

COMPETITION LAW: ISLAMIC PERSPECTIVES

Abstract

Islam is concerned with pragmatics of life and is designed to achieve a balance between human bodily requirements, spirit and reason. Being a comprehensive religion it covers *shariah*, *akhlak* (manners), *muamalat* (dealings) and *aqidah* (faith). This paper attempts to discuss competition laws and related issues in the light of Islamic perspectives. Therefore towards this end this paper in the first instance traces the competition law principles which are enshrined in holy Quran, traditions of the Prophet and the juristic principles *viz.* *al-Hisba*, *ihtikar*, *maslahah*, *sadd al-dhara'i*, *et al.* derived in the interest of public by the eminent Islamic jurists from time to time. Thereafter it briefly analyses how the contemporary competition legislations in the Muslim countries are formed on the basis of these principles.

1. Introduction

The emergence and evolution of competition law in modern history was a gradual process. The competition laws were adopted initially in the developed countries and later in the developing countries. However, the evils associated with the trade were not easy to deal with. Adam Smith in his acclaimed book, *The Wealth of Nations*,¹ cautioned the society about the threats of unfair trade practices like monopoly and abuse of dominant position.

With the advent of globalization, the trade and commerce between the nations grew immensely. However, owing to the disparity between the nations with regard to the technology and economy necessary for trade it was realized immediately that any trade carried in the absence of rules of competition rules may result in considerable adverse consequences to the nations involved in such trade. This is because trade liberalization only removes public barriers (quotas, custom duties etc.). Private barriers (abuse of dominance, cartels, etc.), on the other hand, given the chance of their occurrence in any trade relationship, lead to trade distortion and can only be controlled by competition laws to some extent.²

Consequently, trade agreements that were entered by nations in the past two decades –regional or bilateral – included competition rules. The adoption of competition rules in trade by developed countries inspired the developing countries to pass their own competition laws. Competition law is also seen as a mechanism for dealing with

1 Adam Smith, *The Wealth of Nations*, William Strahan, Thomas Cadell, London 37 (1776).

2 World Bank '*Competition Law and Regional Economic Integration- An Analysis of the Southern Mediterranean Countries*' World Bank Policy Research Working Paper No. 35, Washington D.C. 15 (2004).

poverty in developing countries because it can help keep prices as low as possible and as such enables the poor to have access to resources which are usually beyond their reach.

The purpose of the paper is to discuss competition laws and related issues in the light of Islamic perspectives. Therefore towards this end this paper in the first instance traces the competition law principles which are enshrined in holy Quran, traditions of the Prophet and the juristic principles derived in the interest of public by the eminent Islamic jurists from time to time. Thereafter it briefly analyses how the contemporary competition legislations in the Muslim countries are formed on the basis of these principles. A humble attempt is also made to provide an overview of the comparison of the principles of Sharia on competition law with Indian as well Muslim countries' laws on hoarding, monopoly, black marketing and unfair as well as restrictive trade practices.

II Islamic Law on Competition

Islam as a system of life provides guidelines in each and every walk of life pertaining to individual, economic, moral, politics and intellectual property rights. It covers all aspects of life including *shari'ah* (law), *akhlak* (morality), and *aqidab* (faith).

Sharia aims at protecting some significant human values namely *Deen* (Religion), *Aqal* (Reason), *Nasab* (Linage), *Khasia* (Property) and *Hayat* (life). The purpose to protect these values is to maintain justice amongst mankind. And therefore, unjust behaviour with other human being is not permitted in Islam. Thus, while discussing the issue of unfair treatment, we briefly discuss the Islamic perspective on the competition law and policy.

In the days of the Prophet, *Ablaf* and *Fudul* were well known by group of well-off merchants intended to protect the business monopoly and to sustain virtues, protect poor and needy³. The principles of competition law are already in existence in Islam and most importantly it is also constitutive of prohibition of monopolies. In a tradition reported in *al-Muslim*, where Prophet declared that: "No body hoards except the wrongdoer."⁴

Quran is replete with multiple provisions which promote justice and fairness. To illustrate, the Quran ordains:

O ye who believe! Stand out firmly For Allah, as witnesses to fair dealing
and let you not The hatred of others To make you swerve To wrong and

3 Razali Nawawi, *Islamic Law of Transactions 2* (CT Publications, Kuala Lumpur 1999).

4 Al-Tirmidhi. *Sabih* Vol. VI p. 23 in *id.* at 25.

depart from Justice. Be just: that is Next to Piety: and fear Allah. For Allah is well-acquainted with all that ye do.⁵

In the Quran it is further stated that,

And O my people! Give Just measure and weight, nor withhold from the people the things that they are due: Commit not evil in the land with intent to do mischief.⁶

It is narrated in *Ibnu Majah*, the famous book of *Hadith* wherein Prophet said:

He also keeps back grain from sale for forty days only to sell it at higher prices, sale it that such a man is not aware of the existence of God or that God has cut himself off from him.⁷

Famous progressive jurist Ibn Taimiyah has also commented that cases wherein price in the market can't reasonably fixed by the implementation of general principles of marketing in order to fulfil the needs of the people, then the price should be fixed for the welfare of the people in a balanced manner, neither more nor less⁸.

The sharia principles also promote market competition. For instance, price fixing and monopoly have been prohibited as early as the time of the Prophet Muhammad. Therefore, a great similarity can be ascertained between modern competition law concepts and sharia principles relating to market competition. Sharia principles on competition were not founded on the idea of absolute right of private ownership and engagement in private enterprise. Thus, in these principles priority is given to the concept of trusteeship over the concept of ownership. According to these principles individual freedom is subject to societal regulation and control. The man owns the property as a trustee in the interest of community at large.

The principles derived by the Islamic jurists in this regard are generally facilitative of free market and normal market conditions, the forces of demand and supply as well as price control. Ibn Taimiyah explained,

Rise and fall in prices is not always due to an injustice (*ẓulm*) by certain individual. Sometimes the reason for it is deficiency in production or decline in import of the goods in demand. Thus if desire for the goods increase, its price rises. On the other hand, if availability of the goods

5 Quran V:8.

6 Quran XI:85.

7 Said Sabiq, III *Fiqh Sunnah* 119 (Dar Fikr , Beirut, 1995).

8 See Maher M. Dabbah, *Competition Law and Policy in the Middle East* 120-27 (Cambridge, 2007).

increase and the desire for it decrease, the price comes down. This scarcity or abundance may not be caused by the action of any individual, it may be due to a cause not involving any injustice, or sometimes, it may have a cause that does not involve injustice. It is Almighty God who creates desires in the hearts of people.⁹

Main Principles relating to Competition law

***Al-Hisba* (Regulation of Competition)**

Sharia not only perceives the need for an institution to regulate competition but also provides one. *Al-Hisba* is one such institution which has come into existence to help regulate the society and economy. *Al-Hisba* maintains public law and order and acts as a check against dishonesty and malpractice amongst the behaviour of the buyers and sellers in the market. The responsibilities of *hisba* comprise of checking for bad workmanship or faulty measures or discrepancy in quality. Since markets have always been prone, to *hisba* also ensure against any such arbitrary manipulation of the market, by resorting to hoarding, under-utility, over-charging, obstructing supplies, etc. In other words, *Al-Hisba* is responsible for the protection of the *Suq* (market) and its existence is to foresee injustice in the market¹⁰.

Even though sharia law advocates free market, intervention in the regulation of prices and market conditions is only allowed in cases of market failure. In such cases, sharia principle mandates that, it is duty public authorities to act for the protection and furtherance of interest of the people. Therefore, if dominant player in the market, charges prices which all outrightly excessive or unfair, or fixed through anticompetitive agreements or other forms of collusion between the market players, it becomes incumbent on the state to intervene in order to rectify such anomalies in the price. Maximizing consumer welfare towards eradicating the sufferings of affected people is the paramount principle upon which such a duty is based.

Both sharia as well as modern man-made principles on market competition talk about anti-competitive talk about anti-monopoly laws and law of mergers. Sharia. In true sense sharia law promotes free market but monopoly and price fixing are prohibited as these may cause injustice to the people.

9 Abdul Azim Islahi, *Economic Concepts of Ibn Taimiyah* 88-89 (The Islamic Foundation, Leicester UK, 1988).

10 Ibn Taimiyah, *Public Duties in Islam The Institution of the Hisba*, as cited in *Mediterranean Journal of Social Sciences* Safinaz Mohd Hussein et al. 5 (23) "Is Fair Market Competition Regulated under Syariah Law?" 156 (2014).

It is also ordained in the Quran that “Islam concerns on man’s living and his livelihood”¹¹. This verse lays down that there is prohibition to accumulation of wealth in the hands of the few prohibited. Whatever leads to the establishment of a just society should be observed and provided. Justice is constitutive of equality of all men before the law, equality in exercise of basic human, economic and social rights. The provisions of Islamic law are two-fold: the first deals with the matters relating to man’s duty to God and the second to the man’s duty to his fellow men. If there were no such inherent competition law or policy in Islam the economic situation would have further deteriorated and the malaise of corruption and unhealthy economic activities would have become rampant. Islam strongly condemns such anti-competitive practices and this condemnation is to ensure the effectiveness of economic administration and also to create a just and fair society on the lines of Islamic teaching.

***Ibtikar* (Hoarding)**

The issue of competition in Islam is discussed in the principle of *ibtikar*. *Ibtikar*, principally, is defined as “...hoarding up grain with the object of raising the price”¹². It is derived from the word *hakara* which refers to *al-zulm* or injustice. It refers to the act of hoarding goods (trade) until its price witness a rise. The Maliki School goes further as it states that the prohibition on *Ibtikar* is not limited to goods but to services so long as it is something that is needed by the society. The prohibition of *ibtikar* is recognized from the Quran wherein it is laid down:

And whoever comes with an evil deed - their faces will be overturned into the Fire, [and it will be said], “Are you recompensed except for what you used to do.”¹³

It further ordains:

Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice. Excellent is that which Allah instructs you. Indeed, Allah is ever Hearing and Seeing.¹⁴

It also declares:

We have already sent our messengers with clear evidences and sent down with them the Scripture and the balance that the people may maintain

11 Quran XI:6

12 Ichtiar Baru, *Ensiklopedia Hukum Islam* (Penerbit PT Van Hoeve, Jakarta, 1996) as cited in *Supra* note 10 at 155.

13 See, Quran XXVII: 90

14 Quran IV: 58.

[their affairs] in justice. And we sent down iron, wherein is great military might and benefits for the people, and so that Allah may make evident those who support Him and His messengers unseen. Indeed, Allah is Powerful and Exalted in Might.¹⁵

Apart from the above Quranic verses there were even traditions or *hadith* of the Prophet Muhammad putting great emphasis on justice. Sharia principle explicitly forbids *ibtikar*. This is prescribed in the tradition of the prophet which says: "...whoever with holds cereals that they may become scarce and dear, is a sinner..."¹⁶ A. Mahyuddin stresses that

the fact that *ibtikar* or the act of monopolizing supply (hoarding) to increase price is forbidden under sharia law. In order to ensure just dealings amongst members of the society the sharia principle propagate the use of just and fair market price. That is why such act of monopolizing supply to increase market price with view of maximizing profit is prohibited and against public interest¹⁷.

Next example is concealment or hoarding of the property or *iktinaḥ*. *Iktinaḥ* refers to a scenario were large stocks of goods in warehouses all withhold with an ulterior aim of creating artificial shortages and consequently withholding them from sale. The motive is to earn profit by reducing the supply in relation to actual demand. The underlying motive is able to earn profit by reducing the supply in relation to the actual demand. Second caliph, Umar devised of strict way of penalising such traders by imposing the additional amount of the monetary payment paid by the offender to the victim. Islam is prohibitive of competition distorting deeds such as economic crisis and inflation and this is also evident from a decision by Umar wherein he imposed penalty on the person who concealed the property.

Ibtikar also includes any kind of effort which may influence the price of the goods or services through monopolizing the production of goods or via immoral or unethical competition. Therefore, essentially, the act of monopoly is forbidden particularly, when it affects the interest of the consumers or public at large. Sharia principle regards such act as against public interest and whenever individual rights clash with public interest, the latter prevails. Hence, sharia law recognizes free market and prohibits anti-competitive acts of monopolizing and price fixing. These are all

15 Quran LVII:25.

16 Muhammad Ali, *A Manual of Hadith* Chapter XIII No. 11 (Lahore, 1944).

17 Ahmad Mahyuddin Ahmad Hassan, *Amal Sharikat al-istithmar al-Islamiyyah fi al-suq al-Alamiyyah* (Bank al-Barakah al-IslamililIstithmar, Bahrain, 1975) as cited in *Supra* note 10 at 155.

common values shared between sharia as well as modern man-made competition law. Both are clearly against monopoly which clearly discourage competition, lead to an abused dominant position or market power. Both principles also disapprove price fixing being usually a *per se* prohibition under competition law.

Other Significant Juristic Principles that can be applied to promote Competition

In discussing the Islamic law perspective on the competition law and policy, reference should also be made to the several basic Islamic principles that can be applied in promoting fair-trading and healthy competition. The scope of the discussion on the subject will confine to the doctrine of *maslahab*, *saddz'arai'*, *suisti'malal-haq*, *maqasidsbaria*, *qawaid fiqh* and *tawbeedic* approach.

Maslahab

Technically it refers to the need to balance between private interests and the larger public interest, which is harmonious with the (*maqasid*) objectives of the *sharia*¹⁸. It applies to either right of Allah or mankind with the purpose of protecting the two rights, the right of mankind which encompasses both society and individual rights. Protection of public interest is given primacy in Islam and it is necessary for preservation of the objective of law. Such preservation is known as *maslahab* and failure to preserve is *mafsadah*. Illustratively the principle of *maslahab* relating with the competition law and policy, reference can be made to the principle of *tasi'ir* or price regulation¹⁹.

There is a monetary penal provision for traders who violate the law. Such law is to guard public from effects of inflation, which may have adverse economic impact on them. This matter promotes the *maslahab*. In the absence of such law the traders will be left free to fix the price whenever they wish to maximize their profit without taking into consideration public interest and this will lead to consequential inflation.

Comparisons can be made with the recent competition law, and in this regard we may refer to article 85 (1) of the Treaty of Rome. This provision prohibits trading which is incompatible with the common market agreement, competition within the common market and which may affect trade between member states and these include agreement to fix prices, to limit production, markets or technical developments, to share markets, to apply dissimilar conditions to equivalent transactions and to make the conclusion of contracts subject to acceptance by other parties of supplementary obligations with no connection with the contract.

18 Muhammad Hashim Kamali, *Principles of Islamic Jurisprudence* 267 (Ilmiah Publishers Sdn. Bhd. Kuala Lumpur, 2nd Ed, 1998).

19 Said Sabiq, III *Fiqh Sunnah* 117-18 (Dar Fikr, Beirut, 1995).

The comparison between the *maslahah* principle and the recent competition law as mentioned above reveals the largesse view of Islamic law particularly pertaining to commercial dealings. The implementation and enforcement of the competition law are in agreement with the principle of *maslahah* i.e. to uphold public interest. It is explicit from the above principle that the competition law and policy is not only inherent in Islam but is facilitated and recommended by Islam.

Sadd Al-Dharai'

Islam prohibits any kind of unfair competition through the concept of blocking the means to an evil deed (*sadd al-dharai'*)²⁰. Certain conducts which benefit the society are approved and prohibits those which are detrimental to the society. We find the following legal maxims in this regard:

(i) any harm which occurs need be redressed. (ii) What is perceived as greater harm should be avoided even if resulting in inconsequential minor harm. (iii) General or unspecified harm should be given priority to specific harm. (iv) The avoidance of harm takes precedence over the promotion of interest. (v) During emergency normal rules of legality are waived and resort to unlawful acts are allowed.

If the consequences of blocking lead towards benefits, they are desirable provided they are in consonance with the quest for its goals. And if the consequences are directed towards evils, they are forbidden as corresponds to the prohibition of these evils, even if the amount of prohibition is less in the means.²¹ In a *hadith* reported in *al-Tirmidhi* as mentioned earlier in which Prophet declared that: *He who monopolizes is not but a wrongdoer*.²²

The above principle provides recognition of the competition law in Islam. The enforcement of the competition law principles and policy is intended to prevent damage to the community. In absence of law to regulate the conduct of the businessmen and traders, great harm and damages may become a recurrence in the society. Thus, *Sad al-Dharai'* is in fact in agreement with the famous saying "prevention is better than cure".

Maqasid Shariah

Maqasid Shariah denotes the protection of the five interests of the Muslim, i.e. *al-din* (Islamic religion), *al-nafs* (soul), *al-'aql* (mind), *al-nasl* (descendants), and *al-mal* (property). Islam guarantees justice so that everyone gets his due for his contribution

20 *Supra* note 18 at 311.

21 See generally, Abdul Karim Zaidan, *Al-Wajiz fi Usul Fiqh* 245-247 (Muassasah Risalah, Beirut, 1994).

22 *Supra* note 3.

to society and that there is no exploitation of one individual by another. The Quran urges that “withhold not things justly due to others”²³. It implies that every individual must get what is his due provided it does not deprive others of their share. The Prophet also reminded that “beware of injustice for injustice will be equivalent to darkness on the Day of Judgment”²⁴.

The above Quranic verses and Prophetic traditions do emphasize that Islam totally rejects any unfair practice such as unhealthy competition. *Maqasid shari’ah* may be referred to as the principle of overbidding in others people’s sales. The Prophet, however, forbade this practice as he said that: “one of you should not make offers over his brother’s transaction”²⁵. This activity refers to where the sale transaction is in the stage of choice and there was a seller and the buyer that have agreed on a specific price. Third person comes and outbids the buyer with the different price altogether. It is narrated in the famous book of tradition *Muslim* wherein Prophet said:

Do not envy one another; do not inflate prices by overbidding against one another; do not hate one another; do not harbour malice against one another; and do not enter into commercial transaction when others have entered into that (transaction); but be you, O slaves of Allah, as brothers. A Muslim is the brother of another Muslim; he neither oppresses him nor does he look down upon him, nor does he humiliate him. Piety is here, (and he pointed to his chest three times). It is enough evil for a Muslim to hold his brother Muslim in contempt. All things of a Muslim are inviolable for his brother- in-faith: his blood, his property and his honour.²⁶

The law of competition is clearly in agreement with the principle of *maqasid sharia* as mentioned in *al-Quran* and *hadith*. This principle is based on the spirit of injunctions found in *al-Quran* and *al-Sunnah* and therefore ensures that the five interests of the Muslims i.e. Islamic religion, soul, mind, and descendants and the property are protected.

23 Quran XXVI: 183.

24 Ahmad Ibn Hambal, *Mosnad Ahmad* #5798 (Urdu Translation: Muhammad Zafar Iqbal, Maktaba Rahmaniya, Lahore, n.d.). Also see *Sabeeh Al-Bukhari*, #2447.

25 *Sabih Muslim* Kitab Al-Buyu (Chapter on Transactions) Book 010, Number 3621 available at <http://www.iupui.edu/~msaiupui/010.smt.html>. (Last visited on 1/11/2017).

26 *Muslim* # 235, Abu Zakaruya Yahya Bin Sharaf An-Nawawi, *Riyad Us-Salibeen* (The Paradise of the Pious).

Qawaid Fiqhiyah

There are few relevant legal maxims related with the competition law and policy. For example, *al dhararyuzal* or any harm, which occurs, need be redressed.²⁷ Another maxim pertaining to competition law and policy is *Yatahamm aluldharar al kbafif li daf I al dhararalashadd* which denotes that what is perceived as greater harm should be avoided even if resulting in inconsequential harm.²⁸ Similarly another maxim *Taqdim al maslahab al ammabalaalmaslahab al kbassab* means that general or unspecified harm should be given priority to specific harm.²⁹ Further, the maxim *Dafi al mafasidmuqaddimun al jalb al masalih* implies that the avoidance of harm takes precedence over the promotion of interest.³⁰ Lastly the maxim *Al dharurattubihulmahzurat* means in the event of dire needs, the normal rules of legality can be waived and resorting to unlawful act is allowed.³¹

The above popular legal maxims form the basis for the legality and the permissibility to enact legislation and enforce the law and policy pertaining to competition. These maxims provide supposed to be act as guidelines for the enforcement of competition law and policy and at the same time laying emphasis on the need to weigh relative benefits and loss.

Tawbeedic Approach

This approach is based on the philosophic foundation which accords value to every Muslim to obey Allah's commands and not to indulge in what He forbids. It means God's unity and sovereignty or faith of Allah. He is the creator of this universe and all creatures.³² Therefore, Muslims as servants of Allah in this world are subject to His laws, and they must submit their life wholeheartedly to Him alone.

In the background of *tawbeedic* approach, we have to comprehend the principle of *khilafah*, which can be defined as a man's role as God's vicegerent on earth. Since man is the *khilafah* of Allah on the earth every human being is under obligation to motivate every member in society to observe piety (*taqwa*) and to urge them not to act with falsehood, uphold the truth and protect the oppressed people from cruelty.

27 Abdul Karim Zaidan, *Al-Waiz fi Usul Fiqh* 383 (Muassasah Risala, Beirut, 1998).

28 *Id.* at 384.

29 *Id.* at 236-244.

30 *Ibid.*

31 *Id.* at 378-385.

32 Khurshid Ahmad, *Economic Development in an Islamic Framework* 171-190 (Islamic Foundation, Leicester, 1980); See also Masudul Alam Choudhury, *Contribution to Islamic Economic Theory* (Macmillan Press Ltd., London, 1986).

III Position in some Islamic countries and India

Malaysia

The Malaysian Competition Act was enacted in 2010 and came into force on January 1, 2012. Under the said Act, the Competition Commission of Malaysia was established. This Act applies to all commercial activities within and outside Malaysia that have a prejudicial effect on competition in any market in Malaysia.³³ The two key areas of regulation under the Act are- a prohibition on anti-competitive agreements and a prohibition on the abuse of a dominant market position. However, the Act does not apply to specific sectoral activities regulated under the Communications and Multimedia Act 1998 and the Energy Commission Act 2001.³⁴

Also, the Act does not deal with merger control which is a usual feature in competition law in many other jurisdictions. Though there is no exclusion of mergers in Malaysia, the Malaysian Competition Commission (MyCC) can consider that a merger agreement is restrictive of competition and challenge the transaction itself.

Saudi Arab

In Saudi Arabia some states have laws that deal with particular areas of competition law, such as telecommunications, however, there is an aspiration to adopt a comprehensive competition law regime.

Saudi Arabia adopted a Competition Law in 2004 and it came into effect in January 2005. It is applicable to all kinds of firms, i.e. any corporation or company doing business in Saudi Arabia and includes a non-Saudi entity also.³⁵ The Act, however, does not apply to public (i.e. government) corporations and fully-owned state enterprises.³⁶ The law prevents different kinds of behaviors such as anticompetitive agreements, abuse of dominant positions, and merger operations that adversely affect the level of competition.

Ten years later, in 2014, the Competition Council issued new legislation called the Implementing Regulation of the Saudi Competition Law. The Competition Law along with the associated Regulations and the Competition Rules make up Saudi Arabia's competition law regime at present and they are enforced by a Competition Council. The Council is a stand-alone agency and reports to the government on an annual basis.

33 See, Malaysian Competition Act (Act 712 of 2010), s 3(2).

34 *Id.* s 3(3).

35 See, Saudi Arabia Competition Law, Royal Decree No. M / 25, art 3.

36 *Ibid.*

UAE.

The first anti-trust and competition legislation was introduced in the United Arab Emirates (“UAE”) in October, 2012 through the publication of the UAE Federal Law No 4 of 2012 on the Regulation of Competition (the “2012 Law”) and has been in force since 23rd February, 2013. The primary aim of the enactment is to promote and protect competition in the UAE. The following regulations were subsequently introduced to set out the procedure and application of the 2012 Law:

- The Resolution of the Council of Ministers No. 37 of 2014, Concerning the Executive Regulation of the Federal Law No 4 of 2012 on the Regulation of Competition (the “2014 Regulations”); and
- The Cabinet Decree No 13 of 2016 on Ratios and Regulatory Controls related to Application of UAE Federal Law No 4 of 2012 for the Regulation of Competition and the Cabinet Resolution No 22 of 2016 concerning the small and medium enterprise organizations (collectively the “2016 Regulations”).

These regulations collectively form the competition Law regime in the country. The UAE Competition Law introduces standard international competition law principles and focuses on three key areas of economic activity: transactions leading to concentrations between businesses (merger controls), restrictive agreements, and actions that constitute an abuse of dominant position. However it does not specify which entities are regarded as dominant. But the position is quite clear after 2016 regulations.³⁷ Resolution No. 13 provides that a restrictive agreement will be deemed to have a “weak impact” if the total share of the parties does not exceed 10% of the *total transactions in the relevant market*. It also specifies that a “dominant position” accrues if the market share of the establishment exceeds 40% of the *total transactions in the relevant market*.

The UAE Competition Law applies to all entities operating in the UAE but does not include or apply to ‘small and medium establishments’ (SME). This has been clarified by the 2016 regulations. Res. 39 solution No. 22 sets out a “unified definition” of a SME for the purposes of UAE law and distinguishes between enterprises operating in the trading, manufacturing and services sectors. An establishment may meet the relevant criteria depending on the number of employees or annual revenues. The thresholds are relatively high - for example, an enterprise in the manufacturing sector

³⁷ Resolution Nos. 13 and 22 of 2016 with effect from 1 August 2016.

will qualify as “medium” with annual revenues of up to AED 250 million. In addition, it applies to any entity whose activities outside the UAE may affect competition in the UAE. A range of sectors and activities, including telecommunication, cultural activities, and land, sea, and air transport sectors are, however, explicitly excluded from the scope of the law.³⁸ Also, the Federal Government of the UAE or the local government of an Emirate (including “establishments owned or controlled by the Federal Government or any of the Emirates’ Governments”) are exempted from the application of the law.³⁹

Egypt

The Egyptian Competition and Prevention of Monopolies Law was adopted in 2005. The Law aims to ensure that economic activity does not prevent, cripple, or harm freedom of competition. Basically, the Law handles the behaviour of persons doing business in the market. A person’s market share shouldn’t constitute a violation unless one of the violations mentioned in the Law is committed. This corresponds with the very name of the Law, as it aims to prevent monopolistic practices, not monopoly.

The Law sets a number of rules that organize the economic activity of persons transacting in the market in general. This applies to natural and legal persons, economic entities, unions, financial associations and groupings, and groups of persons, regardless of their means of incorporation.

The provisions of the Law shall apply to acts committed abroad and likely to result in the prevention, restriction or harm of the freedom of competition in Egypt and which constitute crimes under the Law.⁴⁰ The provisions of this Law shall not apply to public utilities managed by the State and the agreements made by the governments to fix the price of one or more basic commodities upon a decree from the Cabinet of Ministers.⁴¹

38 Philip O’Riordan & Naji Hawayek, “UAE Competition Law: Cabinet issues Market Share Threshold” Clyde and Co. *available at*: <https://www.clydeco.com/insight/article/uae-competition-law-cabinet-issues-market-share-thresholds> (Last visited on 1/11/2017).

39 Annexure to Federal Law No. 4 of 2012 on the Regulation of Competition. Sectors, Activities and Businesses Excluded from the Provisions of the Federal Law No. 4 of 2012 on the Regulation of Competition.

40 Article 4 Chapter III of Federal Law No. 4 of 2012 on the Regulation of Competition.

41 Egyptian Law on the Protection of Competition and the Prohibition of Monopolistic Practices, Law No. 3 of 2005, art 5.

The Law prohibits a number of conducts that have negative impact on the economic activities namely agreements among competing persons in the relevant market, Vertical agreements, Abuse of Dominant Position.

India

In India, MRTP Act 1969 (Monopolies and Restricted Trade Practices Act), the predecessor of Competition Act, was enacted with the objective to prevent concentration of economic power, to provide for the control of monopolies and protect consumer interest. The Act was sufficient for the economic and trade milieu prevalent at that time. However, a law is needed to yield to the changing scenario on both economic and trade fronts.

Owing to economic liberalization undertaken by India a need was felt for an effective competition regime and therefore India chose to enact a new competition law called the Competition Act, 2002, pursuant to Articles 38 and 39 of the Constitution of India. The Competition Commission of India was constituted under the new Act and it promotes the implementation of the Act and most importantly it is engaged in creating awareness of competition law principles through its advocacy provisions. The Act has been amended recently in 2014.

The Indian pattern of the law is in line with prevailing pattern of modern competition laws, the Act seeks to:

- 1) Prohibit anti-competitive agreements, which determine prices or control or limit or share markets among players or result in bid rigging.⁴²
- 2) Prohibit abuse of dominance through unfair and discriminatory prices or conditions limiting or restricting production, denying market access, etc.⁴³
- 3) Regulate combination (acquisition, mergers and amalgamations etc.) that causes or likely to cause appreciable adverse effect on competition.⁴⁴
- 4) Entrust the Competition Commission of India the responsibility of undertaking competition advocacy, awareness and training about competition issues.⁴⁵

42 *Id.* art. 9.

43 The Competition Act, 2002 (12 OF 2003), art. 3.

44 *Id.* art. 4.

45 *Id.* art. 5.

The Act is exhaustive in defining exhaustively the concepts of enterprise, relevant market, anti-competitive agreements and mergers & acquisitions etc.

IV Comparison of Competition Laws of India and other Countries with Sharia

The main objectives of the Competition Law in India, as stated in the Competition Act, 2002 is the prevention of practices which cause adverse effect on competition. Promoting of competition in markets and to ensure the sustainability of such competition, protection of the interests of consumers and to ensure that there is freedom of Trade for other participants in the markets.

These objectives are well in line with the principles of *al Hisba* and *Ihtikar* which were used to regulate market behaviour detrimental to fair competition. *Ihtikar* means a single person or company being the only producer of a commodity either goods or service of which there is no close substitute available in the market. The objective of MRTP Act was also to control monopoly which is also covered in the concept *Ihtikar*. The Competition Act, 2002 although does not prohibit monopoly per se but the act of abuse of monopoly hence partially conforms to Islamic principles. Islam also promotes the concept of *su isti'mal al-haq*, which means prohibition of any exercise of rights that lead to the infliction of real harm to others. Islam discourages and condemns any act of abusing of rights. It is against the principle of Islamic justice, if someone monopolizes some business whereas the other traders are suffered because of the present Indian Competition law legislation thereby conforms to this Islamic principles.

Hoarding is also an aspect of unfair trade practices which was covered by MRTP, though not by Act of 2002. In this regard *ihhtikar* and *iktinaaz* as explained earlier referred to hoarding also which is reflected in the MRTP Act. The objective of the MRTP Act was to promote fair market competition is actually in accordance with the guidelines stipulated under the *qawaid fiqh*.

A *hanbali* Scholar Abin-Alqim considers monopoly to be the purchase of specific goods or services to prevent other buyers from buying the same goods or services, which is unfair to other sellers.⁴⁶ Ibn-e-Tamiah claims that monopolization by a group of sellers that sell particular goods or provide to a specific group of buyers is a form of unfair behaviour because they do not allow other sellers to sell these kind of goods or service directly to the buyers.⁴⁷ Both these acts were also prohibited under MRTP as they come under anti-competitive agreements.⁴⁸

46 *Id.* art. 49.

47 Abin-Alqim, S., *The Rule Ways in The Islamic Policy* 226 (Al-Moasash Al- Arabiah, Cairo, 1961).

48 Ibn-e-Tamiah, *The Computation in Islam* 16 (Al-Mtbaah Al-Salafiah, Egypt, 1980).

The principle of *sadd al-dhara'* is one of the justifications for the recognition of the law of competition in Islam. The implementation of the competition law and policy is actually to prevent real harm to the community.⁴⁹ The concept of consumer interest in Competition Act of 2002 is in fact louds this Islamic principle.

Saudi Competition Law

The Sharia Law clearly prohibits monopoly which grants one private company the exclusive right to operate in the market. The Saudi Competition Law (2004) does not prohibit monopoly but it prohibits abuse of dominant position in Articles 4 and 5. This indicates that the Saudi Competition Law (2004) does not comply with the Sharia Law at this point.

The practice of 'exclusive purchasing or dealing' is prohibited under Article 5(4) of the Saudi Competition Law (2004) which is an example of abuse of dominant position. Also, arrangements such as 'exclusive agreements' are prohibited under Article 5(3) of the Saudi Competition Law (2004) because they constitute abuse of dominant position in the market. Both these acts are prohibited by Sharia as they are considered as monopoly.

The Sharia Law applies a flexible principle, which is known as the 'prevent damage' principle. This principle prohibits competitors' companies to cause harm to other consumers and competitors; it regulates two issues in competition rules—namely, anticompetitive agreements and merger operations. Generally, this indicates that the Saudi Competition Law (2004) follows the Sharia Law principles in regulating anticompetitive agreements and mergers aiming to prevent damage to others.

Malaysian Competition Act

The Malaysian Competition law acknowledges some of the principles of Sharia however, unlike Sharia it does not prohibit monopoly altogether but prohibits anti-competitive agreements and abuse of dominant position.

Egyptian Competition Law

The Egyptian legislator, likewise, seems to have been inspired by some of the principles of Sharia. This may be envisaged from the fact that the Egyptian Competition Law is entitled: Law on the Protection of Competition and Prohibition of Monopolistic Practices (*Qanoun Himayet Al-Monafsa Wa Mane Al-Momarasat Al-Ihtikaria*).⁵⁰ In fact, if

49 Musaed N. Alotaibi, "Does the Saudi Competition Law Guarantee Protection to Fair Competition? A Critical Assessment" available at: http://clok.uclan.ac.uk/2389/3/Al2otaibiMfinalthesis_complete.pdf (Last visited on August 10, 2017).

the legislator was to ignore the Sharia terminology of monopoly (*ibtikar*), the law would have been named as competition law or competition Act; as is indeed commonly used elsewhere. The practices prohibited by the act have considerable basis in principles of *ibtikar*, *al-bisba* as well as *masalah*.

V Conclusion

The foregoing discussions and elaborations reveal that most of the principles of Islamic law are in line with that of the modern competition laws prevalent in different countries especially those where Islamic law prevails. The *masalah* principle is applicable in most of the competition legislations wherein the larger public interest is protected from anti-competitive and unfair trade practices of companies and enterprises. *Sharia* also promote fair market competition. Indeed there are a lot of similarities in principles between *Sharia* and man-made principles on competition. However, these *Sharia* principles could further be given broad interpretation according to needs of the time and in public interest so as to ensure more effective and efficient enforcement.

India is a secular country having second largest population of Muslims and thus the personal laws i.e. Islamic laws are fully in tune with the central secular legislation. The principles of Islamic Jurisprudence no doubt are tested on the touch stones of the modern times and it assures the required flexibility and generosity to the legal system with its vast interpretations and the Indian Competition law is not an exception to it.

*Furqan Ahmad**

49 Zulkifli Hasan, "Islamic Perspective on the Competition Law and Policy" available at: <http://zulkiflihasan.files.wordpress.com/2008/07/islam-and-competition-policy.pdf> (Last visited on October 13,2 2017).

50 See Egyptian Law No. 3/2005 on the Protection of Competition and Prohibition of Monopolistic Practices.

* Professor, Indian Law Institute, New Delhi.