of the Constitution provides that if at all any restrictions are to be imposed on the declared freedom, it can only be by Parliament. Hence the Constitution gave Parliament the authority to restrict the freedoms declared in Article 151(1), but only in the public interest. The word 'restrictions' relates directly to the declared freedom meaning thereby that Parliament can impose limitations or prohibitions on the freedom, if required. The nature of the restrictions will depend on the act, transaction or conduct which is part of trade, commerce and intercourse if questioned and the test will always be does the law in question leave trade, commerce and intercourse free.

33. The Petitioners have argued that Article 151 of the Constitution does not confer legislative competence on Parliament but merely allows Parliament the imposition of restrictions on the free flow of goods and services between Provinces because if Article 151 of the Constitution is considered as an independent source of legislative power it will allow the Federation to enforce subjects which are not in the FLL of the Constitution. The Petitioners also argue that Article 151 is relatable to Entry 27 of the FLL which provides that Parliament can make laws related to inter-provincial trade and commerce, therefore at best Parliament can make law on competition so long as it relates to inter-provincial trade and commerce but not intra-provincial trade and commerce. So the Petitioners argue that Parliament can legislate on competition, but only to the extent of inter-provincial trade and commerce. Consequently the Petitioners do not dispute the position that to the extent of matters related to anti-competitive behaviour which transcends Provincial boundaries, Parliament is competent to make laws on the subject of competition. During the course of arguments they stated that the subject of competition is not in the FLL

of the Constitution, because this subject falls exclusively in the provincial domain, however where the impact of the act, transaction or behaviour transcends provincial boundaries then the Act will have effect subject to the fact that its application is construed to the extent of interprovincial trade and commerce.

34. We have heard the learned counsel for the Petitioners at length, however we do not agree with their interpretation of Article 151 of the Constitution. In the first instance Article 151 declares a constitutional policy for the whole of Pakistan, in the national interest and for its economic well being. Article 151 requires that there are no barriers on trade, commerce and intercourse throughout Pakistan which means that there is a free market throughout Pakistan for the benefit of the public, to ensure economic efficiency and consumer welfare. It essentially calls for an open market to protect the economy from different legislations or executive acts which can act as an impediment or a restriction or a barrier or embargo on the act, transaction or behaviour in furtherance of the freedom of trade, commerce and intercourse throughout Pakistan. Accordingly the freedom so declared by Article 151(1) of the Constitution is in the interest of uniformity and national interest giving the Federal Government control over the national economy, while allowing the Provinces to operate within the scheme of a single economic unit. The Constitutional declaration for free trade and commerce is a declaration which authorizes the Federation to regulate the national market in whatsoever way that best serves the nation's welfare. As the constitutional command calls for free trade, commerce and intercourse throughout Pakistan, the subject matter of trade, commerce and intercourse throughout Pakistan is directly related to the Federation (Entry 58). This is amplified by the fact that Article 151(2) authorizes Parliament to impose restrictions on the free flow of goods and services and on the free market in the public welfare. Furthermore, when seen in the context of Article 18, where Parliament can regulate the individual's freedom to trade, business and profession so as to ensure that this right be enjoyed with free and fair competition in the market, Article 151(1) and (2) is in the national interest, for the benefit of the public, to promote economic welfare and efficiency. It calls for a free and fair national economic market, which is for the benefit of the public at large. Furthermore Article 151(1) provides for freedom of trade, commerce and intercourse throughout Pakistan which means reliance on Entry 27 of the FLL is misplaced as the said Entry refers to inter-provincial trade and commerce, meaning that only matters confined to inter-provincial trade and commerce fall within its ambit. Article 151(1) of the Constitution however applies throughout the country and is not limited to inter-provincial trade and commerce and its

application is not limited to inter-provincial matters. While interpreting the Constitution, its application and meaning cannot be limited on account of an Entry in the FLL. Hence the application of Article 151(1) of the Constitution to just inter-provincial trade and commerce goes against the constitutional mandate in Article 151 of the Constitution. In this context, it is important to note that Entry 27 refers to 'inter-provincial trade and commerce' whereas Article 151(1) and (2) provides for 'trade, commerce and intercourse throughout Pakistan' making it clear that Article 151(1) and (2) is not relatable to Entry 27 of the FLL. As already stated the use of the word 'intercourse' is a deliberate attempt to bring all activities being instrumentalities of trade and commerce within the ambit of Article 151(1) of the Constitution and keeping it distinct from Entry 27 of the FLL. Even when compared in the historical context, Article 131(2) of the 1962 Constitution gave the central legislature the power to make law for the national interest of Pakistan where economics and financial stability was involved. Hence as per the constitutional mandate, the subject of trade, commerce, industry and intercourse between Provinces is related to the Federation. Parliament can regulate trade, commerce and industry and it can impose restrictions on the freedom of trade, commerce or intercourse between the Provinces or within any part of Pakistan in the interest of free trade, commerce and intercourse throughout Pakistan. This shows that a uniform economic policy geared to economic efficiency for consumer welfare is at the very root of Pakistan being a federal state. Therefore Article 151(1) and (2) of the Constitution balances the power between the Federation and the Provinces giving the Federation control over a set of economic activities which have a direct nexus or effect on the national economy, in the public interest. Furthermore, Article 151(1) and (2) of the Constitution are not just limited to inter-provincial trade and commerce rather requires trade, commerce and intercourse to be free throughout Pakistan which means that this free market is not limited to just interprovincial trade and commerce rather it takes the constitutional command beyond the realm of inter-provincial trade and commerce and calls for a free market and a national economy which has to be protected by the Federation, within which the Provinces can legislate subject to the provisions of the Constitution. When seen in the context of the Act, it is noted that the issue before the CCP will always be the prohibitions contained in Chapter II of the Act. These prohibitions essentially prevent anti-competitive behaviour. Hence where the behaviour is seen as being anti-competitive, it will be seen in the context of the relevant market, be it product or geographic. In this context the application of the Act is not limited to inter-provincial disputes but disputes where anti-competitive behaviour will impact the relevant market. One of the key features of competition law

is market integration by protecting market structures and economic freedom. Hence the Act cannot be restricted in its application to inter-provincial issues as the Act applies to the whole of Pakistan.

35. The Act was promulgated on 6.10.2010 after the 18th Amendment which was promulgated on 19.4.2020. The Petitioners argue that provincial autonomy was at the heart of the 18th Amendment and that if at all trade, commerce and commercial intercourse is to be regulated then based on Article 142 (c) of the Constitution it can only be by the Provinces. A lot has also been said with reference to regulating in the interest of free trade under Article 18 and imposing restrictions on the freedom of trade, commerce and intercourse under Article 151 of the Constitution. However, we find that the central theme of the Petitioners' argument is that all legislative authority has to be read in conjunction with Article 142 of the Constitution, specifically Article 142(a) and (c). We have already held that the provisions of Article 142 of the Constitution are subject to other provisions of the Constitution and as per the dicta laid down by the august Supreme Court of Pakistan, legislative competence is not restricted to Article 142 of the Constitution. In this context Article 18 read with Article 151 and Entry 58 of the FLL of the Constitution gives Parliament the authority to legislate on the class of economic activities which fall under trade, commerce, industry and intercourse for the benefit of the national economy. We also find that Article 151(1) and (2) of the Constitution does not impede on the autonomy of the Provinces post 18th Amendment, because the purpose of Article 151(1) and (2) of the Constitution has always been the ability to have a single economic unit giving the Federation the authority to act in the interest of the national economy notwithstanding the 18th Amendment. Accordingly after the 18th Amendment it calls for a balance of power between the Federation and the Provinces such that the goals of the national economy are maintained.

36. In view of the aforesaid, Parliament can legislate on the subject of trade, commerce, industry and intercourse so as to keep it 'free' throughout the country and in the interest of free competition. What needs to be seen is whether the subject of competition falls within Parliament's competence that is whether the subject of competition is related to Article 18 or Article 151 of the Constitution that is trade, commerce and intercourse throughout Pakistan. In order to answer this question, it is necessary to ascertain whether the subject of competition falls within the scope of trade, commerce and intercourse (Article 151) and industry (Article 18). Essentially we have to determine whether the Act or the subject matter of the Act falls within the federal domain for enforcement of the command under Article 151 and Article 18 of the Constitution. The US experience with the

'commerce clause' best highlights the difficulties in defining the limits of Congress to regulate commerce amongst the several States. The United States Constitution, Section 8(3) authorizes Congress to regulate commerce with foreign nations and amongst the several states and with Indian tribes. The United State Constitution specifically authorizes regulating between the States hence, its powers are to regulate interstate commerce. The central question before the United States Supreme Court with respect to the commerce clause has been what constitutes commerce amongst the States. In *Gibbons v. Ogden* 22 U.S 1 (1824), the question before the Supreme Court was whether a state law is invalid because it infringes upon Congress authority to regulate interstate commerce. The U.S Supreme Court held that interstate commerce includes navigation of steam boats amongst the several States. The Supreme Court allowed Congress to regulate the navigation of steam boats due to its impact on commerce, which was held to be a complete power with no limitation other than that prescribed by the court. After a long period of holding in favour of Congress, in *United States v. Lopez*, 514 U.S 549 (1995), the Supreme Court of the United States held a statute to be unconstitutional because it exceeded Congress' power to regulate commerce. At the time the court took a narrow meaning of the word 'commerce', relating it to the original or textual meaning of commerce which was limited to trade and exchange of goods and transportation. The Supreme Court held that the test is whether regulated activity substantially affects interstate commerce. If it does not affect commerce then Congress cannot make law on the subject. Over the years, this view evolved with a more liberal interpretation of the word 'commerce'. In *NLRB v. Jones and Laughin Steel Corp.* 301 U.S. 1 (1937), the Court used the substantial and economic effect test and the cumulative effect test on commerce to determine Congress authority. In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Supreme Court upheld federal regulations by linking it to economic activity. Raich stated that commercial activity was a subset of economic activity which can be regulated by Congress. The Court observed that Congress can regulate local activities that are part of the economic class of activities that affect interstate commerce. The problem then centered on, the definition of economic activity and how to characterize it. So the Supreme Court used the substantial effects test and the cumulative effect test to ascertain whether the challenged statutes were related to national economic activity. If so, it would fall in Congress' domain. In *Wickard v. Filburn* (317 US 111 (1942)), the Supreme Court increased the regulatory domain of Congress by holding that Congress could regulate local economic activity in ways in which the States cannot effectively control the national economy. Hence the Court also looked at whether the law or regulation had some nexus or impact on the economy. Essentially through the cases it

appears that the Supreme Court of the United States looked for some palpable connection with the national economy to give Congress authority. Furthermore, the Supreme Court of the United States used the 'commerce clause' essentially to balance the power between the Federal and State governments. Accordingly the objective of the commerce clause has evolved to enforce a national economy and all matters related to it.

37. The commerce clause is similar to Article 151(2) of the Constitution but there is no parallel to Article 151(1) of the Constitution in the Constitution of United States. In the above context, the august Supreme Court of Pakistan has applied the pith and substance test to ascertain the purpose of the law and to ascertain whether the subject matter legislated on is related to the Federation. While construing legislative competence, this Court must preserve the basic scheme of the Constitution which is embodied in Article 151(1) and (2) of the Constitution. It is the essence of a federal constitution that legislative authority is demarcated between the Federation and the Provinces so that each functions within its domain. Therefore it is the duty of this Court to determine whether Parliament has the authority to deal with the subject matter of 'competition' while applying the pith and substance test to the Act to ascertain whether the Act is Federal or Provincial by its construct and if the application of the Act is beyond territorial boundaries, it will fall within the Federal domain. The preamble of the Act provides the intent of the legislature to make a law to provide free competition in all spheres of commercial and economic activities to enhance economic efficiency and to protect consumers from anti-competitive behaviour. Hence the objective of the Act is economic welfare and consumer welfare. The Act sets out to improve economic efficiency through its regulatory mechanism by prohibiting anti-competitive behaviour as it impacts all spheres of commercial and economic activity. By its very intent the Act has a national interest. It calls for a uniform approach to anti-competitive behaviour so as to improve the economy and protect the consumer by ensuring that free competition prevails. Consumer welfare means all things that are good for the consumer such as price, quality and choice which is why the Act is designed to promote economic growth. When seen in the comparative context of the MRTPO which was promulgated in pursuance of Article 131(2) of the 1962 Constitution it also aimed to ensure economic and financial stability in the national interest. Therefore both laws aimed to ensure a free market with free competition in all spheres of commercial and economic activity to boost economic efficiency and required a unified approach to this subject as it involves the welfare of all consumers. The Act prohibits certain anti-competitive behaviour which impacts

the product market and the geographic market which in turn can impact the economy. The Act prohibits abuse of a dominant position in the relevant market by controlling practices in which a dominant organization may engage in order to increase its position in the market. Such dominance can impact prices, productivity and quality which affects economic welfare. Since the relevant market is either product based or geographic, its reach is not confined to provincial boundaries. In the same way, the Act prohibits anti-competitive agreements and deceptive marketing practices and regulates mergers as a means to increase consumer welfare. Hence, the Act aims to promote free competition between undertakings and to remedy structural and behavioural problems and it advances an economic policy aimed at protecting consumer interests. This in turn means that the behaviour sought to be controlled and its effects are not contained in any one territory as the impact is based on the market and the market players have presence based on the market they serve. Consequently, the structures and behaviour sought to be regulated has its nexus with trade, commerce, industry and intercourse throughout Pakistan. Therefore, the Act by its very nature is federal in character because it is not confined to any territorial limits since it regulates the market, which can be geographic or based on the product. The relevant market is part of the larger scheme of one economic unit, which means that any anti-competitive behaviour in the relevant market must be regulated as per the Federal policy for the benefit of the economy due to its impact on the national economy.

38. Accordingly the Act eliminates activities that reduce competition in the market place and embodies a scheme of economic regulation to achieve the purpose of economic efficiency. In this way it is directly related to trade, commerce and industry and is in furtherance of economic and consumer welfare. It also ensures that trade, commerce and intercourse are free as required under Article 151(1) of the Constitution and allows the freedom under Article 18 of the Constitution to be effectively enforced. Competition as a subject cannot be effectively regulated if it is confined to territorial boundaries, because competition law regulates anti-competitive behaviour which can take place in one geographic market and effect another geographic market. Anti-competitive behaviours may exert substantial economic effect which is why it requires federal regulation. It is therefore, part of the constitutional scheme aimed at preventing unfair market practices, which hamper free and fair competition and affect trade and commerce along with all its instrumentalities, as the presence of healthy competition will affect the welfare of the national economy. As per the United Nations Set of Principles and Rules on Competition, free competition enhances economic efficiency and protects the

consumers. Therefore the purpose of the Act is federal and its enforcement is related to the Federation as the Act was promulgated for the benefit of the national economy.

39. Accordingly we find that Parliament is competent to legislate on the subject of competition as the very purpose of the said subject relates to the Federation since it impacts and benefits the national economy and consumers at large. Not only is this in furtherance of the fundamental right under Article 18 of the Constitution, it is also in furtherance of Article 151 of the Constitution that is to ensure that trade, commerce and intercourse throughout Pakistan is free. This mandate travels beyond the territorial limits of the Provinces and is a specific command to the Federation. Since the requirement of maintaining free competition throughout Pakistan is beyond the territorial limits of the Province, the subject matter of 'competition' falls within the federal domain. In this context, it is important to note that the entire dispute before us is that competition is a provincial subject after the 18th Amendment. However, we find that the true spirit of the 18th Amendment was to balance power between the Federation and the Provinces, such that the Provinces have an equitable share in the Federation. This is evident from the debates on Article 151 of the Constitution. The constitutional mandate under Article 151 and the constitutional duty in terms of Article 18 have not eroded post 18th Amendment and continue to require the Federation to exercise its authority on the subject of competition as it is the duty of the Federation to enforce fundamental rights and act in the national interest to promote economic efficiency. This freedom is not limited to just movement of goods, but entails the requirement of a free market throughout Pakistan. The freedom of trade and commerce is not just amongst the Provinces but will include areas within the Provinces. Situations may require the Federation to impose restrictions within the Province, to maintain uniformity and efficiency, because centers of production of certain commodities may be situated within one Province but the market for consumption may be located outside the Province. Hence Article 151 of the Constitution calls for a dynamic process of government with shared responsibilities in line with the structure of a Federal Government. The 18th Amendment did not intend to take away the constitutional authority of the Federal Government and Parliament rather it enhanced the authority of the Provinces by giving everything in the Concurrent Legislative List to the Provinces. Whether the Provinces can also legislate on the subject of competition is not before us, hence we have not deliberated on this issue.

40. Having held that Parliament is competent to make law on the subject of competition, in this context, it is also necessary to examine

Entry 3 and Entry 32 of the FLL which also creates an obligation on the Federation to make law on the subject of competition. Entry 3 relates to external affairs which include implementing treaties and agreements and Entry 32 is the subject of international treaties, conventions and agreements as well as international arbitration. Pakistan has signed several international agreements in which it has committed to ensure free and fair competition within its borders. The World Trade Organization requires free trade amongst Member States and in this regard requires that Member States make laws to discourage monopolies with a view to promote competition. In a meeting of the World Trade Organization held in Doha, a declaration was adopted known as Doha Declaration in 2001 which focused on core principles such as transparency, non-discrimination and competition. Pakistan is required to comply with the same. The United Nations Conference on Trade and Development and the United Nations Set of Principles and Rules on Competition ("UNCTAD") requires that Member States make appropriate legislation on the subject of competition. The objective of the UNCTAD is to ensure that restricted business practices do not impede or negate the realization of benefits that should arise from the liberalization of trade and to attain greater efficiency in international trade, particularly that of developing countries, by stressing on economic structures that encourage and protect free and fair competition and prohibit the concentration of economic power or capital in a few hands. Some of the other agreements executed by the Federal Government with respect to free trade is the SAFTA and the trade agreements with Sri Lanka and China. These agreements also require the Federation to fulfil its obligation to provide fair conditions of competition for trade in goods and services between these countries. Therefore the Federation is obligated to fulfill its commitments under international treaties and agreements and since the subject of competition is the subject matter of international agreements and treaties, Parliament can make law on the subject of competition. Reliance is placed on 2018 SCMR 802 (supra).

41. Counsel for CCP pointed out that W.Ps. Nos.15624/2009, 4574/2012, 20280/2012, 21105/12 and 39346/2015 have been filed by Associations such as All Pakistan Cement Manufacturers Association, GCC Approved Medical Centres Association, GCC Approved Medical Diagnostic Centres Administrative Office. These Associations represent their members from across Pakistan, hence their entire claim that they cannot be governed by the Act because the law should be Provincial is without basis given that their own cases transcend provincial borders. We also note that from amongst the Petitioners before the Court, several represent multi-nationals who have businesses throughout Pakistan and their challenge with respect to Parliament's competence

is also without basis given that these Petitioners have businesses throughout Pakistan and by their own admission Parliament can legislate on competition law when the matter transcends provincial borders. The Petitioners in W.Ps. Nos.3530/10, 3534/10, 3537/10, 93165/17, 3538/10, 3750/10, 25296/15, 104015/17, 63067/19, 26929/15, 30824/15 and 24863/15 have been filed by multi-nationals such as Telenor, Mobilink, Warid, Ufone and Zong, Nestle, Unilever, Shezan International, Master Paints. These Petitioners have offices throughout Pakistan and as per the information provided by the Counsel for the CCP, the relevant market in all these cases is throughout Pakistan. Similarly the Petitioners falling under the healthcare sector were issued show cause notices on 9.2.2012 alleging price fixation and cartel like behaviour. Subsequently an order was passed under the Act on 29.6.2012. The GCC Approved Medical Centres Association (W.P. No. 20280/12) have medical centres located throughout Pakistan in the cities of Islamabad, Karachi, Multan, Lahore and Peshawar, hence the relevant market in this case, as concluded by the CCP was Pakistan. In the same way with reference to the Cement Sector, the All Pakistan Cement Manufactures Association is before this Court in W.P. No. 15624/09 along with separate petitions filed by its members. Show cause notices were issued to all members on 28.10.2008 containing allegations of cartel like behaviour, where the geographic market was throughout Pakistan. In the telecom sector, the Petitioners before the Court are Telenor, Mobilink, Warid, Ufone and Zong who have been issued show cause notice on 4.2.2010 for violation of section 4 of the Act and again the relevant geographic market is Pakistan, AJK and the Northern Areas. The Petitioners such as Nestle Pakistan, Master Paints, Shezan International, Meezan International and Unilever have all been issued show cause notices for deceptive market practices and they all have businesses throughout Pakistan, hence the relevant market is Pakistan. With respect to the oil and gas sector, fertilizer sector, power sector, the position is the same. Hence the case of the Petitioners that Parliament cannot legislate on competition law is without basis given that by their own admission Parliament is competent to legislate on a competition law when it relates to matters beyond provincial borders.

42. In view of the above neither the Ordinances nor the Act are ultra vires the Constitution for want of legislative competence nor can the Constitutional mandate be read down limiting the application of the Act to interprovincial matters. The Federal legislature is therefore competent to enact law on the subject of competition under the Constitution.

(B) Exercise of judicial powers by the CCP which is not a court

43. Counsel for the Petitioners argued that the CCP as established under the Act exercises judicial power which is against the mandate of Article 175 read with Article 203 of the Constitution. It is their case that the CCP is not independent from the executive, hence it cannot exercise judicial powers as laid down in Government of Balochistan through Additional Chief Secretary v. Azizullah Memon and 16 others (PLD 1993 SC 341) and Mehram Ali Case. The Counsel argued that the CCP exercises judicial power because it decides on factual disputes after examining evidence and passes orders holding individuals and entities liable for various 'wrongs' specified in the Act and subjects them to penal fines. They argued that these functions of the CCP do not involve the implementation of any policy or exercise of administrative discretion. As to the other functions of the CCP, they are distinct and severable from the CCP's judicial functions. Consequently the provisions of the Act, in particular, Sections 14(2), 14(4), 17, 19 related to the composition of the CCP and appointment of members that purely are through an executive decision, without consultation with the Chief Justice of Pakistan, makes the Act ultra vires the Constitution as laid down in the Mehram Ali Case. Learned counsel further argued that CAT as established under Section 43 of the Act also exercises judicial power of the State. It hears appeals from the order of the CCP, examines the evidence and decides on the basis of law whether the orders made by the CCP are in accordance with the law or not. Even the appointment process of members of CAT is not independent from the executive as there is no consultation with the Chief Justice of Pakistan. Consequently Section 43 of the Act is ultra vires the Constitution. The Counsel further argue that the CCP is a complainant, investigator, prosecutor, judge, appellate body and executioner all at the same time which by itself is unconstitutional and offends the requirements of due process. They argue that the CCP also fails to meet the test laid down in Mehram Ali Case for exercise of judicial power as it is not subject to the supervision and control of the High Court as required under Article 203 of the Constitution. Therefore the grievance of the Petitioners is that the Act and the Ordinances are ultra vires the Constitution as they create a parallel judicial system in violation of Articles 175 and 203 of the Constitution.

44. The AGP argued that the CCP is a regulatory authority established to achieve a regulatory objective. That regulatory authorities are constituted under different laws such as Oil and Gas Regulatory Authority ("OGRA"), National Electric Power Regulatory Authority ("NEPRA") under the Securities and Exchange Commission of Pakistan ("SECP"), the Drug Regulatory Authority of Pakistan ("DRAP") Pakistan Telecommunication Corporation, ("PTA") Pakistan Electronic Media Regulatory Authority, ("PEMRA") and the Regulation of Generation, Transmission and Distribution of Electric Power ("NTDC")

to quote a few. All have similar functions and also have an appellate authority to hear appeals against its orders, as does the Act. That laws such as Income Tax Ordinance, 2001, Customs Act, 1969, Sales Tax Act, 1990, Anti-Dumping Duties Act, 2015, Trade Mark Ordinance, 2001 also provide for similar mechanism of inquiry, investigation and adjudication by the statutory authority, departmental appeals followed by an appeal to the High Court or in the case of Election Laws an appeal to the Supreme Court of Pakistan. He has placed reliance on the Army Welfare Trust (Nizampur Cement Project), Rawalpindi and another v. Collector of Sales Tax (Now Commissioner Inland Revenue), Peshawar (2017 SCMR 9) (Army Welfare Trust Case) to urge the point that the CCP and CAT established under the Act are not a 'court' under Article 175 of the Constitution nor a 'tribunal' under Article 212 of the Constitution. He argued that there is no prohibition under the Constitution to set up tribunals under a regulatory statute as the same is not covered under Article 175 or 212 of the Constitution.

45. The counsel for the CCP explained that the functions of the CCP are quasi-judicial and not equivalent to that of a Court, as contemplated in Article 175 of the Constitution. The CCP is a regulatory authority with a given regulatory objective. All actions taken are pursuant to the regulatory objective, which is to regulate anti-competitive behaviour. Hence where an undertaking acts as per the prohibited sections, the CCP is required to regulate the undertaking and restore free competition. In doing so the CCP issues notices and gives an opportunity of hearing, which is in line with the principles of due process which is mandatory in any decision making process. The CCP also performs administrative functions as detailed in the Act which is why it's a quasi-judicial authority. So far as CAT is concerned it decides matters against the orders of the CCP which orders are based on market dynamics and economics which is why CAT has two technical members and one legal member. Therefore, they argue that there is no merit in this argument.

46. The relevant provisions of the Constitution are Articles 175, 202 and 203 which are as under:-

Article 175	(1) There shall be a Supreme Court of Pakistan, a High Court for each Province and a High Court for the Islamabad Capital Territory and such other courts as may be established by law. (2) No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law. (3) The Judiciary shall be separated progressively from the Executive within fourteen years from the commencing day. Provided that the provisions of this Article shall have no application
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	to the trial of persons under any of the Acts mentioned at Serial Nos.6 and 7 of sub-part III of Part I of the First Schedule, who claim, or are known, to belong to any terrorist group or organization misusing the name of religion or a sect.
Article 202	Subject to the Constitution and law, a High Court may make rules regulating the practice and procedure of the Court or of any court subordinate to it.
Article 203	Each High Court shall supervise and control all courts subordinate to it.

The thrust of the Petitioners' case lies in the Mehram Ali Case wherein five Hon'ble Judges of the august Supreme Court of Pakistan deliberated on the issue of establishment of special courts under the Anti-Terrorism Act, 1997 ("ATA") and whether these courts are 'courts' contemplated under Article 175 of the Constitution. In the Mehram Ali Case, the august Supreme Court of Pakistan, while considering special courts established under the ATA, essentially examined whether the special courts meet the requirements of Articles 175 and 203 of the Constitution. The context being that under the Constitution courts as provided in Article 175 have to be independent from the executive so as to maintain separation of power and independence of judiciary as interpreted in the Government of Sindh through Chief Secretary to Government of Sindh, Karachi and others v. Sharaf Faridi and others (PLD 1994 SC 105) and Sharaf Faridi and 3 others v. The Federation of Islamic Republic of Pakistan through Prime Minister of Pakistan and another (PLD 1989 Karachi 404). In the Mehram Ali Case, the august Supreme Court of Pakistan concluded that Articles 175, 202 and 203 of the Constitution provide the framework and hierarchy of the judiciary, which includes the Supreme Court of Pakistan, the High Court of each province and such other courts as may be established by law. The Mehram Ali Case specifically held that:

- (i) That Articles 175, 202 and 203 of the Constitution provide a framework of Judiciary i.e. the Supreme Court, a High Court for each Province and such other Courts as may be established by law.
- (ii) That the words "such other Courts as may be established by law" employed in clause (1) of Article 175 of the Constitution are relatable to the subordinate Courts referred to in Article 203 thereof.
- (iii) That our Constitution recognises only such specific Tribunal to share judicial powers with the above Courts, which have been

specifically provided by the Constitution itself Federal Shariat Court (Chapter 3-A of the Constitution), Tribunals under Article 212, Election Tribunals (Article 225). It must follow as a corollary that any Court or Tribunal which is not founded on any of the Articles of the Constitution cannot lawfully share judicial power with the Courts referred to in Articles 175 and 203 of the Constitution.

- (iv) That in view of Article 203 of the Constitution read with Article 175 thereof the supervision and control over the subordinate judiciary vests in High Courts which is exclusive in nature, comprehensive in extent and effective in operation.
- (v) That the hallmark of our Constitution is that it envisages separation of the Judiciary from the Executive (which is founded on the Islamic Judicial System) in order to ensure independence of Judiciary and, therefore, any Court or Tribunal which is not subject to judicial review and administrative control of the High Court and/or the Supreme Court does not fit in within the judicial framework of the Constitution.
- (vi) that the right of "access to justice to all" is a fundamental right, which right cannot be exercised in the absence of an independent judiciary providing impartial, fair and just adjudicatory framework i.e. judicial hierarchy. The Courts/Tribunals which are manned and run by executive authorities without being under the control and supervision of the High Court in terms of Article 203 of the Constitution can hardly meet the mandatory requirement of the Constitution.
- (vii) That the independence of judiciary is inextricably linked and connected with the process of appointment of Judges and the security of their tenure and other terms and conditions (Emphasis added)

The august Supreme Court of Pakistan concluded that where a court or tribunal is established under the Constitution, it must be separate from the executive to ensure independence of the judiciary. The reason as explained in the judgment is that the judiciary is a branch of government which is vested with the judicial power of the State in the same way as the executive exercises executive power and the legislature has legislative power. Hence Article 175(3) of the Constitution requires independence of the judiciary from the other branches of the State so that it can perform its functions effectively, in the constitutional spirit. The Petitioners' case is that any forum that seeks to exercise judicial power, must comply with the requirements of independence and separation of the judiciary from the executive

and the legislature as mandated under Article 175 of the Constitution. In support of their contentions, the Petitioners argue that the CCP exerts judicial power which can be derived from the nature of the orders it passes, enforcement powers and the adversarial nature of proceedings. The AGP however disagreed with their contentions on the ground that the CCP is not a 'court' as it is a regulatory authority which decides specialized matters strictly under the Act and as such their functions do not fall under the concept of 'judicial power'. Further that the Act is regulatory in nature in pursuance of a regulatory policy, hence disputes can be decided by the statutory authority and its regulatory tribunals.

47. In the Army Welfare Trust Case, the constitutionality of the Sales Tax Appellate Tribunal was not under challenge. The question before the Court was with reference to the nature of the orders of the appellate tribunal under the Sales Tax Act in order to answer the question of maintainability of the CPLA. Three Hon'ble Judges of the august Supreme Court of Pakistan concluded that the Sales Tax Act does not establish an Appellate Tribunal rather uses the Appellate Tribunal established under the Customs Act, 1969; that the Tribunal comprises of one Judicial and one Technical Member appointed by the Federal Government. The Federal Government also appoints the Chairman and determines the terms and conditions of the Judicial and Technical Members. Therefore by its very composition, the Appellate Tribunal is not a 'court' as contemplated in Article 175 of the Constitution. The august Supreme Court of Pakistan also concluded that the Appellate Tribunal cannot be equated with the Tribunal under Article 212 of the Constitution which exercises judicial powers. The Court held that the Sales Tax Appellate Tribunal was not mentioned or provided for under the Constitution, therefore it cannot be equated to the Tribunal envisioned under the Constitution. Reliance was placed on Sh. Riaz-ul-Haq and another v. Federation of Pakistan through Ministry of Law and others (PLD 2013 SC 501) ("Riaz ul Haq Case") where the appointment of the Chairman and Members of the Service Tribunal were under challenge on the ground that the service tribunal performs judicial functions and falls within the definition of 'court' under Article 175 of the Constitution, hence should be separated from the executive. The august Supreme Court of Pakistan clarified that Federal and Provincial Service Tribunals are established pursuant to Article 212 of the Constitution, hence they must be independent from the executive as contemplated under Article 175 of the Constitution because they have been established by way of a constitutional mandate and exercise judicial powers. Hence their separation from the executive is imperative for exercise of judicial power.

48. We have heard the Counsel for the Petitioners, the CCP and the AGP and have gone through the precedents relied upon. We find that the application of the Mehram Ali Case is misconceived when seen in the context of the CCP. It is important to note that the Mehram Ali Case was examining a special court, established under the law, in the context of Article 175 of the Constitution. Hence the august Supreme Court of Pakistan concluded that 'courts' established under the law as per Article 175(1) of the Constitution fall within the hierarchy of the judiciary hence relatable to subordinate courts referred to in Article 203 of the Constitution, because the courts that are established have to be subordinate to the High Courts. Article 212 of the Constitution establishes Administrative Courts or Tribunals to exercise exclusive jurisdiction with reference to the matters listed in Sub-Clauses (a) to (c) of the said Article. The Mehram Ali Case states that tribunals established under Article 212 of the Constitution, having a constitutional mandate, must also be separate from the executive and fulfil the conditions of being independent from the executive as stated in Article 175(3) of the Constitution. The *raison d'etre* as per the Mehram Ali Case is that the specific tribunals established under the Constitution exercise the judicial power of 'courts' under Article 175 of the Constitution, such as the tribunals under Article 212, the election tribunal under Article 225 and the Federal Shariat Court under Article 203C of the Constitution. The Court also clarified that any tribunal or Court not founded on any provision of the Constitution cannot exert judicial power. Therefore the Mehram Ali Case examined a special court, which was established to carry out judicial functions and in the context of the exercise of its judicial power required independence from the executive.

49. The word 'judicial power' has not been defined under the Constitution, but it is related to the functions of the judiciary under Article 175 of the Constitution. It is important to also note that there is no vesting of judicial power in the courts under the Constitution rather it has been interpreted as the constitutional concept when construed in comparison to the functions of the legislature and executive. Reliance is placed on Registrar, Supreme Court of Pakistan, Islamabad v. Qazi Wali Muhammad (1997 SCMR 141). A distinction therefore has to be drawn between 'courts' which form part of the judicial system and the functions of regulatory or administrative authorities established under the law. In this regard, Justice Fazal Karim opined in Fauj Din and another v. Akhtar Mahmood Khan, Additional District Judge, Multan and 4 others (PLD 1988 Lahore 352) that:

10. In *Attorney-General v. B.B.C.*(1981) A C 303) the question before the House of Lords of England was whether the local valuation Court was a Court coming within R.S.C. Ord. 52, rule I, which

empowered the Divisional Court of the Queen's Bench Division to make an order of committal where the contempt of Court was committed in connection with "proceedings in an inferior Court". Local Valuation Courts were created by section 44 of the Local Government Act 1948. It was held that the local valuation Court was a Court but this label did not necessarily mean that it was an "inferior Court"; the Divisional Court's jurisdiction did not extend to all Courts created by the State; a distinction has to be drawn between Courts which discharge judicial functions and those which discharge administrative functions, between Courts of law which form part of the judicial system of the country on the one hand and Courts which are to resolve problems which arise in the course of administration of the Government of the country. A local valuation Court has to act judicially, that is to say its proceedings must be conducted with the fairness and impartiality which characterise proceedings in Courts of justice and are proper to the functions of a Judge, but that does not make it a Court of law, for there are many tribunals with many of the trappings of a Court and upon which the Parliament has put the "Court" label, yet they are not Courts in the strict sense of exercising judicial power. Judicial power is an exercise of sovereign power; and a Court of law means a Court of judicature, as a body established by law to exercise, either generally or subject to defined limits, the judicial power of the State. In this context, judicial power is to be contrasted with legislative and executive (i.e. administrative) power. If the body under review is established for a purely legislative or administrative system of the State, it is part of the legislative or administrative system of the state, even though it has to perform duties which are judicial in character. Therefore, unless the body exercising judicial functions can be demonstrated to be part of the judicial system, it is not a Court of law.

11. Thus the test is not whether the authority under review is required to act judicially, that is to say, act with such fairness and impartiality as characterise proceedings in Courts of justice; nor whether it has the label of Court attached to it. For, as Lopes L.J. said in *Royal Aquarium and Summer and Winter Garden Society Limited v. Parkinson* (1892) I.Q.B 431, the word "judicial" has two meanings. It may refer to the discharge of duties exercisable by a Judge or by justices in Court, or to administrative duties which need not be performed in Court, but in respect of which it is necessary to bring to bear a judicial mind - that is, a mind to determine what is fair and just in respect of the matters under consideration. The test is whether

the authority under review is required to perform the act in question as a Court in the proper sense of the word and whether the authority under review was performing the act judicially as a Court in the exercise of the judicial power of the State, as distinguished for executive (administrative) or legislative power of the State. Judicial power, in this context, has a well-known meaning, particularly in countries having a written Constitution like Pakistan, namely, the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property (Griffith C.J. in *Huddart, Parker & Co. v. Moorehead* (1909) 8 C.L.R 303,357) (Emphasis added)

This case lays down that the fundamental test to determine whether a forum is acting as a 'court' and is required to exercise judicial power or whether it was established to perform administrative functions as part of the functions of the executive. The reason as explained is that judicial power entails several characteristics which must be construed in the context of the purpose of the forum created because while it may seem as if the function is judicial, it may not necessarily be so, in the Constitutional context of 'court'. The judgment goes on to provide that the test is not whether the authority is exercising judicial power rather the test is to determine the purpose for which the forum was established. The reason being that judicial power entails several characteristics which must be construed in the context of the purpose of the forum created. This brings us to the moot question that is whether the CCP and CAT are exercising judicial power and whether they are a 'court' as per Article 175 of the Constitution.

50. The Petitioners have argued that the CCP exercises judicial power as it issues orders under section 31 of the Act and can enforce its orders under sections 38 and 41 of the Act by way of imposing penalty and recovering penalties. They have also suggested that the proceedings are adversarial in nature by relying on section 37(2) and section 30(2) of the Act. In this context, they argue that the CCP is not independent as its members lack independence from the executive and that it is neither impartial nor free from institutional bias in its proceedings. So far as CAT is concerned, they argue that it cannot exercise judicial power as it is not a court, that it is not under the supervision of the High Court and that it is not an adequate substitute for the High Court in terms of Article 203 of the Constitution. Hence they argue that the CCP cannot be regarded as an administrative body passing administrative orders and CAT being a court must be separate from the executive. In order to appreciate the arguments made about the CCP, it is necessary to understand the objective and nature of the

functions of the CCP. This goes to the purpose for which the CCP was established and the nature of its functions. The preamble of the Act states that the Act is to provide for free competition in all spheres of commercial and economic activities, to enhance economic efficiency and to protect consumers from anti-competitive behaviour. As per the preamble the Act ensures free competition in all spheres of commercial and economic activity by defining anti-competitive behaviour, which is regulated by the CCP. Chapter-II of the Act sets out the prohibitions which make for anti-competitive behaviour. Consequently, the abuse of dominant position in the relevant market, entering into a prohibited agreement, engaging in deceptive marketing practices and approval of mergers falls within the domain of anti-competitive behaviour to be mimed by the CCP. Chapter III establishes the CCP and provides for the terms and conditions of service of the members of the CCP amongst others. Section 28 provides for the powers and functions of the CCP which includes initiating proceedings in case of contravention of the provisions of the Act and passing orders in terms thereof conducting inquiries for the purposes of this Act, to conduct studies for promoting competition and giving advice to undertakings for maintaining the objective of the Act and to engage in competition advocacy. As per section 29 of the Act, competition advocacy includes creating awareness and imparting training about competition issues and reviewing policy frameworks, soliciting public opinion and keeping the public updated through its website. Therefore, the functions of the CCP essentially involve compliance and enforcement of the regulatory objective, which is to ensure that anti-competitive behaviour does not prevail in the market such that an undertaking does not engage in the prohibited behaviours set out in Chapter-II of the Act. For compliance the CCP can initiate an inquiry, conduct proceedings and pass an order seeking compliance of the provisions of the Act as well as impose penalty because it is in furtherance of its regulatory objective. In this regard section 31 of the Act provides for the nature of the orders passed by the CCP. As per this section if an undertaking is in contravention of any of the provisions provided in Chapter-II of the Act, the CCP can pass an order requiring an undertaking to restore competition and not repeat the prohibition set out in Chapter-II or engage in similar practice. So far as, mergers are concerned, the CCP can authorize the merger or undo a prohibited merger in terms of Section 11 of the Act to ensure that it does not result in a prohibited act. As per Section 11 no undertaking shall enter into a merger which substantially lessens competition by creating or strengthening a dominant position in the relevant market. Hence even with reference to orders passed and regulating mergers the objective of the CCP is to control anti-competitive behaviour by issuing restorative orders and correctional orders. The scope of the orders

passed is therefore limited to the scope of Section 31 of the Act which requires the CCP to ensure that anti-competitive behaviour if at all is being carried out, it should be corrected and restored to bring it in compliance with the Act. In this context penalties are provided for in Section 38 of the Act and can be imposed if an undertaking has been engaged in any prohibited activity under the Act or has failed to comply with the orders of the CCP or has failed to supply copies of the agreement or any other document or information or has made a false statement before the CCP or in any manner has interfered or obstructed the process of the CCP. Therefore, the CCP imposes penalty for contravention or non-compliance and for obstructing its process. The orders of the CCP can be appealed before the Appellate Bench of the Commission under Section 41 of the Act and an appeal lies against the order of the Appellate Bench of the Commission before CAT under Section 42 of the Act. The order of CAT may be appealed before the Supreme Court of Pakistan in terms of section 44 of the Act.

51. The objective of the Act is consumer welfare that is to ensure that commercial and economic activities are free from anti-competitive behaviour. The Act also aims to ensure economic efficiency by regulating mergers and prohibiting certain agreements which may result in cartelization or allow a dominant position in the market. The purpose of the CCP is to ensure fair competition is maintained by regulating the prohibitions set out in Chapter-II. Therefore, the Act has a regulatory objective, to promote free competition and prevent anti-competitive behaviour and prescribe enforcement mechanisms to ensure compliance. The CCP's legal framework is such that it involves some decision making process when behaviour becomes anti-competitive, that is behaviour is against the provisions of the Act. Therefore, the CCP is a regulatory authority, with a regulatory objective and its purpose is not to exercise judicial power. Furthermore, by the Petitioners own arguments, not all functions of the CCP are judicial functions, only those related to the decision making process under section 31 of the Act are alleged to be judicial powers. Therefore the question is whether on account of this decision making function it can be said that the CCP exercises 'judicial power' of the State so as to bring it within the realm of the Mehram Ali Case. We are of the opinion that the very nature of the orders which the CCP can issue under section 31 of the Act establishes that its scope is limited to being preventive and restorative. The CCP seeks compliance of the prohibitions and where there is a violation, it seeks to restore competition and ensure that the prohibited behaviour is not repeated. Even for mergers the CCP is concerned with the effect of the merger on competition as to whether it will lessen competition by creating or strengthening a dominant position in the relevant market. This shows

that the nature of the orders are not judicial per se rather it involves a more technical understanding of the market, economics, commerce and finance, amongst others. We find by its very nature the CCP does not perform judicial functions akin to a 'court'. It is a regulatory authority with administrative functions which includes giving advice, creating awareness, impart training, review of policy frameworks to foster competition as well as decision making to enforce the regulatory policy.

52. It has been argued at great length that separation of power between the executive, legislature and judiciary is a core principle of the Constitution and must be upheld to retain the spirit of the Constitutional structure. We understand that every government function can be classified as either executive, legislature or judicial and accordingly carried out by the respective arm of the government. However we find that such rigid separation of functions as has been argued, is not only difficult but also impractical. The fundamentals of separation of power is engrained in the constitutional framework, however the complexity of modern government requires some overlapping of functions, within permissible limits. In this context, we note that all three functions of the state require to 'hear and decide' issues based on facts. The legislature may do so through committees and the executive through its officers make determinations by ascertaining the facts. In fact this Court in its constitutional jurisdiction can direct the relevant authority of the executive branch to decide controversies based on the facts, through a speaking order. Accordingly for each function, the State is entitled to carry out its business by adopting procedures and methods suited to it and can set out processes to carry out its functions which includes the decision making function. The question is whether the function to 'hear and decide' controversies is merely incidental to the regulatory objective hence administrative in nature or can all instances of 'hear and decide' be termed as judicial function.

53. A similar issue was brought before the Dehli High Court in the case of Mahindra Electric Mobility v. CCI and ANR in the year 2019 wherein the Dehli High Court while deciding on the issue of whether the Competition Commission of India ("CCI") is a tribunal exercising judicial powers held that the proceedings before the CCI are akin to departmental proceedings making their opinion formation an administrative function. The court concluded in the following terms:

83. In view of these specific functions, this court is of opinion that there can be no manner of doubt that the CCI does not perform exclusive adjudicatory functions to be called a tribunal. A tribunal and one entrusted solely with the judicial power of the

state (the touchstone on which *L. Chandra Kumar v. Union of India* and others 1995 (1) SCC 400, *R. Gandhi* (supra) and *Madras Bar Association* (supra) are premised is seen as a substitute for courts. However, the creation of CCI and investing it with a multifarious functions, which extend to directing (and overseeing) investigation and fact gathering, advising the government on policy (as an expert body) and advocating competition, in addition to issuing directions or orders against specific entities or companies with the aim of eliminating a practice found pernicious or one which constitutes a barrier to competition and fair dealing in the marketplace.

84. However, the above finding that the CCI is not a tribunal exercising exclusive judicial power, does not lead to the conclusion that its orders are any less quasi-judicial at the stage when they attain finality. They are, for the simple reason that the consequences are far reaching, to those entities and companies which are subjected to directions (cease and desist orders, directions to alter agreements, etc). The right to freedom of trade, to the extent that it impinges on the right of the entity, to exercise free choice about contractual terms, or whom to associate with (in regard to association and merger) are undeniably implicated. These orders, however, are subject to appeal, to a tribunal (COMPAT). CCI is also amenable to judicial review under Article 226 of the Constitution of India as regards the directions it makes procedurally. For instance, if it can be shown that investigation has been launched without a reasoned prima facie expression of its opinion, under section 26(2) the CCI's orders can be corrected in writ proceedings. Similarly, in regard to conduct of proceedings during investigation (i.e. the fact gathering exercise) the jurisdiction of the High Court to ensure fair procedure and compliance with natural justice is assured [*Ref. Competition Commission of India and another v Oriental Rubber Industries Pvt. Ltd.* 2018 (251) DLT 137 and *Cadila Healthcare Ltd and another v. Competition Commission of India and others* 2018 (252) DTL 6471].

As already explained, the term judicial power is not defined anywhere in the Constitution nor is judicial power vested in the courts. It is by way of the constitutional scheme that we understand judicial power to be the power exercised by the judiciary. In *The Tariq Transport Company, Lahore v. (1) The Sargodha-Bhera Bus Service, Sargodha* (2) *The Regional Transport Authority, Lahore* and (3) *The Provincial Transport Authority, Lahore* (PLD 1958 SC (Pak.) 437) the august Supreme Court of Pakistan while considering the concept of judicial functions held that it is extremely difficult to define 'judicial power'

and that there is no clear cut definition of the term with reference to administrative authorities or tribunals. The august Supreme Court of Pakistan again reinforced the purpose test to ascertain the reason for the establishment of the forum notwithstanding the fact that it may exercise judicial functions in some context. The august Supreme Court of Pakistan held as follows:

the question whether an act is judicial, quasi-judicial or administrative is clouded by a confusion which it is extremely difficult to resolve and no clear-cut distinction between these three functions can be discovered from the large number of reported cases and the divergent opinions expressed therein. In modern States where expertise is the dominating feature of Government more than one function is combined in administrative tribunals, and more often than not an administrative agency discharges not only legislative and administrative but also judicial functions. The true question in the case of such tribunals always is whether the act which is complained of is a judicial act and not whether the procedure adopted by the tribunal is judicial or quasi-judicial or whether the dominant or general aspect of the tribunal is that of a judicial, quasi-judicial or administrative body. A tribunal is not always furnished with the trappings of a Court, nor will such trappings make its action judicial. The character of the action taken in a given case and the nature of the right on which it operates must determine whether that action is judicial, ministerial or legislative or whether it is simply the act of a public agent. A tribunal acts judicially in the full sense of the term if:

- (1) it has to determine a dispute;
- (2) the dispute relates to a right or liability, which whatever its immediate aspect, is ultimately referable to some right or liability, recognised by the Constitution or statute or by custom or equity which by the domestic law is declared to be the rule of decision;
- (3) since every right or liability depends upon facts the tribunal is under an obligation to discover the relevant facts;
- (4) the ascertainment of the facts is in the presence of the parties either of whom is entitled to produce evidence in support of its respective case and to question the truth of the evidence produced by his opponent; and
- (5) after an investigation of the facts and hearing legal arguments the tribunal renders a judgment which so far as the tribunal is

concerned terminates the dispute. In the case of an administrative tribunal, however, the emphasis is on policy, expediency and discretion to enable it to achieve the object with which it was set up. In the case of such a tribunal the approach in determining the relevant facts is therefore often subjective and not objective, there being generally no lis before it in which the parties are arrayed against each other for the enforcement of a private right or liability and who for that purpose are entitled to produce evidence and adduce legal argument. The word 'quasi' as prefixed to the word 'judicial' may either indicate that the tribunal is not acting purely administratively or that it is acting in a manner in which a judicial tribunal is expected to act.

In *Iftikhar Ahmad v. The Muslim Commercial Bank Ltd and another* (PLD 1984 Lahore 69) the Lahore High Court held that a court adjudicates by fixed standard objectives upon a controversy or dispute, as regards pre-existing legal rights and liabilities, conferred or imposed by a statute, usage or agreement recognised by law, and long settled principles, on the basis of the evidence produced by the parties before it. In contrast a non-judicial or administrative tribunal may adopt the same procedure as the courts but its decisions or orders are incidental to an obligation to administer law to regulate or supervise matters and are based not on fixed objective standards but on subjective considerations, policy and expediency. A court looks for some law to guide it but an administrative tribunal, within its domain, is law unto itself. In this case the formality of the procedures and processes adopted was considered relevant as courts are bound by a strict procedural code and by the letter of the law whereas tribunals are less formal and do not always require to adhere to the formalities of a court process.

In *Mir Rehman Khan and another v. Sardar Asadullah Khan and 14 others* (PLD 1983 Quetta 52), the Balochistan High Court defined a 'court' as a forum which is dependent on the manner and method in which proceedings are regulated before it. This process embraces all procedural laws, which bind it in its functions and determine its course of action. For evidence which is the deciding factor in all kinds of disputes, courts are bound by Evidence Act. Ordinarily the decision of a dispute by an arbitrator and a conciliatory body etc. may be termed as decision by a court but that is not so because such forums are not bound by any law with regard to procedure and evidence as such, they only settle the dispute but do not administer justice according to law, and are not, therefore, courts. Hence, as per this judgment courts are such organs of the State which follow legally prescribed scientific methodology as to procedure and evidence in

arriving at just and fair conclusions. It thus manifests that although the term 'court' is at times used for quasi-judicial or administrative tribunals also but on this premises it cannot be inferred that such forums can be equated with a court of law. The Balochistan High Court concluded that 'courts' are such organs of the State which administer justice strictly in accordance with law, meaning thereby that while applying laws to the controversies, they follow certain rules with regard to procedures and evidence.

In Messrs Ranyal Textiles through Proprietor/Employer v. Sindh Labour Court No.2, Karachi and 3 others (PLD 2010 Karachi 27) the Sindh High Court held that 'judicial power' is the ability and authority to hear and decide cases, objectively after allowing the parties an opportunity to produce evidence, argue on the rights, duties or interest at stake and pass an authoritative decisions which is the parties binding on and will include the authority to execute its decision and prevent and redress wrongs and punish offences through legal process. The court also found that judicial power must be conferred by the State under the Constitution or law and not the mere consent of parties, on persons who are paid by the State and removable by it only. The authority or body in which this power is vested is generally called a court and in performing its functions it declares, construes and applies law or custom or usage, having the force of law. The 'judicial power' is thus the instrument to be used by the court.

In the Riaz ul Haq Case the august Supreme Court of Pakistan concluded that a tribunal does not always function as a 'court' nor are its actions always judicial. The Supreme Court held that the determining factor is the nature of dispute and the rights and liabilities that have to be decided.

54. These cases highlight that in order to understand judicial power, the purpose for which the forum was established is relevant; the process and procedures the forum follows is relevant; the finality given to its decision is relevant; and the rights and liabilities decided upon are relevant and the manner in which a dispute is brought to the forum is relevant. These decisions also attempt to distinguish between judicial power and functions which may have the characteristics of judicial power but not in the constitutional scheme of the term 'court'. Hence the decisions have looked at the various attributes of a 'court' in comparison with that of a tribunal or authority where all the attributes of a court are not prevalent yet some form of 'hear and decide' is involved. The referred to decisions of the august Supreme Court of Pakistan find that the only function of a 'court' is to adjudicate as per the law, whereas a tribunal or authority may have to decide

upon issues as one of its functions, that too being incidental to its administrative objective. As per the dicta of the august Supreme Court of Pakistan we find that the CCP was not established as part of the judicial hierarchy of courts nor are its function to exercise judicial power. It is established to carry out the administrative function of the executive to ensure economic efficiency and promote consumer welfare and in doing so it discharges quasi-judicial functions with the sole objective to regulate anti-competitive behaviour. Although the process followed by the CCP while hearing cases must follow due process, they are not bound by the formal laws of evidence and procedure. Furthermore, the members of the CCP are not necessarily trained in law, as they require expertise in economic, commerce, finance and industry. The CCP was established under the Act, with the intent to ensure free competition and economic efficiency, so the function of hearing and deciding issues only occurs where the prohibitions have been violated, that to with the intent to restore competition in the relevant market. Hence while exercising its functions under the Act the CCP is not a 'court' under Article 175 of the Constitution.

55. Even in the context of CAT, we are not inclined to agree with the contentions of the Petitioners. CAT is constituted under section 43 of the Act and consists of a Chairperson and two Technical Members having the requisite special knowledge and expertise as required under the Act. The Chairperson and the Members are appointed by the Federal Government on such terms and conditions of service as established by the Federal Government. Any person aggrieved of any order of CAT may prefer an appeal to the Supreme Court of Pakistan under section 44 of the Act. CAT hears appeals against orders passed by the Appellate Bench of the Commission under Section 41 of the Act. It is noted that members of the CCP can initiate proceedings in accordance with the procedure set out under the Act and pass orders in cases of contravention of the provisions of the Act. The nature of the orders and the proceedings in cases of contravention are preventive and restorative as per Section 31 of the Act. These orders are appealable under section 41 and again under sections 42 and 43 of the Act. As the nature of the orders passed by the CCP are preventive and corrective, aimed at restoring competition, the nature of the order remains the same in the appellate process. Consequently CAT comprises of two technical members with the relevant experience and one judicial member to decide the cases as per the regulatory objective. Article 175 of the Constitution provides for the establishment and jurisdiction of the Supreme Court of Pakistan, the High Court for each Province and such other courts as may be established by law. It provides that no court shall have jurisdiction

save as may be conferred on it by the Constitution or under any law and that the judiciary shall be separated from the executive. CAT is not a 'court' established under the law as contemplated under Article 175 of the Constitution. The Act does not establish a court rather it establishes an Authority and an Appellate Tribunal, that too with only one Judicial Member and two Technical Members with the special expertise required to achieve the objective of the Act. Article 212 of the Constitution establishes administrative courts or tribunals to exercise jurisdiction in respect of matters enumerated under the said Article. CAT is not an Administrative Tribunal as contemplated under Article 212 of the Constitution as it does not decide upon any of the stated matters in the said Article. Hence it does not fall under the mandate of Article 212 of the Constitution. The Act establishes an Appellate Tribunal which has to adjudicate upon matters arising out of and pursuant to the matters set out in the Act, hence it is not working as a 'court' as contemplated in Article 175 or a tribunal under Article 212 of the Constitution. In this regard, we are of the opinion that the Army Welfare Trust Case has sufficiently addressed this question in the following terms:

6. Therefore, the question arises whether the Appellate Tribunal is a court established by law. The Act does not set up the Appellate Tribunal, but utilizes the "Customs, Excise and Sales Tax Appellate Tribunal" already set up under section 194 of the Customs Act, 1969 (see subsection (1) of the Act). The Federal Government constitutes the Appellate Tribunal which comprises of judicial and technical members (subsections (1) and (2) respectively of section 194 of the Customs Act. The qualification of a judicial member is provided in subsection (2) and of a technical member in subsection (3) of section 194 of the Customs Act. The Federal Government also appoints the Chairman and determines the terms and conditions of appointment of the judicial and technical members (subsections (4) and (5) respectively of section 194 of the Customs Act). Neither through the Sales Tax Act, 1990 ("the Sales Tax Act" or the Act") nor through the Customs Act a court was established, therefore, the Appellate Tribunal cannot be categorized as a court.
7. The Appellate Tribunal can also not be equated with the tribunals envisaged in the Constitution which exercise judicial powers, such as the tribunals established under Article 212 and election tribunals under Article 225 of the Constitution. Ajmal Mian, CJ, heading a five member bench of this Court in the case of Mehram Ali v. Federation of Pakistan (PLD 1998 Supreme Court 1445) held, "that any Court or Tribunal which is not founded on any of the Articles of the Constitution cannot lawfully share

judicial power with the Courts referred to in Articles 175 and 203 of the Constitution" (sub-paragraph (iii) of paragraph 11, page 1477). A more recent judgment of a three member bench of this Court authored by Iftikhar Muhammad Chaudhry, CJ, in the case of Riaz-ul-Haq v. Federation of Pakistan (PLD 2013 Supreme Court 501) held, that, since the Federal and Provincial Service Tribunals perform judicial functions and are set up pursuant to Article 212 of the Constitution they have to be made autonomous and independent of the Executive arm of the government/s in compliance with the mandate of the Constitution (clause (3) of Article 175) which provides for the separation of the Judiciary from the Executive. The Appellate Tribunal is not mentioned or provided for in the Constitution, therefore, it can not be categorized or be deemed to be a court in terms, of paragraph (d) of clause (2) of Article 185 of the Constitution. When through the impugned judgment the High Court set aside the Appellate Tribunal's order it did not do so of a court immediately below. Consequently the Petitioner acted in accordance with the Constitution when it preferred a petition seeking leave to appeal the impugned judgment. The above mentioned office objection is therefore, overruled.

The Army Welfare Trust Case recognizes that there can be administrative tribunals other than that contemplated under Article 212 of the Constitution and also recognizes that every administrative tribunal is not a court as defined under Article 175 of the Constitution. Although the Petitioners have argued at length that by accepting the Army Welfare Trust Case, it would mean reading down the Mehram Ali Case, their argument is premised on the understanding that even if a forum is not mandated under Article 175 or 212 of the Constitution it must comply with the requirement of independence and separation from the executive because it exercises some forum of judicial decision making. However we do not agree with these contentions as the Mehram Ali Case was specifically about special courts created under the ATA, hence falling squarely within Article 175 of the Constitution because it was a forum established as a court, and was made to exercise judicial functions as part of the judicial hierarchy under the Constitution.

56. In this context, the august Supreme Court of Pakistan declared in the Riaz ul Haq Case that a tribunal does not always function as a court nor are its actions always judicial. In this case, the issue was the appointment of the chairman and members of the service tribunals which was not statedly free from the executive. The Supreme Court concluded the service tribunals were 'courts' capable of exercising

judicial functions as per the constitutional mandate of Article 212 of the Constitution in the following terms:

58. On having discussed the cases supra it is concluded that Service Tribunals (Federal and Provincial) falling in the category of Court capable to exercise judicial powers are bound to follow the principle of independence judiciary for the purpose of ensuring enforcement of fundamental rights of access to justice under Article 9 of the Constitution, thus, are required to be separated from the Executive under Article 175 (3) of the Constitution. These listed constitutional objects ought to have been redressed by the Legislature in making suitable amendments in the law governing the Tribunals and the rules framed thereunder to the extent as noted hereinabove, any of the provisions of the law contrary to the fundamental and constitutional provisions if any.

Hence on reading this case there is a distinction between tribunals under Article 212 of the Constitution and all other tribunals formed under a statute for a specific purpose. As the service tribunals are constitutional tribunals which exercise judicial powers, hence they must be independent and separate from the executive. However that does not apply for all tribunals as was elaborated upon in the Army Welfare Case. CAT is established under the Act in furtherance of the regulatory objective. As it is a specialized area of law which calls for corrective and restorative action, the appellate forum CAT hears appeals in the same context as the CCP, meaning thereby that it exercises quasi-judicial functions.

In *Dr. Zahid Javed v. Dr. Tahir Riaz Chaudhary and others* (PLD 2016 SC 637), the august Supreme Court of Pakistan deliberated on quasi-judicial powers when examining the revisional powers of the chancellor under the University of the Punjab Act, 1973 as to whether such functions were judicial or administrative functions. The Supreme Court concluded that:

34. The word "Quasi" is defined 'as if', as though, as it were, in a manner, in a certain sense or degree, seeming, seemingly, analogous to and it may mean resemblance. The quasi judicial power is a duty conferred by words or by implication on an officer to look into facts and to act on them in the exercise of discretion, and it lies in the judgment and discretion of an officer other than a judicial officer. A "quasi judicial power" is one imposed on an officer or an authority involving the exercise of discretion, judicial in its nature, in connection with, and as incidental to, the administration of matters assigned or intrusted to such officer or authority. A "quasi judicial act" is usually not

one of a judicial tribunal, but of a public authority or officer, which is presumably the product or result of investigation, consideration, and human judgment, based on evidentiary facts of some sort in a matter within the discretionary power of such authority or officer. A quasi judicial power is not necessarily judicial, but one in the discharge of which there is an element of judgment and discretion; more specifically, a power conferred or imposed on an officer or an authority involving the exercise of discretion, and as incidental to the administration of matters assigned or entrusted to such officer or authority.

In *Shafaatullah Qureshi v. Federation of Pakistan* (PLD 2001 SC 142), the august Supreme Court of Pakistan held that quasi-judicial authorities have certain attributes of a court and are required to act fairly and impartially but are not necessarily courts under Article 175 of the Constitution. Relevant para is reproduced hereunder:

Performance of quasi-judicial functions by itself does not convert an authority into Court, whether an act is quasi-judicial or purely executive depends on the interpretation of rules/law under which the authority exercises its jurisdiction. It is true that the administrative authority also is to act bona fide, but is different from saying that it must act judicially. Many authorities are not Court, although they have to decide questions and have to act judicially in the sense that the proceedings shall be conducted with fairness and impartiality. In order to constitute a Court in strict sense, it shall have power to give a decision or a definitive judgment, which has finality and authoritativeness.

In all these cases the courts examined the functions of the forum which statedly was exercising judicial powers. The crux of these decisions is that while Parliament can establish courts under the law, courts exercising judicial power must be separate from the executive. Loosely put a forum is a 'court' under Article 175 of the Constitution if it has been established as part of the judicial hierarchy, to adjudicate upon disputes as per the law. However there can be other forums which exercise quasi-judicial functions, which are not 'courts' under Article 175 of the Constitution and are not tribunals under Article 212 of the Constitution but may perform functions similar to judicial functions. Specifically a regulatory authority, created under a statute, to carry out its objectives can exercise quasi-judicial functions. In this regard, the ultimate authority is with Parliament which can establish a regulatory authority to achieve its administrative objectives. The establishment of regulatory authorities falls within Parliament's domain where it is a federal subject as per Entry 6 of Part II of the FLL of the Constitution.

57. We are of the opinion that CAT is an administrative tribunal formed to conduct quasi-judicial proceedings related to issues which arise under the Act. The dispute under the Act is always between an 'undertaking' and the CCP as the undertaking challenges the order of the CCP before CAT. The nature of the order before CAT will be restorative or corrective as per section 31 of the Act that is why there are two technical members of CAT specialize in the area of international trade, economics, law, finance and accountancy and not trained in law. The scheme of the Act is that it prevents abuse of dominant position, prohibits agreements which restrict reduce or prevent fair competition and prevents deceptive market practices. The CCP makes orders in cases of contravention of the provisions of the Act and imposes penalty in terms of section 38 of the Act. These orders are then appealable within the regulatory framework under sections 41 and 42 of the Act, meaning that even CAT is to decide upon the legality of the 'preventive' or 'restorative' orders. In this context the purpose of an administrative tribunal is that it is an expert body, qualified to resolve disputes in a specialized area. Hence even for the purposes of the appellate forum, its function remains quasi-judicial. Furthermore, administrative tribunals are a common feature in several regulatory regimes as in OGRA, NEPRA and the SECP to name a few. The establishment of administrative courts and tribunals for federal subjects is provided for in Entry 14 of Part I of the FLL of the Constitution which authorizes Parliament to establish administrative courts and tribunals in relation to federal subjects. As Parliament is competent to legislate on competition, which is a federal subject, it can establish a regulatory authority for regulating anti-competitive behaviours and provide a tribunal to resolve disputes arising under the Act. Consequently tribunals established pursuant to Entry 14 of Part I of the FLL are distinct from 'courts' under Article 175 of the Constitution. We therefore do not agree with the Petitioners' contentions that a parallel judicial system has been created or that administrative tribunals cannot be established for any other purpose other than Article 212 of the Constitution or that CAT is a 'court' under Article 175 of the Constitution.

58. The Petitioners have also questioned the appointment of the Chairperson of CAT who is a retired Judge of the Supreme Court of Pakistan or a retired Chief Justice of a High Court without the consultation of the Chief Justice of Pakistan. Although the Petitioners' case is that CAT falls under the governance of the High Court under Article 203 of the Constitution, the said argument is not relevant for the purposes of governance by the High Courts as the CCP and CAT are established under a federal law. So far as the argument that the members of CAT should be appointed after meaningful consultation

with the Hon'ble Chief Justice of Pakistan, as per the information provided, the Federation did consult with the Hon'ble Chief Justice of Pakistan on the appointment of the judicial member of CAT before appointing him earlier this year. So far as terms and conditions of service, Section 43(2) of the Act provides for a three year term for its members which is extendable until the age of 68 years. Hence its a three year appointment made in consultation with the Hon'ble Chief Justice of Pakistan. However, in terms of section 43(3), the Federal Government is required to make rules with respect to the terms and conditions of service of the members of CAT, which rules have still not been made. In order to ensure that the process of consultation with the Hon'ble Chief Justice of Pakistan is undertaken and that the terms and conditions are provided for, the Federal Government is directed to take all necessary steps to issue the required rules as per section 43(3) of the Act within six months which should provide for consultation with the Hon'ble Chief Justice of Pakistan in the appointment of the judicial member of CAT and should require the selection process of the technical members to be done through a selection committee.

#### (C) Unconstitutionality of sections 43 and 44 of the Act

59. The challenge against the constitutionality of sections 43 and 44 of the Act is that the Act vests appellate functions in CAT and bypasses the High Court, as the appeal is before the august Supreme Court of Pakistan; that there is nothing in the Act that indicates that CAT is subject to the supervisory control of the High Court under Article 203 of the Constitution; that it provides for an appeal to the Supreme Court of Pakistan which is in violation of Article 185 of the Constitution and that it is not an effective, independent mechanism before which an aggrieved person can challenge the orders of the Commission itself. The Counsel argued that there is nothing in the Constitution which justifies a direct appeal to the Supreme Court of Pakistan as Article 185 of the Constitution envisions appeals to the Supreme Court of Pakistan only against the judgments, decrees and orders of the High Court. The only exception is contained under Article 212 of the Constitution which is not applicable to the present case.

60. On behalf of the Federation, the AGP argued that as per Article 175 of the Constitution an appeal before the Supreme Court of Pakistan is maintainable. There is no constitutional provision which requires all appeals of administrative tribunal to be before the High Court. He argued that Article 175 of the Constitution read with Entry 55 of Part I of the FLL allows the legislature to provide for a direct appeal to the Supreme Court of Pakistan. He relied on the appeal under the Companies Act, 2017 ("2017 Act") under section 5(14) which provides for an appeal to the Supreme Court of Pakistan. He also relied on The

Province of Punjab and another v. National Industrial Cooperative Credit Corporation and another (2000 SCMR 567) on this point stating that this issue has already been decided by the august Supreme Court of Pakistan.

61. Articles 175, 184, 185 and 186 of the Constitution are reproduced below:

Article 175	(1) There shall be a Supreme Court of Pakistan, a High Court for each Province and a High Court for the Islamabad Capital Territory and such other courts as may be established by law. (2) No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law. (3) The Judiciary shall be separated progressively from the Executive within fourteen years from the commencing day. Provided that the provisions of this Article shall have no application to the trial of persons under any of the Acts mentioned at Serial Nos.6 and 7 of sub-part III of Part I of the First Schedule, who claim, or are known, to belong to any terrorist group or organization misusing the name of religion or a sect.
Article 184	(1) The Supreme Court shall, to the exclusion of every other court, have original jurisdiction in any dispute between any two or more Governments. (2) In the exercise of the jurisdiction conferred on it by clause (1), the Supreme Court shall pronounce declaratory judgments only. (3) Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved, have the power to make an order of the nature mentioned in the said Article.
Article 185	(1) Subject to this Article, the Supreme Court shall have jurisdiction to hear and determine appeals from judgments, decrees, final orders or sentences of a High Court. (2) An appeal shall lie to the Supreme Court from any judgment, decree, final order or sentence of a High Court: (a) if the High Court has on appeal reversed an order of acquittal of an accused person and sentenced him to death or to transportation for life or imprisonment for

	<p>life; or, on revision, has enhanced a sentence to a sentence as aforesaid; or (b) if the High Court has withdrawn for trial before itself any case from any court subordinate to it and has in such trial convicted the accused person and sentenced him as aforesaid; or (c) if the High Court has imposed any punishment on any person for contempt of the High Court; or (d) if the amount or value of the subject matter of the dispute in the court of first instance was, and also in dispute in appeal is, not less than fifty thousand rupees or such other sum as may be specified in that behalf by Act of [Majlis-e-Shoora (Parliament)] and the judgment, decree or final order appealed from has varied or set aside the judgment, decree or final order of the court immediately below; or (e) if the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value and the judgment, decree or final order appealed from has varied or set aside the judgment, decree or final order of the court immediately below; or (f) if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution. (3) An appeal to the Supreme Court from a judgment, decree, order or sentence of a High Court in a case to which clause (2) does not apply shall lie only if the Supreme Court grants leave to appeal.</p>
Article 186	<p>(1) If, at any time, the President considers that it is desirable to obtain the opinion of the Supreme Court on any question of law which he considers of public importance, he may refer the question to the Supreme Court for consideration. (2) The Supreme Court shall consider a question so referred and report its opinion on the question to the President.</p>

Similarly sections 43 and 44 of the Act are also reproduced hereunder:

Section 43	<p>(1) As soon as may be within thirty days of the commencement of this Act, the Federal Government shall constitute the Competition Appellate Tribunal which shall consist of a Chairperson who shall be a person who has been a Judge of the Supreme Court or is a retired Chief Justice of a High Court and two technical members</p>
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	<p>who shall be persons of ability, integrity and have special knowledge and professional experience of not less than ten years in international trade, economics, law, finance and accountancy. (2) The Chairperson and members shall hold office for a period of three years and shall be eligible for reappointment for a similar term and shall cease to hold office on attaining the age of sixty eight years or the expiry of the term whichever is earlier. (3) The Chairperson and the members shall be entitled to such salary and other terms and conditions of service as the Federal Government may by rules prescribe. (4) The Competition Appellate Tribunal may, in consultation with the Federal Government, make rules governing procedure in proceedings before the Tribunal. (5) The Competition Appellate Tribunal shall decide an appeal expeditiously within six months of its presentation to the Tribunal.</p>
Section 44	<p>Any person aggrieved by an order of the Competition Appellate Tribunal may prefer an appeal to Supreme Court within sixty days.</p>

62. Article 184 of the Constitution refers to the original jurisdiction of the Supreme Court of Pakistan, Article 185 of the Constitution to its appellate jurisdiction and Article 186 provides for the advisory jurisdiction of the Supreme Court of Pakistan. The argument is that sections 43 and 44 of the Act are violative of Article 185 of the Constitution, which envisages appeals against judgments, decrees and final orders or sentences of the High Court before the Supreme Court of Pakistan. Meaning that a statute cannot provide for an appeal before the Supreme Court of Pakistan unless the Constitution mandates it. The only exception is Article 212 of the Constitution, as the said Article specifically provides for an appeal to the Supreme Court of Pakistan from a judgment, decree, order or sentence of the Administrative Courts or Tribunal under Article 212 of the Constitution. The case of the Petitioners is that if at all the jurisdiction of the Supreme Court of Pakistan is to be enlarged it must have constitutional underpinning. The AGP has relied on Entry 55 of Part I of the FLL to urge the point that an appeal before the Supreme Court of Pakistan is as per the Constitution. Entry 55 is as follows:

<p>55. Jurisdiction and powers of all Courts, except the Supreme Court, with respect to any of the matters in this list and, to such extent as is expressly authorized by or under the Constitution, the enlargement</p>
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of the jurisdiction of the Supreme Court, and the conferring thereon of supplemental powers.

There are two parts to Entry 55; the first part allows Parliament to legislate on the jurisdiction and powers of all courts with respect to matters in the FLL. The Supreme Court of Pakistan has been excluded from this part, meaning that Parliament cannot legislate on the jurisdiction and power of the Supreme Court of Pakistan in so far as the entries in the FLL. The second part of Entry 55 deals with the enlargement of the jurisdiction of the Supreme Court of Pakistan and the conferring of supplemental powers thereon. This has been made subject to that which is authorized by or under the Constitution, meaning that where the Constitution confers authority on Parliament, it can enlarge the jurisdiction and power of the Supreme Court of Pakistan and confer supplemental powers as well. Article 175(2) of the Constitution states the no court shall have jurisdiction save as is conferred on it by the Constitution or by or under the law. Article 175(2) of the Constitution gives Parliament competence to confer jurisdiction on the courts by or under a law. The question is does this include the jurisdiction of the Supreme Court of Pakistan. When Article 175(2) is read with Entry 55 of the First Part of the FLL and Article 142 of the Constitution, Parliament is competent to make law enlarging the jurisdiction of the Supreme Court of Pakistan and conferring supplemental powers, where it is provided by or under the Constitution meaning that the constitutional jurisdiction of the Supreme Court of Pakistan cannot be taken away but where the Constitution authorizes Parliament on jurisdiction it can be enlarged.

63. The same issue was discussed in great detail in 2000 SCMR 567 (supra) where the august Supreme Court of Pakistan held as follows:-

15. As regards section 22 of the impugned legislation providing for an appeal before the Supreme Court of Pakistan against the orders passed by the Cooperative Judge, it has been held in the impugned judgment of the High Court that in the light of the aforesaid provisions of the Constitution read with Entry No.55 of the Federal Legislative List, enlargement of the jurisdiction of the Supreme Court and conferring thereon of any supplemental power falls within the exclusive domain of the Parliament and the Provincial Legislature has no power whatsoever to deal with or to legislate on any matter in the Federal Legislative List and therefore, section 22 providing for an appeal before the Supreme Court is violative of the Constitution.

16. Reference may also be made to the relevant entries in the previous Constitutions of Pakistan. In 1956 Constitution, there

were three Legislative Lists (in the Fifth Schedule), i.e Federal List, the Concurrent List and the Provincial List. Relevant entries are Entry No.29 in the Federal List, Entry No.19 in Part II of the Concurrent List and Entry No.92 in the Federal List. All these entries gave powers in relation to jurisdiction and powers of the Courts except the Supreme Court. The jurisdiction on the Supreme Court was conferred by the Constitution but there was one Article 160 which gave additional jurisdiction to the Supreme Court.

17. Coming now to the present Constitution of 1973, it may be observed that, according to Mr. Abid Hassan Minto, learned counsel for the Government of Punjab, in view of Article 175(2) of the Constitution, under which jurisdiction can be conferred on any Court including the Supreme Court by or under any law, in relation to matters in respect of which Provincial Legislatures have power to make laws (including Cooperative Societies), additional/supplemental jurisdiction or powers can be conferred on the Supreme Court by the Provincial Legislatures as the "law" mentioned in Article 175(2) includes a Provincial law and additional/supplemental jurisdiction or powers in the form of an appeal to the Supreme Court under Section 22 of the impugned legislation was being conferred on the Supreme Court in respect of a matter on which Provincial Legislatures have exclusive jurisdiction under the Constitution to enact laws.

In our view there is no ambiguity in interpreting Entry No.55 of Part I of the Federal Legislative List (Fourth Schedule) of the 1973 Constitution. Such Entry read with Articles 175(2) and 142(a) of the Constitution confers exclusive powers on the Parliament to make laws for enlargement of jurisdiction of the Supreme Court or conferring on it supplemental powers.

If Entry No.55 was not there in the FLL, it could be argued that under Article 175(2) of the Constitution, in respect of matters relating to Cooperative Societies exclusively falling under the competence of the Provincial Legislature, a law can validly be made by a Provincial Legislature enlarging jurisdiction of the Supreme Court and conferring on its supplemental powers but Article 175(2) is not to be interpreted in isolation. It has to be read and interpreted along with Article 142(a) and the Entries in the Legislative Lists. Under Entry No.55 of the Federal List, Federal Legislature is competent to make laws regarding jurisdiction and powers of all Courts (except the Supreme Court) with respect to any of the matters in such list. The other part of this entry makes the Federal Legislature competent to make laws

enlargement of the Supreme Court and the conferring thereon the supplemental powers with the proviso that this is to such extent as is expressly authorised by or under the Constitution. Powers and jurisdiction conferred on the Supreme Court by the Constitution can neither be interfered with or varied nor taken away by Legislature. However, jurisdiction of the Supreme Court can be enlarged and supplementary powers can be conferred on the Supreme Court by "law" in view of the Article 175(2) of the Constitution and Entry No.55 read with Article 142(a) of the Constitution leave no doubt that such enlargement of the jurisdiction and conferment of supplementary powers can only be done through law made by Federal Legislature. We are, therefore, of the view that section 22 of the impugned legislation is ultra vires the Constitution. The Provincial Governor and the Provincial Assembly are not competent to enact any law whereby jurisdiction of the Supreme Court could be enlarged by providing an appeal to the Supreme Court against the orders of the Cooperative Judge. (Emphasis added)

In the aforementioned case the law under question was the Punjab Undesirable Cooperative Societies (Dissolution) Ordinance, 1992 in which section 22 provided for an appeal before the Supreme Court of Pakistan against orders passed by a Cooperative Judge. The august Supreme Court of Pakistan concluded that the Federal Legislature can enlarge the jurisdiction of the Supreme Court under a law as contemplated in Article 175(2) of the Constitution. As per the judgment of the august Supreme Court of Pakistan, Parliament can enlarge the jurisdiction of the Supreme Court of Pakistan but the Provincial Assemblies are not competent to enlarge the jurisdiction of the Supreme Court of Pakistan by any law. Essentially the rationale is that the subject of enlargement of jurisdiction of the Supreme Court of Pakistan under the FLL is a subject which exclusively falls within Parliament's domain, so Parliament can confer jurisdiction on the Supreme Court of Pakistan, by law, if the Constitution permits it.

64. In this regard, it is important to note that Article 225 of the Constitution provides that election disputes shall be called into question under an Act of Parliament. The Article does not require or authorize that an appeal lie to the Supreme Court of Pakistan. Yet the Election Act, 2017 provides for a direct appeal to the Supreme Court of Pakistan even though Article 225 of the Constitution only confers competence on Parliament to make a law dealing with election disputes. In the same way Article 6 of the Constitution deals with the crime of high treason and Sub-Clause 3 provides that Parliament can by law provide for punishment of high treason. The High Treason (Punishment) Act, 1973 tries the offence of high treason by special

courts constituted under the Criminal Law Amendment (Special Court) Act, 1976 where section 12(3) provides for an appeal against final judgment to the Supreme Court of Pakistan. Again the Constitution declared Parliament competent to make law to provide for the punishment of high treason. On reading both Articles it leads us to conclude that where the Constitution declares Parliament competent to make law which regulates jurisdiction, Parliament can confer jurisdiction on the Supreme Court of Pakistan through a law as per Entry 55 of the FLL. We have already held that Parliament is competent to make law to regulate trade, commerce or industry in the interest of free competition under Article 18 of the Constitution. The power to regulate the fundamental rights includes the jurisdiction of the court because the august Supreme Court of Pakistan has jurisdiction to ensure the enforcement of fundamental rights in the public interest under Article 184(3) of the Constitution. So if Parliament can make a law on the subject of competition to regulate trade, commerce and industry, it can confer appellate jurisdiction on the Supreme Court of Pakistan, as the Supreme Court of Pakistan is already vested with the jurisdiction to enforce any of the fundamental rights mentioned in Chapter I and II of the Constitution. This view was taken by the august Supreme Court of Pakistan in *Baz Muhammad Kakar and others v. Federation of Pakistan through Ministry of Law and Justice and others* (PLD 2012 SC 923) where five Hon'ble Judges of the august Supreme Court of Pakistan were considering the jurisdiction of the Supreme Court of Pakistan with reference to the Contempt of Court Act, 2012 and held that the jurisdiction of the Supreme Court of Pakistan and High Courts includes enforcement of fundamental rights enshrined in the Constitution under Articles 184(3) and 199 respectively. Hence based on a reading of Article 175(2) read with Entry 55 of Part I of the FLL read with Article 184(3) of the Constitution, Sections 43 and 44 of the Act are not ultra vires the Constitution.

(D) Lapses of Ordinances and consequently lapses of all proceedings and orders

65. Learned counsel argued that prior to the promulgation of the Act, there were the Ordinances. As per the given timeline there are three periods when there was a gap in the legal regime provided by the Ordinances but no savings or continuance or revival clause in the subsequent law. Hence the proceedings initiated under one Ordinance were never saved under the subsequent Ordinance. As the proceedings and orders were not saved under the Ordinances, they could not continue under any of the subsequent Ordinances or under the Act. Furthermore, the 2009 and 2010 Ordinances purports to

establish the CCP afresh; hence there can be no continuity with the establishment of the CCP. The effect of this lapse and the gaps between the promulgation of the Ordinances is such that all actions, proceedings and orders cease to exist and cannot be resumed or continued with under the subsequent laws. As the CCP ceased to exist, no continuity can be given to the power it exercised during the gap period, or even in the continuation of, after its fresh establishment under the 2009 and 2010 Ordinances and then the Act. In this regard, it was argued that there is nothing in the Act to save the actions, proceedings and orders under the Ordinances nor can they continue with the proceedings or orders passed under the earlier Ordinances. Section 62 of the Act is the validation clause which merely stipulates that orders, proceedings pending since 2007 are valid but there is nothing in section 62 which can validate proceedings which ceased to exist on account of the gaps between the 2007, 2009 and 2010 Ordinances and then the Act. Hence they argue that section 62 does not have the effect of covering any of the time gaps nor can the Act save the proceedings which were never saved in the first instance under the relevant Ordinances.

66. The AGP argued that the first gap period between the 2007 Ordinance and the 2009 Ordinance is covered by the judgment passed by the august Supreme Court of Pakistan in *Sindh High Court Bar Association through Secretary and another v. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others* (PLD 2009 SC 879) ("Sindh High Court Bar Case"). The second gap period between the 2009 Ordinance and the 2010 Ordinance is of 24 days and is covered by giving retrospective effect to the 2010 Ordinance. Similarly, the third gap period between the 2010 Ordinance and the Act is covered under section 62 of the Act. He further argued that section 62 of the Act gives legal cover to all gap periods from 2007 in the form of a declaration by Parliament. He has also relied on the de facto doctrine to urge the point that the de facto doctrine covers all actions and decision taken by the CCP in the gap period. In this regard, he has relied on *Mahmood Khan Achakzai and others v. Federation of Pakistan and others* (PLD 1997 SC 426), *Malik Asad Ali and others v. Federation of Pakistan through Secretary, Law, Justice and Parliament Affairs, Islamabad and others* (PLD 1998 SC 161) and *Pakistan Medical and Dental Council through President and 3 others v. Muhammad Fahad Malik and 10 others* (2018 SCMR 1956). However, he has placed great emphasis on *Federation of Pakistan and others v. M. Nawaz Khokhar and others* (PLD 2000 SC 26) ("Nawaz Khokhar Case") in which he states that a similar issue was considered with reference to the Ehtesab Act and the Court has upheld all proceedings while relying on the intent of the legislature.

67. In order to appreciate the arguments of the parties, it is necessary to first illustrate the gap period:

Law	Date of Promulgation	Date of Expiry
Competition Ordinance, 2007	02.10.2007	02.02.2008
Competition Ordinance, 2009	26.11.2009	26.03.2010
Competition Ordinance, 2010	20.04.2010	18.08.2010
Competition Act, 2010	6.10.2010	

In this respect it is also important to reproduce the repeals and savings clauses in the Ordinances:

2007 Ordinance:

Section 59 Repeals and savings.-On the commencement of this Ordinance- (a) the Monopolies and Restrictive Trade Practices (Control and Prevention) Act, 1970 (V of 1970), hereinafter referred to as the repealed Ordinance, shall stand repealed; (b) the Monopoly Control Authority established under the repealed Ordinance shall stand dissolved; (c) all assets, rights, powers, authorities and privileges and property, movable and immovable, cash and bank balances, reserve funds, investments and all other interests and rights in, or arising out of, such property and all debts, liabilities and obligations of whatever kind of the Monopoly Control Authority subsisting immediately before its dissolution shall stand transferred to and vest in the Competition Commission of Pakistan established under this Ordinance; (d) no officer, employee, servant, or any other person holding any post in connection with the affairs of the Monopoly Control Authority shall have any right or lien to appointment to any post in the Competition Commission of Pakistan established under this Ordinance; (e) officers, employees, servants, or any other person holding any post in connection with the affairs of the Monopoly Control Authority, not considered for appointment in the Commission shall have the option to be discharged from service on payment of admissible relieving benefits or alternatively, their services shall be placed at the disposal of the Finance Division for absorption on the terms and condition to be determined by that Division but not less favourable than those which they were entitled to in Monopoly Control Authority, and unless sooner they are absorbed elsewhere, they shall continue to draw their pay, allowances, privileges or other benefits from the Commission as they were drawing while holding their posts in the Authority; (f) save as

otherwise provided in clause (c), all the debts and obligations incurred or contracts entered into or rights acquired and all matters and things engaged to be done by, with or for the Monopoly Control Authority before the enforcement of this Act shall be deemed to have been incurred, entered into, acquired or engaged to be done by, with or for the Commission, established under this Act, as the case may be; and (g) all suits and other legal proceedings instituted by or against the Monopoly Control Authority before the commencement of this Ordinance shall be deemed to be suits and proceedings by or against the Competition Commission of Pakistan as the case may be and may proceed and be dealt with accordingly.

2009 Ordinance:

Repeals and savings: Nil

2010 Ordinance:

Section 59 Repeals and savings.-On the commencement of this Ordinance- (a) the Monopolies and Restrictive Trade Practices (Control and Prevention) Act, 1970 (V of 1970), hereinafter referred to as the repealed Ordinance, shall stand repealed; (b) the Monopoly Control Authority established under the repealed Ordinance shall stand dissolved; (c) all assets, rights, powers, authorities and privileges and property, movable and immovable, cash and bank balances, reserve funds, investments and all other interests and rights in, or arising out of, such property and all debts, liabilities and obligations of whatever kind of the Monopoly Control Authority subsisting immediately before its dissolution shall stand transferred to and vest in the Competition Commission of Pakistan established under this Ordinance; (d) no officer, employee, servant, or any other person holding any post in connection with the affairs of the Monopoly Control Authority shall have any right or lien to appointment to any post in the Competition Commission of Pakistan established under this Ordinance; (e) officers, employees, servants, or any other person holding any post in connection with the affairs of the Monopoly Control Authority, not considered for appointment in the Commission shall have the option to be discharged from service on payment of admissible relieving benefits or alternatively, their services shall be placed at the disposal of the Finance Division for absorption on the terms and condition to be determined by that Division but not less favourable than those which they were entitled to in Monopoly Control Authority, and unless sooner they are absorbed elsewhere, they shall continue to draw their pay, allowances, privileges or other benefits from the Commission as they were drawing while holding their posts in the Authority; (f) save as

otherwise provided in clause (c), all the debts and obligations incurred or contracts entered into or rights acquired and all matters and things engaged to be done by, with or for the Monopoly Control Authority before the enforcement of this Ordinance shall be deemed to have been incurred, entered into, acquired or engaged to be done by, with or for the Commission, established under this Ordinance, as the case may be; and (g) all suits and other legal proceedings instituted by or against the Monopoly Control Authority before the commencement of this Ordinance shall be deemed to be suits and proceedings by or against the Competition Commission of Pakistan as the case may be and may proceed and be dealt with accordingly.

Section 60. Validation of actions, etc. Anything done, actions taken, orders passed, instruments made, notifications issued, agreements made, proceedings initiated, processes or communication issued, power conferred, assumed or exercised, by the Commission or its officers on or after the 2nd October, 2007 and before the commencement of this Ordinance, shall be deemed to have been validly done, made, issued, taken, initiated, conferred, assumed and exercised and provisions of this Ordinance shall have, and shall be deemed always to have had effect accordingly.

Sections 61 and 62 of the Competition Act, 2010 are reproduced below:

Section 61 Repeals and savings.-On the commencement of this Act-

(a) the Monopolies and Restrictive Trade Practices (Control and Prevention) Act, 1970 (V of 1970), hereinafter referred to as the repealed Act, shall stand repealed; (b) the Monopoly Control Authority established under the repealed Act shall stand dissolved; (c) all assets, rights, powers, authorities and privileges and property, movable and immovable, cash and bank balances, reserve funds, investments and all other interests and rights in, or arising out of, such property and all debts, liabilities and obligations of whatever kind of the Monopoly Control Authority subsisting immediately before its dissolution shall stand transferred to and vest in the Competition Commission of Pakistan established under this Act; (d) no officer, employee, servant, or any other person holding any post in connection with the affairs of the Monopoly Control Authority shall have any right or lien to appointment to any post in the Competition Commission of Pakistan established under this Act; (e) officers, employees, servants, or any other person holding any post in connection with the affairs of the Monopoly Control Authority, not considered for appointment in the Commission shall have the option to be discharged from service on payment of admissible relieving benefits or alternatively, their services shall be placed at the disposal of the Finance Division for absorption on the terms and condition to be determined by that Division but not less favourable than those

which they were entitled to in Monopoly Control Authority, and unless sooner they are absorbed elsewhere, they shall continue to draw their pay, allowances, privileges or other benefits from the Commission as they were drawing while holding their posts in the Authority; (f) save as otherwise provided in clause (c), all the debts and obligations incurred or contracts entered into or rights acquired and all matters and things engaged to be done by, with or for the Monopoly Control Authority before the enforcement of this Act shall be deemed to have been incurred, entered into, acquired or engaged to be done by, with or for the Commission, established under this Act, as the case may be; and (g) all suits and other legal proceedings instituted by or against the Monopoly Control Authority before the commencement of this Act shall be deemed to be suits and proceedings by or against the Competition Commission of Pakistan as the case may be and may proceed and be dealt with accordingly. Section 62 Validation of actions, etc. Anything done, actions taken, orders passed, instruments made, notifications issued, agreements made, proceedings initiated, processes or communication issued, power conferred, assumed or exercised, by the Commission or its officers on or after the 2nd October, 2007 and before the commencement of this Act, shall be deemed to have been validly done, made, issued, taken, initiated, conferred, assumed and exercised and provisions of the Act shall have, and shall be deemed always to have had effect accordingly.

68. The issue therefore, in the light of the timeline is one of continuance, saving and validation. In particular the 2007 Ordinance lapsed on 02.02.2008, the 2009 Ordinance makes no reference to the 2007 Ordinance nor does it propose to continue the proceedings initiated or save the orders made under the 2007 Ordinance. The 2007 Ordinance repeals the MRTPO but so does the 2009 Ordinance and the 2010 Ordinance and the Act without any reference to the CCP when at the time, under the relevant law, being the 2009 Ordinance the relevant authority was the CCP and not the Monopolies Control Authority. Even though actions taken by the Monopolies Control Authority could have continued, so should have proceedings, decisions and actions of the CCP. So far as the Act is concerned, it repeals the MRTPO and dissolves the Monopolies Control Authority and gives continuity to suits and legal proceedings by the Monopolies Control Authority as well as the CCP. Therefore, in the light of what the Petitioners have argued their contentions can be summed up in the following terms:

- a) The proceedings initiated under the 2007 Ordinance on 20.03.2009 cannot continue as the 2007 Ordinance did not exist on that date having expired on 02.02.2008;

- b) The life of one Ordinance cannot be extended by another Ordinance;
- c) The proceedings initiated under the 2007 Ordinance have not continued under the 2009 Ordinance or the 2010 Ordinance and there is nothing in the Act to save, revive or continue the proceedings or the orders passed under the Ordinances.

69. In the Sindh High Court Bar Case, the Proclamation of Emergency issued by General Pervez Musharaf on 03.11.2009 was declared unconstitutional and the validity conferred on saved Ordinances, under Article 270AAA of the Constitution was such that the Ordinances were given an extension in time to preserve continuity so that the matter be placed before Parliament to make temporary legislation into permanent legislation. The Court decided the matter in the following terms:-

It may be noted that such Ordinances were continued in force throughout under a wrong notion that they had become permanent laws. Thus, the fact remains that on the touchstone of the provisions of Articles 89 and 128 read with Article 264 of the Constitution and Section 6 of the General Clauses Act, 1897, only such rights, privileges, obligations, or liabilities would lawfully be protected as were acquired, accrued or incurred under the said Ordinances during the period of four months or three months, as the case may be, from their promulgation, whether before or after 3rd November, 2007, and not thereafter, until such Ordinances were enacted as Acts by the Parliament or the concerned Provincial Assembly with retrospective effect.

In the light of the above, the question of validation of such Ordinances would be required to be decided by the Parliament or the concerned Provincial Assembly. However, the period of four months and three months mentioned respectively in Articles 89 and 128 of the Constitution would be deemed to commence from the date of short order passed in this case on 31st July, 2009 and steps may be taken to lay such Ordinances before the Parliament or the respective Provincial Assemblies in accordance with law during the aforesaid periods. This extension of time has been allowed in order to acknowledge the doctrine of trichotomy of powers as enshrined in the Constitution, to preserve continuity, to prevent disorder, to protect private rights, to strengthen the democratic institutions and to enable them to perform their constitutional functions, which they were unconstitutionally and illegally denied under PCO No.1 of 2007. Needless to say that any validation whether with retrospective effect or otherwise, shall always be subject to

judicial review on the well recognized principles of ultra vires, non-conformity with the Constitution or violation of the Fundamental Rights, or on any other available ground. (Emphasis added)

70. The 2007 Ordinance was promulgated on 02.10.2007 and lapsed on 02.02.2008. However, in terms of the Sindh High Court Bar Case, the time was extended with effect from 31.07.2009 for 120 days, until 30.11.2009. The 2007 Ordinance was initially covered under the Provisional Constitution Order 2007 as a saved Ordinance and the judgment in Tika Iqbal Muhammad Khan v. General Pervez Musharaf and others (PLD 2008 SC 178) and then the Sindh High Court Bar decision. The Sindh High Court Bar judgment extended the time to place the 2007 Ordinance before Parliament and gave legal cover for the extended period. The 2007 Ordinance was not placed before Parliament, rather was re-promulgated as the 2009 Ordinance on 26.11.2009. The 2009 Ordinance was made applicable with effect from 02.10.2007, hence covered the gap period including the period covered under the Sindh High Court Bar Case with retrospective effect. This means that proceedings, orders and actions under the 2007 Ordinance continued under the 2009 Ordinance till its lapse on 25.03.2010. The 2010 Ordinance was promulgated on 20.04.2010 and lapsed on 18.08.2010. As per the Repeals and Savings section of all three Ordinances all suits and other legal proceedings instituted by or against the Monopoly Control Authority before the commencement of the Ordinance shall be deemed to be suits and proceedings by or against the CCP, as the case may be, and may proceed and be dealt with accordingly. Section 60 validated all actions taken, orders passed and proceedings initiated on or after 02.10.2007 and section 1(3) of the 2010 Ordinance provided that it shall be deemed to take effect from 26.03.2010. Hence section 1(3) of the 2010 Ordinance gives retrospective effect to the 2010 Ordinance from the date of lapse of the 2009 Ordinance. The gap period is therefore covered by the deeming provision of section 1(3) of the 2010 Ordinance. Hence the claim of continuity remained with the repeated promulgation of the 2007, 2009 and 2010 Ordinances.

71. The Act was promulgated on 06.10.2010 and came into force at once. The 2010 Ordinance lapsed on 18.08.2010, hence there is a gap of 50 days between the lapse of 2010 Ordinance and the promulgation of the Act. There is no savings section or continuation of earlier proceedings, actions and orders under the Repeals and Savings Section of the Act. The validation section of the Act is section 62 which deems to validate everything from 02.10.2007, which is the date of promulgation of the 2007 Ordinance. The Petitioners argue that section 62 is merely a validation clause and does not save or revive or

continue orders, actions or proceedings. They argue that a repeal without a saving section will quash all proceedings, orders and actions because they have not been saved. The AGP argued that section 62 is not just a validation simplicitor it is a declaration by the legislature to give continuity to all actions, orders, proceedings under the Ordinance and then the Act. He argued that it should not be read strictly as a validation clause but rather as a declaration by Parliament, with the intent to save all actions and decisions and give continuity from 02.10.2007 to the decisions, actions and exercise of power by the CCP. Essentially the AGP argued that the intent of the legislature should be considered as was done in the Nawaz Khokhar Case.

72. In the Nawaz Khokhar Case a seven member bench of the august Supreme Court of Pakistan considered the successive promulgations of the Ehtesab Ordinances in the following terms:-

The next contention of the learned counsel for the private appellants in the above cases is, that Ordinance XX having repealed and replaced Ordinance CXI, the proceedings pending on the date of repeal of Ordinance CXI, could not be saved and continued under Ordinance XX in the absence of a specific clause in the repealing Ordinance saving the proceedings pending under Ordinance, CXI. It is contended by the learned counsel for the private appellants that section 28 of the Ordinance XX which repealed Ordinance CXI, Ordinance VII and Ordinance XI, did not specifically save the proceedings which were pending under Ordinance CXI and therefore, all proceedings pending under Ordinance CXI came to an end with the repeal of Ordinance, CXI, and the same could not be continued or saved under Ordinance XX. In support of this contention, reliance is placed by the learned counsel on Government of Punjab v. Zial Ullah Khan 1992 SCMR 602 and Muhammad Arif v. State 1993 SCMR 1589.

Before considering the above contention, it may be stated here that if any Ordinance stands repealed under the Constitution, the consequences of repeal are provided under Article 264 of the Constitution. However, if a law is repealed by a subsequent Act, the consequences flowing from such repeal are to be determined with reference to the provisions of Section 6 of the General Clauses Act. The contention of the learned counsel for the private appellant is, that Ordinance XX while repealing Ordinance CXI, though contained a saving clause, did not provide for continuation of the proceedings pending under Ordinance CXI, which shows that the Legislature did not intend to keep the pending proceedings alive under Ordinance XX.

Repeal of Ordinance CXI, by Ordinance XX was not a case of simple repeal but it was a case of simultaneous repeal and re-enactment of a legislation, and therefore, besides consequences mentioned in section 6 of the General Clauses Act, section 24 of the General Clauses Act were also attracted. Ordinance XX was a verbatim reproduction of Ordinance CXI. Ordinance CXI, was still enforced when it was repealed by Ordinance XX. It may also be mentioned here that Ordinance XX was finally converted into a permanent legislation when the Legislature passed it as Act IX of 1997. It is, therefore, quite clear to us that although Ordinance CXI, was a temporary legislation but the Legislature intended to provide continuity to its provisions by first repealing it by Ordinance XX and then converting the later into an Act of Legislature by passing it as Act IX of 1997. (Emphasis added)

73. The Nawaz Khokhar Case relies on the intent of the legislature in giving continuity to temporary legislation which eventually became permanent legislation. The august Supreme Court of Pakistan held that there was clear intent on the part of the legislature while enacting the Act, to give continuity to the provisions of the Ordinances, proceedings initiated in spite of the fact that there was no saving clause in the Ordinances. The circumstances of this case are similar with the instant cases before us with the repeated promulgation of the Ordinances and eventually the Act. Section 62 of the Act gives the clear intent of Parliament to give continuity and permanence to the actions, proceedings and orders, amongst others of the CCP under the Ordinances which suggests that the intent was there to give continuity to the exercise of power by the CCP. Section 62 supports the intent of Parliament by deeming everything to be validly done as of 02.10.2007 and by declaring that the Act shall have, and shall be deemed always to have had effect accordingly. So the legislature by way of a deeming provision has declared that actions, proceedings orders etc. which were not saved due to the defect caused by the gaps and lack of a saving clause, will deem to exist by way of legal fiction. The use of a deeming provision is not uncommon in our jurisdiction. In *Mehreen Zaibun Nisa v. Land Commissioner, Multan* (PLD 1975 SC 397) the august Supreme Court of Pakistan concluded that when a statute contemplates that a state of affairs should be deemed to have existed, it clearly proceeds on the assumption that in fact it did not exist at the relevant time but by a legal fiction we are to assume as if it did exist. The classic statement as to the effect of a deeming clause is to be found in the observations of Lord Asquith in *East End Dwelling Company Ltd. v. Finsbury Borough Council* (1952) AC 109) namely where the statute says that you must imagine the state of affairs, it does not say that

having done so you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

In *Begum B.H. Syed v. Mst. Afzal Jahan Begum and another* (PLD 1970 SC 29) the august Supreme Court of Pakistan found that certain limits have to be determined within which the legislature can create legal fiction. Consequently, the Court is bound to ascertain for what purposes the statutory fiction is to be resorted to.

In *Molasses Trading and Export (Pvt.) Limited v. Federation of Pakistan and others* (1993 SCMR 1905) it was held that:-

When a legislature intends to validate a tax declared by a Court to be illegally collected under an invalid law, the cause for ineffectiveness or invalidity must be removed before the validation can be said to take place effectively. It will not be sufficient merely to pronounce in the statute by means of a non obstante clause that the decision of the Court shall not bind the authorities, because that will amount to reversing a judicial decision rendered in exercise of the judicial power which is not within the domain of the legislature. It is therefore necessary that the conditions on which the decision of the Court intended to be avoided is based, must be altered so fundamentally, that the decision would not any longer be applicable to the altered circumstances. One of the accepted modes of achieving this object by the legislature is to re-enact retrospectively a valid and legal taxing provision, and adopting the fiction to make the tax already collected to stand under the re-enacted law. The legislature can even give its own meaning and interpretation of the law under which the tax was collected and by "legislative fiat" make the new meaning binding upon Courts. It is in one of these ways that the legislature can neutralise the effect of the earlier decision of the Court. The legislature has within the bounds of the Constitutional limitations, the power to make such a law and give it retrospective effect so as to bind even past transactions. In ultimate analysis therefore the primary test of validating piece of legislation is whether the new provision removes the defect which the Court has found in the existing law and whether adequate provisions in the validating law for a valid imposition of tax were made.

In this case, the deeming provision was to neutralise the effect of a Court decision. The concept of a deeming provision has been relied upon by the august Supreme Court of Pakistan in several decisions so as to import the intent of the legislature and give effect to it. Reliance is placed on *Muhammad Mubeen-us-Salam and others v. Federation of*

Pakistan through Secretary, Ministry of Defence and others (PLD 2006 SC 602), Federation of Pakistan and others v. Mian Muhammad Nawaz Sharif and others (PLD 2009 SC 644) and All Pakistan Newspapers Society and others v. Federation of Pakistan and others (PLD 2012 SC 1). The august Supreme Court of Pakistan has held in these cases that by way of the deeming provision the legislature has declared its intent, which is to remove any doubts, defects or errors and the courts are bound by this intent.

74. The Supreme Court of India has also considered deeming provisions as declaratory clauses where the legislature declares its intent in a statute to remove doubt or error. In *The Central Bank of India and others v. Their Workmen and others* (AIR 1960 SC 12) held that:-

For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains preamble, and also the word declared as well as the word enacted.

In this case the declaratory provision under the statute was used to overcome a judicial error. The point being that a declaration is made by Parliament to correct or clarify a situation. In the cases before us the declaratory provision under Section 62 of the Act does not change the effect of any judicial decision rather aims to correct a defect caused by the legislature itself. It declares that which is the law and has always been the law since 2007, under the 2007 Ordinance. As Parliament is the supreme law maker, Parliament can correct an error in a former statute and it can explain and remove ambiguity in a subsequent statute. In *M. Venugopal v. Divisional Manager, Life Insurance Corporation of India, Machilipatnam, A.P. and another* (1994 2 SCC 323) it was stated that a deeming clause is one where the legislature can introduce a statutory fiction and courts must proceed on the assumption that such statutory fiction relates to the accepted state of affairs, which are real and consequences and incidents, which inevitably flow from such state of affairs are also real. In *Commissioner of Income-tax, Bombay Presidency v. Bombay Trust Corporation Ltd.* (AIR 1930 PC 54) the court concluded that when a provision is deemed to be something the only possible meaning of a deeming clause is that Parliament requires something which is not real to be treated as if it is real. In *Consolidated Coffee Ltd and another*

v. Coffee Board Bangalore ((1980) 3 SCC 358) the court held that the word deemed is used a great deal in modern legislation not only in creating legal fiction but also made to include that which is uncertain or obvious or to impose for the purpose of the statute an artificial construction that would not otherwise prevail but is relevant for the intent of the legislature. On the basis of these precedents it follows that a deeming provision must be looked at with respect to its intent that is to uphold a non-existent situation as being existing. The legislature is competent to enact a deeming provision for the purposes of assuming the existence of facts or state of affairs which did not exist at the time and the court must assume that the facts or state of affairs which the legislature wants to be treated as legal fiction, are real and all consequences and incidents which inevitably flow therefrom should be given effect to. In State of Maharashtra v. Laljit Rajshi Shah ((2000) 2 SCC 699) the Supreme Court held that it is a well known principle of construction that when interpreting a provision creating a legal fiction the court is to ascertain the purpose for which the legal fiction is created and thereafter to assume that the facts and consequences which are incidental or inevitable from the legal fiction are real. We find that the only intent that has come forward with reference to Section 62 of the Act is that continuity be given to all proceedings, decisions and actions taken by the Monopolies Control Board and the CCP from the promulgation of 2007 Ordinance. Hence the intent of Parliament is clear, which is to give legal cover to proceedings, decisions, actions and orders, amongst others, of the CCP. The effect of this declaration is simply to give continuity to the exercise of authority by the CCP with reference to the show cause notices, orders and proceedings challenged before the Court.

75. While looking at the vires of a statute all effort must be made to protect the statute and preserve the intent of the legislature. There is always a presumption of its constitutionality and a more liberal interpretation can be given in order to uphold the vires of the statute. A statute must be construed to preserve its intent, *ut res magis quam pereat*. The legal maxim requires courts to make legislation operative, given reasonable intendment and construction. The meaning of this maxim that a deed should never be avoided where the words may be applied to make it good, requires that every effort be made by the court to find a meaning capable of interpretation to uphold the vires of the law because it is better for a law to have effect than be void. This maxim is a rule of construction which requires the Court to give effect to the law and not destroy it, so if two constructions are possible, the court should always adopt that construction which will uphold the law and not the one which will render the law a nullity. Reliance is placed on Sardar Farooq Ahmad Khan Leghari and others v.

Federation of Pakistan and others (PLD 1999 SC 57) and Lahore Development Authority through D.G and others v. Ms. Imrana Tiwana and others (2015 SCMR 1739).

76. We are therefore of the opinion that by giving supremacy to the intent of the legislature, the Nawaz Khokhar Case has sufficiently addressed the issue of continuity. However, in the cases before this Court, section 62 of the Act provides for the intent of the legislature in the clear words of a deeming provision. Although the Petitioners have attempted to distinguish the Nawaz Khokhar Case on account of the express repeal by Ehtesab Ordinance No.XX of the Old Ehtesab Ordinance No.CXI and section 31 of the Ehtesab Act, 1997, and have also relied on cases to urge the effect of the expiry of an Ordinance, we find that Section 62 of the Act is distinguished as the intent of the legislature is evident from the statute itself, that by giving continuity to the actions, proceedings, decisions and orders initiated by the CCP, the legislature has not decided any dispute or settled any issue, it has merely given continuity, to correct the lapse of there being no savings clause in the Ordinances. Hence section 62 of the Act removes the flaw by creating the legal fiction of continuity which gives legal cover to the proceedings, show cause notices and orders challenged before us. As such the Petitioners rights under the Act if any, to challenge the proceedings or orders before CAT or any legal forum remain intact and no prejudice is caused to them.

77. In view of the aforesaid, for the reasons stated, this Writ Petition along with connected Writ Petitions are dismissed. Separate orders have been passed in the appeals.

78. Although the other two learned members of this Bench (Shahid Jamil Khan and Muhammad Sajid Mehmood Sethi, JJ.) have concurred with me on the issues of "Appellate jurisdiction of Supreme Court" and "Validation Clause in the Competition Act, 2010" but are not in agreement with me on the findings on "Federal and Provincial Legislative Competence" and "Parallel Judicial System" and have given their reasons through separate notes which are part of this judgment.

Sd/-

Ayesha A. Malik, J.

Sd/- Muhammad Sajid  
Mehmood Sethi, J.

Sd/- Shahid Jamil Khan, J.

Announced in an open Court on 26th day of October, 2020.

Sd/-

Ayesha A. Malik, J.

**SHAHID JAMIL KHAN, J.**---Before expressing my opinion, I acknowledge the labour put in for assimilating the arguments and material to shape up the issues by learned Senior Member (Ayesha A. Malik, J.), while authoring main judgment, therefore, I have luxury of not repeating much.

After reading the main judgment, with respect and reverence, I have a different opinion and decision on the issues, "Federal and Provincial Legislative Competence" and "Parallel Judicial System".

#### 1. Competence and Extent of Federation to Legislate on Competition Law.

Federation is political entity, consisting of self-governing regions (states or provinces) with a central government. Division of power between the constituent states or provinces and centre is, in recent times, defined by the Constitution of a Federal State. Collective goal of the Federation should be, as per recent political science studies, to achieve trio of social virtues: (i) political participation, (ii) protection of the sovereign rights of citizens and (iii) economic welfare and efficiency. The scholars, called Federalist, argue that democratically elected central government is generally more effective to ensure political participation, protection of the rights of citizens and for more efficient and equitable resource allocations. However, careful balancing of legislative and executive power between centre and constituent states is key to achieve the goals, which varies in different Federalists structures according to their own cultural and political circumstances.

1.2 In Pakistan, state is defined by Article 7 of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution"), which includes Federal Government, Provincial Government and local or other authorities i.e. three tier governing system to achieve and ensure the trio of social virtues. Besides having an effective and efficient central government, modern times approach favours devolution of power to grass root level. There was a longstanding demand for Provincial Autonomy, in particular by smaller Provinces other than Punjab, which was finally answered through the Constitution (Eighteenth Amendment) Act, 2010 ("Eighteenth Amendment"). A new Article 140A is inserted in the Constitution, through this amendment, which commands 'each Province to establish a local government system and develop political, administrative and financial responsibility and authority to the elected representatives of the local governments'. Though the Provincial Autonomy, extent of which is discussed infra, has been given by the Eighteenth Amendment but its implementation is in process, which is raising questions of legislative competence and the Constitutional Courts are enduring to answer under the facts and

circumstances of each case. It will not be out of place to observe that the command of Article 140A is not being rationalized by devolving political, administrative and financial responsibility and control to the local governments.

1.3 There is no doubt that Federal nature of the Constitution is intact, even after the Eighteenth Amendment. But to understand the extent and spirit of Provincial Autonomy, the amendments brought in Chapter 1 of Part V of the Constitution, titled 'Distribution of Legislative Powers' need to be examined.

The basic structure of Federal Constitution has not been compromised, despite abolishing Concurrent Legislative List ("CLL") through amendment in Article 142, for giving power to the Provinces only for legislation on the subjects enunciated in erstwhile CLL. Nevertheless, Basic Rule, as contained in Article 141, remained unchanged that Majlis-e-Shoora (Parliament) shall have power to make laws for whole or any part of Pakistan, including laws having extra-territorial operations, and a Provincial Assembly may make laws for the Province or any part thereof. It is important to note that this rule is not subject to the Constitution, however, elaboration of this rule in Article 142 is Subject to the Constitution. Article 142 defines the extent of Federal and Provincial legislative power; which before amendment through the Eighteenth Amendment was giving exclusive legislative power to Provinces only on the matter not enumerated in either Federal Legislative List ("FLL") or CLL. However, the post amendment Clause (c) to Article 142 has extended the exclusive legislative power to the matters not enumerated in FLL. The CLL, was omitted from Fourth Schedule, however, the rule of Federal Supremacy was maintained in the substituted Article 143 that in case of inconsistency between Federal and Provincial law, if the Parliament is competent to enact that law, the Provincial legislation to the extent of inconsistency shall be void. Importantly, while referring to Parliament's competence, FLL is not referred, which strengthens the finding in main judgment that Parliament's legislative competence can be gathered from the Constitution in addition to the subject matters enumerated in FLL [Entries 58 and 59]. Federal character of the Constitution is further fortified, through amendment in Article 144, by replacing the word 'two' with 'one' for the number of Provincial Assemblies to pass resolution for the Parliament to legislate for regulating a matter not listed in FLL. Even this amendment does not diminish the Basic Rule of legislative competence.

1.4 Petitioner side's arguments are correct to the extent that after the Eighteenth Amendment, Provincial Assemblies have legislative power on matters not listed in FLL. But their assertion that Federal

legislature's power is restricted within Article 142 and FLL, is a pedantic approach and self-destructive in view of Entries 58 and 59 of FLL, besides ignoring opening phrase 'subject to constitution' used in Article 142. Article 151, justifies the phrase 'Subject to the Constitution' as used at the beginning of Article 142, which curtails the legislative power of a Provincial Assemble or executive authority of Provincial Government [Article 151(3)], prohibiting or restricting 'Free trade, commerce and intercourse throughout Pakistan'.

Free trade, commerce and intercourse throughout a State, or amongst its constituent states, is a hallmark of a Federation, be it Commerce Clause of United States of America's Constitution [Article I, Section 8] or European Union's Convention.

1.5 Though Article 151(2) is itself giving legislative power to the Parliament for imposing restriction, to regulate or ensure 'freedom of trade, commerce and intercourse throughout Pakistan', yet if we read it with Entry 27, the legislative power of the Parliament over 'inter-provincial trade and commerce' becomes absolute. Entry 59 and Article 18, if read along, would enhance the scope of Parliament's legislative power over inter-provincial trade and commerce, for ensuring free competition. To conduct a lawful trade and business is a fundamental right guaranteed in Article 18, along with lawful profession or occupation. This right is eclipsed through "regulation of trade, commerce and industry in the interest of free competition" i.e., this fundamental right can be restricted if it is tainted with any anticompetitive behaviour under the law. Free competition is, in a way, a 'fundamental right in contrast' to safeguard the consumers and small business entities from anticompetitive behaviour, therefore, is to be read in or along with the phrase 'trade and commerce' being ancillary or incidental, if mandate of Entry 59 is invoked.

The question whether Parliament has power to legislate on competition law is answered in affirmative in backdrop of analysis hereinabove.

1.6 The question, however, remains whether Parliament has exclusive power to legislate on Competition Law. I do not agree with the finding or observation, in main judgment, that this question is not before us and not required to be deliberated. Because while deciding upon the legislative power of the Federation, its extent and balancing its competence with Provincial Legislative Power, after the Eighteenth Amendment, cannot be ignored.

Entry 27 is empowering the Parliament to legislate over "inter-provincial trade and commerce", along with 'import and export', 'trade and commerce with foreign countries' and 'standard of quality of

goods to be exported'. Similar is subject of Article 151, which ensures 'freedom of trade, commerce and intercourse throughout Pakistan', which necessarily includes interprovincial trade and commerce, but does not include 'intra provincial trade and commerce' by any stretch of interpretation. The Constitution does not suggest, in FLL or elsewhere, that "trade and commerce" is exclusively a Federal subject. While explaining goal of the government, supra, it is explained that political participation, protection of citizen's rights and economic efficiency and welfare is duty of every component of the Federation. This observation is fortified from the language of Article 140A, which commands Provinces to establish local government system and devolve political, administrative and financial responsibilities.

Though Article 151 envisions one National Economy by ensuring free trade, commerce and intercourse, yet it is not obliterating existence of regional or local economies. Trade and commerce can be limited; within territory of a local government which may not necessarily effect comparatively a bigger economy, such trade and commerce at lowest level has to be governed and controlled by the local government, by imposing licence fee, local taxes or fine etc. Any anticompetitive behaviour within local government's limit has to be restricted by it. However, trade and commerce having regional effect, beyond territorial limits of a local government, would become a provincial subject. Any administrative object or subject, effect of which spills over the local government's geographical limits shall be within legislative and executive authority of the Province. The Spillover doctrine is recognized by august Supreme Court in Imrana Tiwana Case (2015 SCMR 1739), while examining Lahore Development Authority's powers and extent, relevant excerpt is:

"74. The solution, therefore, lies in reading the provisions of the two statutes in harmony. The LDA Act, 1975 is to be regarded as an enabling statute. It allows LDA to act in support of and to complement the Local Government in the exercise of its functions and responsibilities. Where the Local Government is unable to act because of a lack of resources or capacity, or where the project is of such a nature that it spills over from the territory of one Local Government to another or where the size of the Project is beyond the financial capacity of the Local Government to execute; the LDA can step in and work with the Local Government. Economies of scale, spillovers and effectiveness are merely illustrative of the situations in which the LDA can act in the exercise of its functions to carry out developmental and other work and perform its statutory functions. These are not exhaustive. Life and time may throw up other situations and create circumstances which may warrant

LDA action to be taken in consultation with the Local Government within the purview of PLGA, 2013. Closing the categories today will freeze growth and retard progress."

(emphasis supplied)

1.7 'Spillover Effect' is an economic term, used for positive or negative effect of an economic activity, causing benefit without paying or suffer without compensation. It is also termed as externality or neighbourhood effect. In law; Spillover Effect may be referred to a situation where laws, regulations or policies of one governing unit effects the people outside its territorial limits. In the instant case if an anticompetitive behaviour is not affecting the trade and commerce of another Province, it does not come with the phrase 'interprovincial trade and commerce', as used in Entry 27 and discernible in Article 151. Conversely, if any act or omission, between anticompetitive behaviour, committed within geographical boundaries of a Province, has its effect beyond such territorial limits, would be subject of a Federal legislation and within its executive competence.

This doctrine seems to have been invoked by August Supreme Court in Sui Southern Gas Case (2018 SCMR 802) also. Vires of Industrial Relations Act 2012 (a Federal Legislation after Eighteenth Amendment) were in question. Eighteenth Amendment was observed to be 'an iron cladding' for balance between the authority of Federation and autonomy of the Provinces. However, in absence of the subject of the Act of 2012, in FLL, Federation's competence to legislate was upheld, because the Provinces and local authorities lacked competence to ensure and enforce Fundamental Right under Article 17 (right to form association and unions), as impact of this right was spilling over the territorial boundaries of the Provinces, for labour unions of the industrial establishments, having inter provincial operations. The principle, for legislative competence, recognized or developed in this judgment is that, 'Federation can always legislate for enforcement of constitutionally recognized Fundamental Rights, even in absence of any Entry in FLL or competence in the Constitution, if Province lacks competence to enforce it due to geographical limit on legislative power. The interpretation is in conformity with Basic Rule of legislative competence under Article 141 or in other words, where other components of State [Article 7] lack legislative competence, the Federation has legislative power to enforce fundamental rights.

1.8 The entries referred in main judgment are no exception. Entry 3 starts with words "external affair" and while explaining it include implementation of treaties and agreements. Entry 32 covers International treaties, conventions, agreements and International arbitration. These entries, through the window of implementing

treaties and agreements, cannot take away legislative competence of a Provincial Assembly, unless it relates to interprovincial matter or foreign affairs. For legislation on Competition Law in the light of an international treaty, distribution of legislative powers between Federation and Provinces, under Part V Chapter 1, cannot be compromised. Even otherwise, it is nowhere suggested, in main judgment or arguments of the parties that any international treaty, to maintain standards of Competition Law, have called for only a central legislation.

1.9 For what has been discussed above, my decision on this issue is that;

Parliament though have power to legislate for ensuring "Free Competition" through Competition Act 2010 ("Act of 2010") but only to the extent of 'Inter Provincial Trade and Commerce' [Entry 27]; Any anticompetitive behaviour, within the territory of Pakistan, if it affects the National Trade and Commerce, beyond territorial limits of a Province, shall be cognizable by the Competition Commission under provisions of the Act of 2010. Every notice under the Act of 2010 should contain the reasons disclosing that effect of the anticompetitive behaviour is spilling over territorial limits of respective Province. For the notices already issued, and are under challenge, the proceedings shall continue, however, the issue of jurisdiction shall be decided at first instance.

As conceded by learned Attorney General of Pakistan, on a specific question, that the Provinces have legislative power to ensure Free Competition within the territorial limits of the Province, either through provisions in existing general laws or through a special legislation. If such law is enacted or exists, the Executive Authority shall not be exercised by a Province on a matter, cognizance of which is taken by the Competition Commission under the Act of 2010 and If cognizance is taken by both, Provincial and Federal Authorities, the proceedings initiated by Federal Authorities shall prevail, unless it is established that the anticompetitive behaviour does not have the spillover effect. [Provisos to Articles 97 and 137 read with Article 148].

In view of above, this and connected petitions are allowed on the issue, *ibid*, in terms noted above.

## 2. Parallel Judicial System.

I agree, with the finding in main judgment, that Competition Commission and Appellate Authority under its control [Section 41 of the Act of 2010] are performing administrative functions, therefore,

are not covered under Article 175(3), but I do not agree with the conclusion that Competition Appellate Tribunal ("CAT") is an Administrative Tribunal.

Before supporting my opinion by discussing law from Pakistani jurisdiction, it seems necessary to understand the development and spirit of Administrative Law, which empowers the authorities to make rules, prosecute for violating these rules and then adjudicate itself on the consequential disputes. Whereas, scheme of our Constitution is separation of Judiciary from the Executive and Legislature, to protect constitutional and statutory rights of citizens from being violated by the Executive and to ensure that laws enacted by the Legislature are within competence and in accordance with the Constitution.

2.2 In twentieth century, concept of Administrative Agencies of the Executive (Regulatory Authorities under Entry 6 Part II of FLL) developed for governance on specialized matters like, taxation, environment, broadcasting or free competition etc. To achieve a specified regulatory agenda of the Executive, such semi-independent executive bodies are conferred, through legislation, with powers of rulemaking, adjudication and decision making through Boards, Commissions and Tribunals. The law defining purpose, structure, functions and powers of the Administrative organs is called 'Administrative Law'. As a recognized branch of Public Law, it deals with relationship of individuals with Government, through its agencies, and to safeguard the rights and privileges of the individuals, which might be wronged by operations of the authorities under Administrative Agencies.

The Administrative Law is differently applied in Civil Law Countries, like France, Germany, China etc., and Common Law Countries, like United Kingdom, United States and Australia etc. In Civil Law Countries procedural rules are specifically designed for adjudication by such authorities and to check correctness of their decision an independent or parallel hierarchy of forums like tribunals and courts are established. Whereas in Common Law Countries the decisions and actions of administrative authorities are subject to judicial review by the courts of general jurisdiction, in addition to internal review through appeal or revision by the administrative authorities themselves. While reviewing judicially, the administrative actions or decisions, courts of general jurisdictions ensure that principles of due process are observed and fundamental rights are not violated, besides looking into fairness and vires of the actions. Needless to say that material from Civil Law jurisdictions cannot be taken as reference or precedent for countries from Common Law jurisdictions. In Pakistan, being a Common Law Country, power of

judicial review is embedded in the Constitution; for High Courts under Article 199 and for Supreme Court of Pakistan under Article 184(3). Being constitutional power, it cannot be abridged, curtailed or compromised by any legislation, provincial or federal, therefore is not in issue before us in these cases.

The issue, in these cases, is of Parallel Judicial System in the name of Administrative Tribunals, which are mostly creation of the same legislation through which the Regulatory Authority is established. Like, CAT under section 43 of the Act of 2010, control of which i.e., appointments of the Chairman and Member and financial dependency lies with the Executive (Ministry of Law) and not the authorities under the same statute, unlike an Appellate Authority, under section 41, within such administrative entity. Appellate Bench of the Commission, under section 41 of the Act of 2010, is constituted by the Commission itself and its financial control is also with it. The appellate, or any other forum, within control of the authority, poised to achieve the administrative goal, is a perfect form of Administrative Tribunals. Any other forum, not in control of the Regulatory Authority, if controlled, administratively or financially, by the Executive would offend and prejudice the mandate of 'Separate and Independent Judiciary', as commanded by Article 175(3) and ruled by august Supreme Court of Pakistan in Sharaf Faridi (PLD 1994 SC 105), Mehram Ali (PLD 1998 SC 1445) and Sh. Riaz-Ul-Haq (PLD 2013 SC 501) Cases. In Tariq Transport Company Case (PLD 1958 SC 437), though being a judgment of the period before the Constitution of 1973, the difference between Administrative and Judicial Tribunals, is very eloquently highlighted in the following excerpt:-

"The question whether an act is judicial, quasi-judicial or administrative is clouded by a confusion which it is extremely difficult to resolve and no clear-cut distinction between these three functions can be discovered from the large number of reported cases and the divergent opinions expressed therein. In modern States where expertise is the dominating feature of Government more than one function is combined in administrative tribunals, and more often than not an administrative agency discharges not only legislative and administrative but also judicial functions. The true question in the case of such tribunals always is whether the act which is complained of is a judicial act and not whether the procedure adopted by the tribunal is judicial or quasi-judicial or whether the dominant or general aspect of the tribunal is that of a judicial, quasi-judicial or administrative body. A tribunal is not always furnished with the trappings of a Court, nor will such trappings make its action judicial. The character of the action

taken in a given case and the nature of the right on which it operates must determine whether that action is judicial, ministerial or legislative or whether it is simply the act of a public agent. A tribunal acts judicially in the full sense of the term if:

- (1) it has to determine a dispute;
- (2) the dispute relates to a right or liability which, whatever its immediate aspect, is ultimately referable to some right or liability, recognised by the Constitution or statute or by custom or equity which by the domestic law is declared to be the rule of decision;
- (3) since every right or liability depends upon facts, the tribunal is under an obligation to discover the relevant facts;
- (4) the ascertainment of the facts is in the presence of the parties either of whom is entitled to produce evidence in support of its respective case and to question the truth of the evidence produced by his opponent; and
- (5) after an investigation of the facts and hearing legal arguments the tribunal renders a judgment which so far as the tribunal is concerned terminates the dispute.

In the case of an administrative tribunal, however, the emphasis is on policy, expediency and discretion to enable it to achieve the object with which it was set up. In the case of such a tribunal the approach in determining the relevant facts is therefore often subjective and not objective, there being generally no *lis* before it in which the parties are arrayed against each other for the enforcement of a private right or liability and who for that purpose are entitled to produce evidence and adduce legal argument. The word 'quasi' as prefixed to the word 'judicial' may either indicate that the tribunal is not acting purely administratively or that it is acting in a manner in which a judicial tribunal is expected to act."

2.3 Powers of Regulatory Authorities; to make rules having force of law, prosecute for violation of these rules and adjudicate on the disputes resulting from such prosecution are apparently in conflict with 'Rule of Natural Justice'; that no one can be a judge in his own cause, 'nemo iudex in causa sua' (Doctrine of Bias), which comes after the rule 'audi alteram partem' (listen to the other side), in common parlance 'no one can be condemned unheard. Yet, regulatory authorities are vested with the adjudicatory powers, quasi-judicial, to

decide on the disputes arising out of their own actions, with justification of effective, specialized and prompt resolution of disputes, need of which is universally accepted now. But to check the Bias, as Administrative Tribunals and Authorities are likely to have, being judge of their own cause while pursuing administrative goal, an independent forum controlled by judiciary is the scheme of our Constitution.

2.4 The scheme, 'Independence of Judiciary' can be gathered, in the Constitution, from Objective Resolution in preamble, Articles 9 and 175(3).

This concept of independence or separation of judiciary from executive is borrowed from 'Separation of Powers' model, also called 'trias politica', for governing a state. It is in contrast with 'fusion of powers' model wherein executive and legislative powers overlap. The theory of trias politica is based on the goal to avoid concentration of power with Legislature, Executive or Judiciary, by creating checks and balances in a constitution. Fusion of powers model is found, mostly, in the parliamentary democracies; United Kingdom is considered the country with strongest fusion of powers, where until 2005, Lord Chancellor was speaker in House of Lords, a government minister heading Lord Chancellor's Department and also head of the Judiciary. However, separation of powers model, or tripartite system, is salient feature of the Constitution of United States. Its first three Articles embody the doctrine of separation of powers. The legislature consists of bicameral Congress (Article I), Executive consists of President and subordinate officers (Article II) and Judiciary consists of Supreme Court and other federal courts (Article III). The Constitution of United States is said to be influenced by Montesquieu's (a French Scholar) treatise on political theory "Spirit of the Laws", an excerpt of which is reproduced;

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise

those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."

2.5 History of Independence of Judiciary in Pakistan is discussed in Mehram Ali's Case (para 4); starting with preamble of the Constitution (now substantive part of the constitution Article 2A) which says, "the independence of the judiciary shall be fully secured", the original provisions of Article 175(3) are referred, which stipulated three years' time for progressive separation of Judiciary from Executive. This period was substituted with five years and then fourteen years, but no step was taken by any Government for separating Judiciary progressively from Executive, therefore, constitutional petitions were filed before the High Court of Sindh for implementing the mandate of the Constitution, which were decided by the Full Bench through judgment in Sharaf Faridi Case (PLD 1989 Karachi 404) with directions. This decision was assailed by Provincial Government of Sindh and Federation of Pakistan before Supreme Court and were disposed of through famous judgment in Sharaf Faridi Case (PLD 1994 SC 105). The apex Court while defining 'Independence of Judiciary' held;

- "(a) that every Judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without improper influences, inducements or pressures, direct or indirect, from any quarter or for any reason; and
- (b) that the judiciary is independent of the Executive and Legislature, and has jurisdiction, directly or by way of review, over all issues of a judicial nature."

Mehram Ali's Case (PLD 1998 SC 1445), is the next milestone judgment by August Supreme Court, wherein vires of various provision of Anti-Terrorism Act, 1997 ("ATA") were examined, on a ground, inter alia that a parallel judicial system is constituted through ATA by giving finality to the judgment of Special Courts, subject to decision by Appellate Tribunal Constituted therein. The then Attorney General gave statement before Lahore High Court (Five Members Bench) that a further right of appeal would be made available to both, the State and the convict by making suitable amendment in the law. The basic question examined by Supreme Court was, whether the provisions of ATA in their original form fit in the Constitutional framework relating to Judiciary.

Supreme Court endorsed the law laid down in Iftikhar Ahmad Case (PLD 1984 Lahore 69), wherein the vires of certain provisions of the Banking Companies (Recovery of Loans) Ordinance (XI of 1979) were examined and material change brought by Article 175 of the

Constitution were highlighted by referring its Article 212, in contrast with relevant provisions of Indian Constitution, in following words;

"Thus, while the Indian Constitution recognises existence of Tribunals sharing judicial power with Courts, it is conspicuously absent in the Constitution. This appears to be a very important departure from the previous Constitutional position as even Article 98(5) of the 1962 Constitution recognise Tribunals alongwith Courts. Strangely enough, however, the power of superintendence of High Courts was conferred only with regard to the Courts subordinate to them and not for Tribunals as in the Indian Constitution. It is thus clear that the 1973 Constitution of Pakistan recognises only such specific Tribunals to share judicial power with Courts, as are particularly mentioned in Article 212 or elsewhere but none else."

It would not be out of place to refer the recent judgments by superior Courts of India. Despite that Indian Constitution recognizes Tribunal along with Court, yet it is consistently ruled that control of the Tribunal, for appointment or financial, shall not be with the Executive. The judgments from Indian jurisdiction ensuring Separation of Judiciary from Executive are:-

"Roger Mathew v. South Indian Bank Limited (2019 SCC OnLine SC 1456), Mahindra Electric Mobility Ltd. v. CCI (2019 SCC OnLine Del 8032), Brahm Dutt v. Union of India (AIR 2005 SC 730), Competition Commission of India v. Steel Authority of India Limited and another [(2010) 10 SCC 744], Union of India and another v. R. Gandhi, President, Madras Bar Association and another [(2010) 11 SCC 1], Madras Bar Association v. Union of India and another [(2014) 10 SCC 1] and Madrass Bar Association v. Union of India and another [(2015) 8 SCC 583]."

In Mehram Ali, Case (PLD 1998 SC 1445), besides discussing some other judgments from High Courts of Pakistan, the Apex Court relied on its earlier judgments in Azizullah Memon Case (PLD 1993 SC 341) and Al-Jehad Trust Case (PLD 1996 SC 324) to lay down following principles:-

"11. From the above case-law the following legal position obtaining in Pakistan emerges:-

- (i) That Articles 175, 202 and 203 of the Constitution provide a framework of Judiciary i.e. the Supreme Court, a High Court for each Province and such other Courts as may be established by law.
- (ii) That the words "such other Courts as may be established by law" employed in clause (1) of Article 175 of the Constitution are

relatable to the subordinate Courts referred to in Article 203 thereof.

- (iii) That our Constitution recognises only such specific Tribunal to share judicial powers with the above Courts, which have been specifically provided by the Constitution itself Federal Shariat Court (Chapter 3-A of the Constitution), Tribunals under Article 212, Election Tribunals (Article 225). It must follow as a corollary that any Court or Tribunal which is not founded on any of the Articles of the Constitution cannot lawfully share judicial power with the Courts referred to in Articles 175 and 203 of the Constitution.
- (iv) That in view of Article 203 of the Constitution read with Article 175 thereof the supervision and control over the subordinate judiciary vest in High Courts, which is exclusive in nature, comprehensive in extent and effective in operation.
- (v) That the hallmark of our Constitution is that it envisages separation of the Judiciary from the Executive (which is founded on the Islamic Judicial System) in order to ensure independence of Judiciary and, therefore, any Court or Tribunal which is not subject to judicial review and administrative control of the High Court and/or the Supreme Court does not fit in within the judicial framework of the Constitution.
- (vi) That the right of "access to justice to all" is a fundamental right, which right cannot be exercised in the absence of an independent judiciary providing impartial, fair and just adjudicatory framework i.e. judicial hierarchy. The Courts/ Tribunals which are manned and run by executive authorities without being under the control and supervision of the High Court in terms of Article 203 of the Constitution can hardly meet the mandatory requirement of the Constitution.
- (vii) That the independence of judiciary is inextricably linked and connected with the process of appointment of Judges and the security of their tenure and other terms and conditions."

In *Sh. Riaz-Ul-Haq Case* (PLD 2013 SC 501), the apex Court went a step ahead to examine whether Service Tribunals, Federal and Provincial, established under Article 212(1)(a) are judicial forums and are performing their functions within the meaning of Article 175 of the Constitution. After relying on various judgments, including judgment in *Tariq Transport Company Case* (supra), the August Court held:-

"40. The perusal of above case-law makes it abundantly clear that a tribunal is not always function as a 'Court', nor its action is

always judicial; however, the determining factor is the nature of the dispute to be resolved by the Tribunal. If the Tribunal has to determine a dispute relating to a right or liability, recognised by the Constitution or law and is under an obligation to discover the relevant facts, in the presence of the parties, in the light of the evidence produced by them, it acts judicially. Besides, whenever judicial power is vested in a forum, be it called a Court or Tribunal, for all legal intents and purposes it is a Court. Further, such Tribunals have to be manned, controlled and regulated in accordance with the established judicial principles.

41. It is pertinent to mention here that as the Service Tribunals are not only deemed to be a civil Court but also exercise judicial powers, therefore, they are included in the term 'Court' mentioned in Article 175 of the Constitution. As such, these Tribunals are to be manned, controlled and regulated in accordance with the law relating to management, regulation and control of Courts in Pakistan.
50. From the above case-law, it is manifest that whenever the appointment of a 'judicial officer' or the Chairman/Member of a Tribunal performing 'judicial functions' is made, the consultation with the concerned Chief Justice is prerequisite. Thus, the appointments of the Chairman/Member of the Service Tribunal, Federal or Provincial, must be made in consultation with the Chief Justice of Pakistan or the Chief Justice of concerned High Court, as the case may be and all appointments made without such consultation are void.
58. On having discussed the cases supra it is concluded that Service Tribunals (Federal and Provincial) falling in the category of Court capable to exercise judicial powers are bound to follow the principle of independence judiciary for the purpose of ensuring enforcement of fundamental rights of access to justice under Article 9 of the Constitution, thus, are required to be separated from the Executive under Article 175(3) of the Constitution. These listed constitutional objects ought to have been redressed by the Legislature in making suitable amendments in the law governing the Tribunals and the rules framed thereunder to the extent as noted hereinabove, any of the provisions of the law contrary to the fundamental and constitutional provisions if any.
59. To make the Chairman and the Members of the Service Tribunal independent, it is necessary to make their appointment with the meaningful consultation of the Chief Justice i.e. for the purpose of Federal Service Tribunal, with the Chief Justice of Pakistan

and for Provincial Service Tribunals, with the Chief Justice of the respective High Court. It is to be noted that compliance of such condition seems to be necessary, because if the Chairman has to be appointed amongst the sitting Judges of a High Court, without consent of the Chief Justice, judicially and administratively, no Judge of the High Court can relinquish the post of Judge of High Court without the approval of the concerned Chief Justice as he has to discharge his function as a Judge of High Court under the administrative control of the Chief Justice. Similarly, a person qualified to be the Judge of High Court, either a District Judge or an advocate, has to be appointed with the meaningful consultation of the Chief Justice of the High Court because the District Judge, if is allowed to hold the charge of Provincial Service Tribunal, can only be released, if permission is granted by the Chief Justice. As far as the appointment of an advocate who is qualified to be the Chairman of a Tribunal or the Member is concerned, his performance or capability can only be evaluated during the period when he had been practicing law because a person who had obtained enrollment but had never appeared before the High Court or Supreme Court cannot claim to have legal experience.

60. As far as a sitting Judge of the High Court acting as Chairman of the tribunal is concerned, there is no difficulty in determining the tenure during which he shall hold the charge in addition to his own functions, simultaneously performing as a Judge of the High Court and the Chairman of the Tribunal. Preferably, it would be appropriate and in the interest of institution if a sitting Judge is not asked to perform his duties as Chairman of a Federal or Provincial Service Tribunals. However, appointments for the position of Chairman can conveniently be made from amongst the Judges who had been a Judge of the High Court. If a retired Judge of the High Court is to be appointed as Chairman of the Tribunal, selection should be made in consultation with the Chief Justice of the High Court in the case of a Provincial Service Tribunal and in consultation with the Chief Justice of Pakistan in the case of Federal Service Tribunal, who may nominate a retired Judge. The tenure of such incumbent should not be for a period of more than three years for one time only. By adopting these measures, the object of ensuring the principle of independence of judiciary and also enforcement of the right of access to justice could be achieved, otherwise such Hon'ble retired Judges would try their best to continue to hold such post for an indefinite period against the principle of independence of judiciary, which also speaks about the tenure of such post.

Reference in this behalf may also be made to the Notification No. F.38(1)/2012-A.II, dated 3-9-2012, whereby the incumbent Chairman of Federal Service Tribunal, Mr. Justice (R) Abdul Ghani Shaikh, was appointed contrary to the rules, for an indefinite period, as a Chairman, whereas, the Federal Service Tribunal Chairman and Members Service Rules, 1983, provide that a Chairman shall not continue to hold office for a period over three years at a time. However, when the petitioner and his counsel objected on issuance of such a notification by filing a Civil Miscellaneous Application, then the same was rectified and a fresh notification has been issued on 22-9-2012. It may not be out of context to point out that the incumbent Chairman had been holding the same position earlier for the period of three years from 5-6-2009 to 4-6-2012. Prior to it, he had remained as Chairman, Sindh Service Tribunal w.e.f. 11-11-2000. Had the Chief Justice of Province or the Chief Justice of Pakistan been consulted, they would have advised to nominate someone else for the purpose of said appointment. Therefore, the Executive cannot be allowed to interfere in the process of appointment of such important functionaries of Tribunals i.e. Chairman, who is required to be appointed independently because while discharging its functions the tribunal does not act as an executive body rather performs judicial functions. If such a body/tribunal is not in a position to enforce Fundamental Rights, including the right to have access to justice because of the reason that when the appointments have to be made, they remain at the mercy of the executive, which is itself a litigant party in most of the cases before the Tribunal, and no hope can be pinned on such a tribunal to discharge its functions independently.

70. The Service Tribunals Acts do not contain any specific provision providing for the financial autonomy of the Tribunals. Thus, on this score as well, the Service Tribunals cannot discharge their functions independently. The Tribunals must be duly empowered to disburse their annual funds, allocated by the Parliament and the Provincial Assemblies, in their respective annual budgets, within the prescribed limit by the Chairman of the respective Tribunals, without the need to seek approval of the Finance Ministry or Provincial Finance Department.
71. The Service Tribunals both Federal and Provincial perform vital judicial functions by adjudicating upon issues pertaining to the terms and conditions of Civil Servants, therefore, it is imperative that appropriate legislation action be taken post-haste. Consequently, to avoid denial of access to justice to them, the

Federal and the Provincial Governments through their respective Law Secretaries are hereby allowed 30 days' time to give effect to the above conclusions/findings and implement this judgment forthwith by making fresh appointments of Chairmen/Members of the Tribunals, following the observations made hereinabove. If no steps are taken within the stipulated time, either through temporary or permanent legislation, the provisions of the legislation which have been declared void under Article 8 of the Constitution shall cease to have effect. As a consequence whereof, the incumbent Chairman/Members of the Tribunals, whose cases are not covered under the above-said proposed provisions, shall also cease to hold said positions, as the case may be. Similarly, independent budgetary allocation for annual expenditures of the Service Tribunals shall be provided for in accordance with the constitution, enabling the Tribunals to function independently."

(emphasis supplied)

In Army Welfare Trust Case (2017 SCMR 9), the issue addressed was not of Independence of Judiciary. Appeal was filed against judgment by Division Bench of Peshawar High Court, whereby judgment of Customs Excise and Sales Tax Appellate Tribunal was set aside. An office objection was raised that instead of CPLA a Direct Appeal lie before Supreme Court. The question whether petition for leave to appeal was correctly filed, was answered in affirmative, while observing;

"The Appellate Tribunal is not mentioned or provided for in the Constitution, therefore, it cannot be categorized or be deemed to be a court in terms, of paragraph (d) of clause (2) of Article 185 of the Constitution. When through the impugned judgment the High Court set aside the Appellate Tribunal's order it did not do so of a court immediately below. Consequently, the petitioner acted in accordance with the Constitution when it preferred a petition seeking leave to appeal the impugned judgment. The above mentioned office objection is therefore overruled."

The judgments in Mehram Ali and Sh. Riaz-ul-Haq Cases were relied upon but not distinguished, therefore, this judgment cannot be placed against the law laid down in both the judgments.

The test of a Judicial Tribunal or a Court, as enshrined in Sh. Riaz ul Haq Case by the apex Court, fully applies, because CAT's jurisdiction is to determine disputes relating to rights and liabilities, recognized by the Constitution and law, by discovering the relevant facts in light of the evidence produced by the parties in their presence, therefore, its separation and independence from executive is mandatory under

constitutional command. The legislature has authority to establish Judicial or Administrative Tribunals, other than Tribunals under Articles 212 and 225, but a Judicial Tribunal, if performing judicial functions has to be independent and separated from the influence of executive.

The administrative authorities, including Administrative Tribunals, are to act in furtherance of regulatory objective, for which they are formed, however CAT, having a judicial member and has power to judicially review all Administrative actions and decisions, by exercising judicial power, has to hear and decide (adjudicate) independently.

For the reasons and case law discussed above, the decision on this issue is as under:-

I agree that Competition Commission is performing administrative functions, therefore, its functions and appellate authority under its control [Section 41 of the Act of 2010] are not covered under Article 175(3) of the Constitution, but in my opinion CAT [Section 43 of the Act of 2010] is a Judicial Tribunal, hence is to be separated from executive influence for being mandatory under constitutional command. The legislature though has authority to establish Administrative Courts and Tribunals for federal subjects [Entry 14 of FLL], other than Tribunals under Articles 212 and 225. Since CAT is determining disputes relating to a right or liability, recognized by the Constitution or law and is under obligation to discover the relevant facts, in the light of evidence and by interpreting the law, therefore, is a Judicial Tribunal. [Sh. Riaz-ul-Haq Case (PLD 2013 SC 501)].

The judgment and directions, in Sh. Riaz-ul-Haq Case (PLD 2013 SC 501) apply for the CAT constituted under the Act of 2010, therefore, following the ratio, provisions of section 43 of the Act of 2010, to the extent of appointment of Chairperson, Members and financial control by the Executive, are declared ultra vires and if the directions contained in Sh. Riaz-ul-Haq Case, reproduced and highlighted supra, are not complied with in 60 days from the date of this judgment, it shall cease to have effect along with Executive actions thereunder.

In view of above, this and connected petitions are allowed on the issue, *ibid*, in terms noted above.

Sd/-

Shahid Jamil Khan, J.

**MUHAMMAD SAJID MEHMOOD SETHI, J.**--- I have had the privilege of going through the judgment as well as Additional Note handed down by my learned senior colleagues. I find myself in agreement with the conclusions drawn by my learned sister Ayesha A. Malik, J. on Issues of "Appellate Jurisdiction of Supreme Court" and "Validation Clause in the Competition Act of 2010" and concur with the opinion and decision on the Issues of "Federal and Provincial Legislative Competence" and "Parallel Judicial System", rendered by my learned brother Shahid Jamil Khan, J.

Sd/-

Muhammad Sajid Mehmood Sethi,  
J

#### Schedule-A

Details of Writ Petitions mentioned in judgment

Dated 26.10.2020 passed in W.P. No.9518/2009

Sr. No.	W.Ps. Nos.	Parties Name	Relevant Sector
1	9518/09	LPG Association of Pakistan v. Federation of Pakistan and others	Oil and Gas
2	15745/09	National Refinery Limited and others v. Federation of Pakistan and others	Oil Refineries
3	15746/09	Pakistan Oilfields Limited v. Federation of Pakistan and others	Oil Refineries
4	15747/09	Attock Refinery Limited v. Federation of Pakistan and others	Oil Refineries
5	15638/09	Mustehkam Cement Limited v. Federation of Pakistan and others	Cement
6	15639/09	Bestway Cement Limited v. Federation of Pakistan and others	Cement
7	15620/09	Lafarge Pakistan Cement Limited v. Competition Commission of Pakistan and others	Cement
8	15670/09	Dandot Cement Company Limited v. Federation of	Cement

		Pakistan and others	
9	15668/09	Kohat Cement Company Limited v. Federation of Pakistan and others	Cement
10	15669/09	Fauji Cement Company Limited v. Federation of Pakistan and others	Cement
11	15640/09	Askari Cement Nizampur v. Federation of Pakistan and others	Cement
12	15618/09	Maple Leaf Cement Factory Limited v. Competition Commission of Pakistan and others	Cement
13	15623/09	Dewan Cement Limited v. Federation of Pakistan and others	Cement
14	1122/10	Shahtaj Sugar Mills Limited and others v. Federation of Pakistan and others	Sugar
15	1175/10	Gojra Samundari Sugar Mills Limited v. Federation of Pakistan and others	Sugar
16	1176/10	Chishtia Sugar Mills Limited v. Federation of Pakistan and others	Sugar
17	3530/10	Telenor Pakistan Private Limited v. Federation of Pakistan and others	Telecom
18	3531/10	Rashid Khan v. Competition Commission of Pakistan and others	Telecom
19	3532/10	Pakistan Mobile Communication Limited v. Competition Commission of Pakistan and others	Telecom
20	3533/10	Abdul Aziz, CEO Pak Telecom Mobile Limited v. Federation of Pakistan and others	Telecom
21	3534/10	Qian Li, CEO CMPak Limited v. Federation of Pakistan and others	Telecom

22	3535/10	CMPak Limited v. Federation of Pakistan and others	Telecom
23	3536/10	Pak Telecom Mobile Limited v. Federation of Pakistan and others	Telecom
24	3537/10	Jon Eddy Abdullah, CEO Telenor Pakistan Private Limited v. Federation of Pakistan and others	Telecom
25	3538/10	Warid Telecom Private Limited v. Federation of Pakistan and others	Telecom
26	3750/10	Syed Tariq Gulzar, CFO Warid Telecom Private Limited v. Federation of Pakistan and others	Telecom
27	2556/10	Pattoki Sugar Mills Limited and others v. Federation of Pakistan and others	Sugar
28	2654/10	National Sugar Industries Limited v. Federation of Pakistan and others	Sugar
29	2761/10	Shakargang Mills Limited v. Federation of Pakistan and others	Sugar
30	1173/10	Sheikhoo Sugar Mills Limited v. Federation of Pakistan and others	Sugar
31	93165/17	Telenor Pakistan Private Limited v. Federation of Pakistan and others	Telecom
32	1174/10	Koinoor Sugar Mills Limited v. Federation of Pakistan and others	Sugar
33	17786/10	Fauji Fertilizer Company Limited v. Federation of Pakistan and others	Fertilizer
34	1441/17	Fauji Fertilizer Company Limited v. Federation of Pakistan and others	Fertilizer
35	28931/11	Javid Ishaq v. Federation of Pakistan and others	Power (transformers)
36	23640/11	AB Ampere Private Limited v. Federation of Pakistan and	Power (transformers)

		others	
37	23743/11	Pak Elektron Limited and others v. Federation of Pakistan and others	Power (transformers)
38	23860/11	Siddique Sons Engineering v. Federation of Pakistan and others	Power (transformers)
39	22575/11	Transfopower Industries Private Limited v. Federation of Pakistan and others	Power (transformers)
40	27488/11	KBK Electronics Private Limited and others v. Competition Commission of Pakistan and others	Power (transformers)
41	22633/11	Transfab Lahore v. Federation of Pakistan and others	Power (transformers)
42	13500/11	NAM International Private Limited and others v. Federation of Pakistan and others	Power
43	13499/11	Amin Brothers Engineers Pak Private Limited and others v. Federation of Pakistan and others	Power
44	13498/11	Redco Pakistan Limited v. Federation of Pakistan and others	Power
45	13497/11	M.R. Electric Concern Private Limited and others v. Federation of Pakistan and others	Power
46	13496/11	Creative Engineering Private Limited and others v. Federation of Pakistan and others	Power
47	14287/19	OTO Pakistan Private Limited and others v. Federation of Pakistan and others	Oil and Gas
48	15621/09	Askari Cement Limited v. Federation of Pakistan and others	Cement

49	15622/09	Attock Cement Pakistan Limited v. Federation of Pakistan and others	Cement
50	15629/09	Facto Cement Limited v. Federation of Pakistan and others	Cement
51	15762/09	Al-abbas Industries Cement Limited v. Federation of Pakistan and others	Cement
52	15630/09	D.G. Khan Cement Limited v. Federation of Pakistan and others	Cement
53	15631/09	Cherat Cement Limited v. Federation of Pakistan and others	Cement
54	15637/09	Lucky Cement Limited v. Federation of Pakistan and others	Cement
55	15619/09	Flying Cement Company Limited v. Federation of Pakistan and others	Cement
56	15614/09	Gharibwal Cement Company Limited v. Federation of Pakistan and others	Cement
57	15616/09	Poineer Cement Limited v. Federation of Pakistan and others	Cement
58	15493/09	Jamshoro Joint Venture Limited v. Federation of Pakistan and others	Oil and Gas
59	22965/11	Elmetec Private Limited v. Federation of Pakistan and others	Power (transformers)
60	20729/12	Canal View Diagnostic and others v. Federation of Pakistan and others	Healthcare
61	21106/12	Urgent Medical Diagnostic Center and others v. Federation of Pakistan and others	Healthcare
62	RP 16/13	Institute of Chartered Accountants of Pakistan v. Federation of Pakistan and others	Accountancy

63	33407/13	Karrs Paint Industries Private Limited v. Federation of Pakistan and others	Paints
64	4412/13	Institute of Chartered Accountants of Pakistan v. Federation of Pakistan and others	Accountancy
65	39344/15	Medical Diagnostic Center and others v. Federation of Pakistan and others	Healthcare
66	26929/15	Educational Services Private Limited and others v. Federation of Pakistan and others	Education (School fees)
67	30824/15	City Schools Private Limited and others v. Federation of Pakistan and others	Education (School fees)
68	24863/15	Master Paints Industries Private Limited and others v. Federation of Pakistan and others	Paints
69	25296/15	Nestle Pakistan Limited and others v. Competition Commission of Pakistan and others	Infant Milk, Juices
70	89423/15	CITROPAK Limited v. Federation of Pakistan and others	Food
71	104015/17	Nestle Pakistan Limited and others v. Competition Commission of Pakistan and others	Infant Milk, Juices
72	241159/18	Mezan Beverages Private Limited v. Federation of Pakistan and others	Juices and Energy drinks
73	63067/19	Friesland Campina Engro Pakistan Limited v. Federation of Pakistan and others	Infant Milk, Juices
74	8772/20	Urban Developers Private Limited v. Federation of Pakistan and others	Developers
75	6532/20	Millanium Land Development v. Federation	Real estate

		of Pakistan and others	
76	12540/20	At Tahur Limited v. Competition Commission of Pakistan and others	Dairy
77	129136/18	Vision Developers Private Limited v. Competition Commission of Pakistan and others	Delevopers
78	29868/20	Pakistan Red Crescent Society and others v. Competition Commission of Pakistan and others	Developers
79	7064/20	Al-Kabir Town Private Limited Company v. Federation of Pakistan and others	Developers
80	21105/12	GCC Approved Medical Diagnostic Center and others v. Federation of Pakistan and others	Healthcare
81	39346/15	GCC Approved Medical Center Association and others v. Federation of Pakistan and others	Healthcare
82	20280/12	GCC Approved Medical Center Association and others v. Federation of Pakistan and others	Healthcare
83	28090/12	Khawaja Saad Saleem and others v. Federation of Pakistan and others	Telecom
84	4574/12	All Pakistan Cement Manufacturers Association v. Federation of Pakistan and others	Cement
85	15624/09	All Pakistan Cement Manufacturers Association v. Federation of Pakistan and others	Cement
86	3641/14	Uneeza Mehboob v. Federation of Pakistan and others	Accountancy
87	19204/15	Toyota Sahara Motors Private Limited v. Federation	Automobile

		of Pakistan and others	
88	14816/13	National Transmission Company v. Federation of Pakistan and others	Power (Transformers)
89	17702/10	Riaz Ahmad and Company v. Federation of Pakistan and others	Accountancy
90	24570/16	Attock Petroleum Limited v. Federation of Pakistan and others	Oil and Refineries
91	31892/12	Pakistan Telecommunication Company Limited v. Federation of Pakistan and others	Telecom
92	221542/18	Transworld Associates Private Limited v. Competition Commission of Pakistan and others	Telecom

Sd/-

Ayesha A. Malik, J.

Sd/- Muhammad Sajid Mehmood  
Sethi, J.

Sd/- Shahid Jamil Khan, J.

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#### Schedule-B

Details of Appeals mentioned in judgment

Dated 26.10.2020 passed in W.P. No.9518/2009

Sr. No.	CCA Nos.	Parties Name
1	CCA1/10	LPG Association of Pakistan v. Competition Commission of Pakistan and others
2	CCA 2/10	Jamshoro Joint Venture Limited v. Competition Commission of Pakistan and others
3	CCA 3/10	Maple Leaf Cement Factory Limited v. Competition Commission of Pakistan and others
4	CCA04/10	Flying Cement Company Limited v. Competition Commission of Pakistan and others
5	CCA05/10	Gharibwal Cement Company Limited v. Competition Commission of Pakistan and others

6	CCA06/10	Al-abbas Cement Industries Limited v. Competition Commission of Pakistan and others
7	CCA07/10	Dewan Cement Limited v. Competition Commission of Pakistan and others
8	CCA08/10	Poineer Cement Pakistan Limited v. Competition Commission of Pakistan and others
9	CCA09/10	Cherat Cement Company Limited v. Competition Commission of Pakistan and others
10	CCA10/10	Lucky Cement Limited v. Competition Commission of Pakistan and others
11	CCA11/10	DG Khan Cement Limited v. Competition Commission of Pakistan and others
12	CCA12/10	Facto Cement Limited v. Competition Commission of Pakistan and others
13	CCA13/09	All Pakistan Cement Manufacturers Association v. Competition Commission of Pakistan
14	CCA14/10	Fauji Cement Company Limited v. Federation of Pakistan and others
15	CCA15/10	Dandot Cement Company Limited v. Federation of Pakistan and others
16	CCA16/10	Kohat Cement Company Limited v. Federation of Pakistan and others

Sd/-

Ayesha A. Malik, J.

Sd/- Muhammad Sajid Mehmood  
Sethi, J.

Sd/- Shahid Jamil Khan, J.

MWA/L-9/L Order accordingly.

