

**ELIMINATING DOUBLE JEOPARDY
IN DRUGS-RELATED OFFENCES**

Report No. 29

Eliminating Double Jeopardy In Drugs-Related Offences

The Registrar Supreme Court vide letter No P-Reg-75/98, SCA dated 23 November 1998 forwarded to the Secretary, Pakistan Law Commission a brief extract from the minutes of the meeting of the Chief Justices' Committee held on 14 November 1998 for consideration. The Reference asked the Secretary to examine as to whether trial in drug-related offences under the Customs Act 1969 and subsequently under the Control of Narcotic Substances Act 1997, tantamount to double jeopardy, prohibited under Article 13 of the Constitution? Accordingly, a draft paper was prepared by the Secretariat and presented before the Commission in its meeting held on 14 March 1999.

Having examined the paper, the Commission expressed the view that a person may be prosecuted for separate/distinct offences, under one or several laws; and further, that a transaction may constitute a civil wrong as well as one or more criminal offences, and to such cases, naturally, the doctrine of double jeopardy will not be attracted. However, it pointed out that both under the Constitution and the laws of land, double jeopardy is prohibited and no person may be prosecuted/punished twice for the same offence. In this regard, the Commission examined the implications of the newly enacted Control of Narcotics Substances Act 1997 viz-e-viz the earlier laws on the subject, namely, the Custom Act, 1969 and the Prohibition (Enforcement of Hadd) Order 1979. The Commission noted the

prevailing confusion/ambiguity in law, and asked the Law & Justice Division to examine the matter and issue necessary clarification to the effect. It stated that cases should be referred to the proper forum, so that there is no apprehension of abuse of the law. Alternatively, to remove the confusion, specific amendments may be added to the relevant sections of the Customs Act 1969 and the Prohibition (Enforcement of Hadd) Order 1979, to the effect that all cases concerning narcotics and narcotic and psychotropic substances are tried by the Special Courts, created under the newly enacted Control Of Narcotics Substances Act 1997. Necessary instructions to this effect may also be issued to the Station House Officers of the police stations to prepare and submit Challans in the proper forum. Such clarification, the Commission observed, is all the more necessary to prevent unscrupulous elements or drug-traffickers, tacking advantage of the confusion and getting away with lighter penalties. The Commission examined and approved the following report.

The relevant provisions relating to the prohibition of double jeopardy are as follows: -

1. Art 13 of the Constitution:

“No person-

(a) shall be prosecuted or punished for the same offence more than once; or

(b)

2. Section 403 of the Criminal Procedure Code 1898.

Person once convicted or acquitted not to be tried for the same offence. ---“(1) A person who has once been tried by a Court of

competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 237.

(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 35, subsection (1).

(3) A person convicted of any offence constituted by any act causing consequences which together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequence had not happened, or were not happened, or were not known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for any other offence constituted by the same act which he may have committed if the court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897, or section 188 of this Code.

Explanation. The dismissal of a complaint, the stopping of proceedings under section 249 or the discharge of the accused is not an acquittal for the purpose of this section”.

3. Rule 26 of the General Clauses Act 1897

Provision as to offences punishable under two or more enactment.

“Where an act or omission constitutes an offence under more enactments, then the offender shall be liable to be prosecuted and

punished under either or any of those enactments, but shall not be liable to be punished twice for same offence”.

It may be relevant to refer various drugs-related laws presently in force; these are:-

1. The Customs Act 1969;
2. The Prohibition (Enforcement of Hadd) Order 1979; and
3. The Control of Narcotics Substance Act 1997.

The relevant drugs-related provisions may be mentioned below:

The Customs Act 1969

“S. 2(s) of Custom Act defines smuggling. It says, “Smuggle” which means to bring into or take out of Pakistan, in breach of any prohibition or restriction for the time being in force, or evading payment of customs duties or taxes leviable thereon-

- (a) gold bullion, silver bullion, platinum, palladium, radium, precious stones, antiques, currency, narcotics and narcotic and psychotropic substances; or

Section 16 of the Act, prohibits or restricts importation and exportation of goods which reads as under:-

“The Federal Government may, from time to time, by notification in the official Gazette, prohibit or restrict the bringing into or taking out of Pakistan any goods of specified description by air, sea or land”.

This is a general prohibition and is distinct from prohibitions mentioned in Section 15 of the Act where different importation of various items is prohibited. Narcotics and psychotropic

goods, however are not listed in section 15.

Section 156 of the Act 1969 prescribes punishment of the offences as follows:

- (1) “Whoever commits any offence described in Column 1 of the Table below shall in addition to and not in derogation of any punishment to which he may be liable under any other law, be liable to the punishment mentioned against the offence in Column 2 thereof”.

According to Sl.No. 9 of the said Table offences u/s 15 and 16 are punishable by confiscation and person concerned in the offence is liable to a penalty not exceeding two times the value of the goods. It may be noted that punishment in the form of imprisonment of the said offence/contravention is not prescribed in this Act. As regards cognizance of the offence by a court, Section 185 A and 185 B provide as follows:

Section 185A

Cognizance of offences by Special Judges

- (1) Notwithstanding anything contained in this Act or any other law for the time being in force; a Special Judge may, within the limits of his jurisdiction, take cognizance of any offence punishable under this Act:-
 - (a) upon a report in writing made by an officer of customs or by an officer-in-charge of a police-station or by any other officer especially authorised in this behalf by the Federal Government;
 - or

- (b) upon receiving a complaint or information of facts constituting such offence made or communicated by any person; or
 - (c) upon his own knowledge acquired during any proceeding before him under this Act or under the Prevention of Smuggling Ordinance 1977.
- (2) Upon the receipt of report under clause (a) of sub-section (1) the Special Judge shall proceed with the trial of the accused.

Section 185B

Special Judge, etc. to have exclusive jurisdiction. --Notwithstanding anything contained in this Act or in any other law for the time being in force,-

- (a) no court, other than the Special Judge having jurisdiction, shall try an offence punishable under this Act;
- (b) no other court or officer, except in the manner and to the extent specifically provided for in this Act, shall exercise any power, or perform any function under this Act.

The Prohibition (Enforcement of Hadd) Order, 1979

- 2(g) "Intoxicant" means an article specified in the Schedule and includes intoxicating liquor and other articles or any substance which the Provincial Government may, by notification in the official Gazette, declare to be intoxicant for the purpose of this order.
- 2(h) "Intoxicating liquor" includes toddy, spirits of wine, wine, beer and all liquids consisting of or containing alcohol normally used for purposes of intoxication, but does not include a solid intoxicant even if liquefied.

Schedule

1. The leaves, small stalks and flowering or fruiting tops of the Indian hemp plant (*Cannabis Sativa L.*) including all forms known as Bhang, Siddhi or Ganja.
2. Charas, that is, the resin obtained from the Indian hemp plant, which has not been submitted to any manipulations other than those necessary for packing or transport.
3. Any mixture, with or without natural materials, of any of the articles mentioned in entries 1 and 2, or any drink prepared therefrom.
4. Opium and opium derivatives as defined in the Dangerous Drugs Act 1930 (II of 1930).
5. Coca leaf and coca derivatives as defined in the aforesaid Act.
6. Hashish.

S.3 Prohibition of manufacture, etc. of intoxicants.

- (1) Subject to the provisions of clause (2) whoever-,
 - (a) imports, exports, transports, manufactures or processes any intoxicant; or
 - (b) bottles any intoxicant; or
 - (c) sells or serves any intoxicant; or
 - (d) allows any of the acts aforesaid upon premises owned by him or in his immediate possession;

shall be punishable with imprisonment of either description for a term which may extend to five years and with whipping not exceeding thirty stripes, and shall also be liable to fine.

- (2) Whoever---

- (i) imports, exports, transports, manufactures or traffics in opium or coca leaf or opium or coca derivatives; or
- (i) finances the import, export, transport, manufacture or trafficking of opium or coca-leaf or opium or coca derivatives;

shall be punishable with imprisonment for life or with imprisonment which is not less than two years and with whipping not exceeding thirty stripes, and shall also be liable to fine.

Control of Narcotic Substances Act, 1997.

Now, coming to the Control of Narcotic Substances Act 1997; it may be stated that under Section 7, the import into Pakistan (ii) export from Pakistan (iii) transport within Pakistan or (iv) transship of narcotic drugs, are declared as offences, punishable u/s 9 of the said Act.

From the above discourse, it is obvious that, there are three different Courts established under the above-mentioned laws i.e.

- (i) Court of Special Judge under section 185B of the Customs Act, 1969 who has exclusive jurisdiction to try offences punishable under this Act;
- (ii) By the Court of Session if an offence falls under Article 8 of the Prohibition Order (drinking liable to hadd); and all other by a Magistrate section 30; and
- (iii) By the Special Courts established under section 46 of the Control of Narcotic Substances Act 1997.

The quanta of punishment in these laws are also variable, as reproduced below:

Under-Customs Act, 1969

Such goods shall be liable to confiscation and any person concerned in the offence shall also be liable to a penalty not exceeding two times the value of goods. (S No.156, Serial No 9 of the table of offences).

Under-Prohibition Order 1979

- (i) If a person is guilty of drinking liable to hadd shall be punished u/s 8 with whipping numbering eighty strips.
- (ii) Imprisonment of five years and with whipping not exceeding thirty u/s 3(I);
- (iii) Imprisonment for life or not less than two years and with whipping not exceeding thirty strips and shall also be liable to five u/s 3(2) ;and
- (iv) If the intoxicant in respect of which the offence is committed is heroin, cocaine, raw opium or coca leaf, and the quantity exceeds ten grams in the case of heroin or cocaine or one kilogram in the case of raw opium or coca leaf, the offender shall be punishable with imprisonment for life or with imprisonment which is not less than two years and with whipping not exceeding thirty stripes and shall also be liable to fine.

Under-Control of Narcotic Substances Act, 1997.

- (i) Imprisonment which may extend to two years, or with fine, or with both, if the quantity of the narcotic drug, psychotropic substance or controlled substance is one hundred gram or less;
- (ii) Seven years in case substance exceeds one hundred grams but does not exceed one kilogram;
- (iii) Death or imprisonment for life or imprisonment for a terms which may extend to fourteen years and shall also be liable to fine which may be upto one million rupees, if the quantity exceeds the limits specified in clause (ii) provided that if the quantity exceeds ten kilogram the punishment shall not be less than imprisonment for life (Sections 6,7,8).

There is a marked distinction between punishment awarded under the Customs Act 1969, Prohibition Order, 1979 and Control of Narcotic Substances Act 1997, in as much as where the former prescribes the penalty of confiscation of goods; the later two provides for heavier punishments including imprisonment, stripes and even death sentence. The Control of Narcotic Substances Act, 1997 give exclusive jurisdiction to the courts established u/s 72 of the Act and debars jurisdiction of any other Court including the Courts established under

Customs Act and the Prohibition Order 1979. Section 72 reads as follows:

“All prohibitions and restrictions imposed by or under this Ordinance (should be Act) on the import into, export from Pakistan and transshipment of narcotic drugs, psychotropic substance or controlled substance shall be deemed to be prohibitions and restrictions imposed by or under the Customs Act, 1969 (IV of 1969) and the provisions of this Act shall apply accordingly.

Provided that notwithstanding anything contained in the Customs Act 1969, or any other law for the time being in force, all offences relating to narcotic drugs, psychotropic substances or controlled substance shall be tried under the provisions of this Act”.

The provision is abundantly clear. It debars the jurisdiction of Custom Courts specifically and all other Courts generally to take cognizance of drugs related offences under any law for the time being in force.

In these circumstances, trial under the Customs Act 1969 and subsequently under the Prohibition Order 1979 or the Narcotics Substance Act 1997 is impermissible and illegal and would fall within definition of double jeopardy, prohibited under the Constitution and laws of the country. In this regard section 74 of the Control of Narcotic Substances Act 1997 further clarifies the situation by emphasising trial under the said new Act. Section 74 states:

Application of other laws.---If an offence punishable under this Act, is also an offence in any other law for the time being in force, nothing in that law shall prevent the offender from being punished under this Act.

Therefore perhaps there is a need for clarification by the Law and Justice Division to all authorities concerned in the country to the effect that under the Control of Narcotic Substance Act 1997, their jurisdiction stands abolished and substituted by the Special Courts constituted under the said new Act i. e. Control of Narcotic Substances Act 1997 and that all such cases should be transferred to the Special Courts. Adequate number of such Courts must be established for the purpose. All Police SHOs should also be directed to prepare the Challans of drugs-related offences with care and under relevant law to avoid the possibility of double jeopardy.

Alternatively, to clarify the ambiguity, specific amendments may be added to the Customs Act 1969 as well as the Prohibition (Enforcement of Hadd) Order 1979, as follows:

- (1) A new sub-clause (e) be added to Section 185B of the Customs Act 1969 as under:-

(e) Notwithstanding anything contained in this Act, all offences relating to narcotics, narcotic and psychotropic substances shall be tried by the Special Courts established under the Control of Narcotics Substances Act 1997.

- (2) The first proviso of Section 27 of the Prohibition (Enforcement of Hadd) Order 1979 may be repealed.