LAHORE HIGH COURT

BULLETIN

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FORTNIGHTLY CASE LAW BULLETIN

(16-11-2020 to 30-11-2020)

A Summary of Latest Decisions by the Superior Courts of Local and Foreign Jurisdictions on crucial Legal, Constitutional and Human Right Issues prepared by Research Centre Lahore High Court

DECISIONS OF INTEREST

1. **Supreme Court of Pakistan**
Inspector General of Prison v. Habib Ullah
Civil Petition No. 4-P of 202
https://www.supremecourt.gov.pk/downloads_judgements/c.p._4_p_2020.pdf

Facts: Respondent was convicted under sections 364-A, and 452, PPC, read with section 6 of the Anti-Terrorism Act, 1997, 13 of the West Pakistan Arms Ordinance, 1965 and 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979. He sought the grant of the remissions provided under the law, which was positively considered by the High Court.

Issue: Whether the respondent convicted and sentenced under Anti-Terrorism Act, 1997 ("ATA") and the Offences of Zina (Enforcement of Hudood) Ordinance, 1979 ("Ordinance") is entitled to be awarded remissions in his sentence under the law or otherwise?

Analysis: As far as the ATA is concerned, section 21-F of ATA bars the award of any remission in the sentence of a person convicted under the said enactment… The Offence of Zina (Enforcement of Hudood) Ordinance, 1979, on the other hand, provides no such bar on the grant of remission in the sentence of a person convicted for any offence thereunder. The remission granted under Article 45 of the Constitution would not be extended to convicts serving sentence under section 10 of the Ordinance. However, he is entitled to remission granted under the relevant prison rules but after serving his sentence for the conviction under the ATA.

Conclusion: ATA bars grant of remissions to persons convicted under any provision of said law. Similarly, the convict cannot be extended benefit of remissions granted under Article 45 of the Constitution, however, he is entitled to remissions granted under Prison Rules and that too after serving his sentence for conviction under ATA.

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2. **Lahore High Court**
Nadeem Ahmad v. Saif ur Rehman
RFA No.29853 of 2019
https://sys.lhc.gov.pk/appjudgments/2020LHC2834.pdf

Facts: The F.I.R for alleged theft of electricity against plaintiff was cancelled by the Area Magistrate on the recommendation of police which order was upheld in constitutional petition. Plaintiff filed a suit for recovery of damages against defendants. Issues were settled. Defendants filed an application u/o 7 rule 11 CPC. On this application, court again framed issues and without affording the oppertunities plaintiff to lead his evidence on issues framed earlier rejected the plaint by holding that it did not meet the essential ingredients to claim damages on account of malicious prosecution.

Issue: Whether the term "prosecution" as used in essential ingredients of "malicious prosecution" means criminal trial?

Analysis: Nowhere in the precedents on which the Trial Court has relied it has been stated that the term "prosecution" refers to a criminal trial, but in fact, no interpretation of "prosecution" has been made…. In order to curb the social evil of false complaints, it would be expedient to read and interpret the word "prosecution" in the sense of criminal proceedings instead of its technical sense which it bears in criminal law. Such use of the term "prosecution" will result that the foundation of the action for damages for malicious prosecution would lie, not in the abuse of the process of court, but in the abuse of the process of law. From this consideration, to found an action for damages for malicious prosecution based upon criminal proceedings the test would not be whether the criminal proceedings instituted on false and frivolous allegations had reached the court; the test would be whether such proceedings had reached a stage at which damage to the plaintiff resulted.

Conclusion: The test expounded has yet to be applied by the Trial Court and, therefore, prior to that stage it can neither be held that the plaintiff had no cause of action nor the suit was premature and thus not proceedable. Hence, application for rejection of plaint was dismissed and case was remitted for decision after evidence.

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3. **Lahore High Court**
Muhammad Kashif v. Defence Housing Authority
2020LHC2754
Writ Petition No.22681 of 2017
https://sys.lhc.gov.pk/appjudgments/2020LHC2754.pdf

Facts: Suit by plaintiff for cancellation of sale deed in favor of defendant. The plaintiff claimed himself owner of the suit land by virtue of sale deed and mutation sanctioned thereafter. The respondent's application for rejection of plaint was dismissed by the trial court but the order was reversed by the revisional court. Said order was assailed by the plaintiff in writ jurisdiction of the High Court on the ground that the court has to confine itself to the averments made in the plaint and it is not supposed to consider other material while deciding an application for rejection of plaint.

Issue: While considering the plea of rejection of plaint, should the court confine itself to the averments made in the plaint or can it also consider other material present on record?

Analysis: By invoking provisions of law especially, Order 7 Rule 11 of CPC, the learned revisional court rejected the plaint on the principle that as soon as the cause for rejection appears, the plaint should be rejected straightaway and such suit should be taken off the file at its very inception and defendant be relieved of vexatious litigation by discussing the averments of plaint alongwith other materials available on the record which on its own strength are legally sufficient to completely refute the claim of the plaintiff/petitioner.

Conclusion: Writ was dismissed.

4. **Lahore High Court**
Raheel Bahadur v. Province of Punjab
2020 LHC 2759
ICA No. 77 0f 2020
https://sys.lhc.gov.pk/appjudgments/2020LHC2759.pdf

Facts: Appellants' brick kilns, built on old methodology were stopped from operating from the 1st week of November till the end of December, by the Relief Commissioner, Punjab, in exercise of the powers vested under section 4 (2)(h) of the Punjab National Calamities (Prevention and Relief Act,1958). The appellants challenged that order through writ which was dismissed, against which the intra court appeal was filed.

Issue: i) Whether there is any illegality in the impugned order?
ii) whether the instant Intra Court Appeal is maintainable?

Analysis: i) The learned counsel for the appellants has been unable to point out any illegality or excess of jurisdiction having been committed by the learned Single Judge in Chambers while passing the impugned order, which is based on record and the facts and circumstances of the case. The Relief Commissioner Punjab has stopped operation the brick kilns built on old methodology for a limited period in accordance with the decision of the Punjab cabinet, section 4 (2)(h) The Punjab National Calamities (Prevention & Relief), Act 1958 (the Act), and orders of this court in Writ Petition No. 227807/2018. Since the Air Quality index of the province has deteriorated to polluted levels, there is a need to take all possible measures to control the rapid deterioration of air quality, which is responsible for multiple diseases. The Zigzag technology is relatively environment friendly; that's the rationale behind stopping operation of the brick kilns only on old methodology and not the ones on zigzag technology.

ii) In respect of words "original order" and "proceedings" used in section 3 of the Law Reforms Ordinance,1972 with reference to the maintainability of Intra Court Appeal, it has been settled in case of "Mst. Karim Bibi and others v. Hussain Bakhsh and another" (PLD 1984 Supreme Court 344) that word 'proceeding' would include every step taken towards further progress by which the machinery of law is put to motion and original order may be the order passed by the lowest officer or authority in the hierarchy. Therefore, the test is that as to whether the original order passed in proceedings is subject to an appeal or a revision under the relevant law, irrespective of fact whether the remedy of appeal or revision so provided was availed or not. The section 8 of the Punjab National Calamities (Prevention and Relief) Act, 1958 itself provides that a revision shall lie against the order of the Relief Commissioner, Punjab passed under section 4 of the said Act. As a revision is provided against the orders passed by the Relief Commissioner, Punjab, therefore, no Intra Court Appeal can be filed under section 3 of Law Reforms Ordinance, 1972.

Conclusion: ICA was dismissed in limine.

5. **Lahore High Court**
Defence Housing Authority v. Lubna Nizami
2020 LHC 2768
I.C.A. No. 142 of 2014
https://sys.lhc.gov.pk/appjudgments/2020LHC2768.pdf

Facts: Civil Appeal of the applicant was dismissed for non-prosecution on 30-10-2015. The applicant through the instant application prayed for setting aside the order for dismissal on the sole ground that he had substituted his counsel a few months earlier, but as no cause list was ever delivered to his counsel; no intimation about the fixation of the appeal was made to his counsel through any mode therefore he could not appear on the 26-10-2015 and then on 30-10-2015, when his appeal was finally dismissed for non-prosecution. During arguments it came to light that counsel for the applicant has not filed his affidavit along with the application.

Issue: i) Whether application for restoration can be filed without affidavit of the counsel?
ii) Whether the ground for non-appearance taken by the applicant is justified in law?

Analysis: i) The applicant has failed to append affidavit of his learned counsel with the application. It was necessary for the learned counsel to file his affidavit to explain his absence on the date when appeal was dismissed for default but only an official of applicant felt contended by filing his affidavit in routine. Affidavit of the official of applicant is of no avail to the applicant and he cannot depose about the alleged non-receipt of cause list by his counsel. In cases of dismissal for non-prosecution law is very much settled that counsel for the applicant is equally responsible to explain his absence as held in PLD 2008 SC 130.

ii) Law helps those who are vigilant and not those who are indolent (vigilantibus, non dormientibus, jura subsveniunt). Mere fact that a litigant has engaged a counsel to appear on his behalf does not absolve the litigant from all responsibilities. Litigant as well as his counsel was bound to see the appeal properly and diligently pursued and in case of any inaction on their part, opposite party cannot be made to suffer rather valuable right accrues in favour of opposite party/respondents. Moreover service of providing cause list to the Advocates by the Bar is only complementary and has no legislative backing. Counsel in a case is supposed to check the list of the cases fixed for hearing, displayed in the office, outside the Court Room or in the Bar Room. The applicant/appellant has failed to explain as to why the fixation of case was not checked up by him, his counsel or by any of the persons from the office of his counsel.

Conclusion: Both the issues were decided against the applicant and the application was dismissed.

6. **Lahore High Court**
Waseem Sajjad v. The District Health Authority
2020 LHC 2820
W.P.NO.6563 OF 2020
https://sys.lhc.gov.pk/appjudgments/2020LHC2820.pdf

Facts: The petitioners being employees of Education and Health Department challenged their transfers, postings, departmental proceedings through various writ petitions. It was the stance of the petitioners that after the establishment of District Education and Health Authorities under Punjab Local Government Act 2013 (the Act), they had ceased to be civil servants; hence bar created by article 212 of the Constitution will not apply on them. The Law officer representing the government refuted any change in the status of the petitioners.

Issue: Whether with the establishment of District Heath and Education authorities under the Act, the petitioners have ceased to be government servants?

Analysis: Indubitably before the establishment of District Education and Health Authorities, the petitioners being regular employees of Education or Health Departments were treated as civil servants. With the promulgation of the Act, District Education and Health Authorities were constituted. In terms of Section 2 (a) of the Act, Authority shall be a body corporate having perpetual succession and a common seal, with power to acquire and hold property and enter into any contract and may sue and be sued in its name. Sub-Section (2) of Section 92 bestows a power upon the government to appoint the Chief Executive Officer of an Authority through open competition on such terms and conditions as may be prescribed and until so appointed the Government may appoint an officer not below the rank of BS18 to look after the functions of the Chief Executive Officer, who shall be the Principal Accounting Officer of the Authority and shall perform such functions as are mentioned in the Act or as may be prescribed or as may be delegated by the Authority or as the Government may assign. Sec 93 of the Act enumerates the functions of District Education Authority whereas Section 94 illuminates the functions of the District Health Authority. Analysis of these sections makes it abundantly clear that District Education Authority and District Health Authority were constituted for administrative purposes to make the imparting of education as well as health more effective, transparent and beneficial. It is undeniable fact that no change in the status of the employees of the District Education Authority and District Health Authority was introduced expressly or impliedly in the Act or anywhere else. Though the Act was repealed through Punjab Local Government Act, 2019, however in Sec 312 of the latter Act, a saving clause was inserted with regard to the previous operation of the Act or anything duly done or suffered thereunder but District Education Authority as well as District Health Authority was excluded and omitted therefrom.

Moreover the definition of a “Civil Servant” given in sec 2 (b) of the Punjab Civil Servants Act, 1974 makes it clear that a person, who is a member of civil service of the Province or who holds a civil post in connection with the affairs of the Province is a “Civil Servant. Hon’ble Supreme Court in its judgments PLD 1996

SC 222, 1992 SCMR 1213 & 2013 SCMR 896 has interpreted the term 'Civil Servant' and the fact of their maintaining the status of the Civil Servant despite transfer corporations.

After having an overview of the principles laid down hereinabove, it is held that no change occurred with regard to the status of the petitioners, being civil servants. After holding so, no cavil left that all these petitions arise out of matter relating to the terms and conditions of service and as such bar under Article 212 of the Constitution of the Islamic Republic of Pakistan, 1973 shall attract with its full force and rigors.

Conclusion: Dismissed being hit by Article 212 of the Constitution of the Islamic Republic of Pakistan, 1973.

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7. **Lahore High Court**
F.A.O.No.111235/2017
Bahoo Dying Industries (Private) Limited v. SNGPL etc.
https://sys.lhc.gov.pk/appjudgments/2020LHC2799.pdf

Facts: The appellant assailed the order of trial court wherein his plaint against SNGPL for declaration and recovery of Rs. 1,088,398/-, an amount charged against it as arrears without any justification, was returned under Order VII Rule 10 CPC. It was held by the trial court that since the bill of appellant against the gas connection was generated by Sheikhupura Division of SNGPL, as per notified arrangement of the department, therefore the Gas Utility Court Lahore did not have territorial jurisdiction to try the suit.

Issue: Whether territorial jurisdiction of Gas Utility Court can be determined according to departmental notification of the SNGPL, which divided areas into zones for the purposes of management and generating gas bills, or the Gas Utility Court Lahore shall have jurisdiction to try the suit since the premises of appellant exist and cause of action accrued within the bound of district Lahore?

Analysis: Section 20 of the CPC lays down general rule regarding the legal fora for institution of suits relating to personal actions. It confers territorial jurisdiction upon a Court to decide all the cases in which the defendant resides, carries on business or personally works for gain, or in which the cause of action arises wholly or partly within the local limits of such Court. So, this provision brings forth choice for the Appellant and a right to select a forum out of the alternatives provided under this provision.

Section 4 of the Gas (Theft Control and Recovery) Act, 2016 provides that a Gas Utility Court shall have exclusive jurisdiction with respect to all matters covered by the Act and such jurisdiction can be determined on the basis of four elements i.e. Gas Utility Company, consumer, gas producer or offender. So, a Court within whose jurisdiction any one of the four elements exist, has jurisdiction to deal with the matter. As in the instant case, it is the consumer who has a grievance against

the Gas Utility Company, hence, the Appellant Company was entitled to file its suit in a Court where its premises is situated and cause of action accrued i.e. District Lahore.

The jurisdiction of the Gas Utility is decided as per Sections 3 and 4 of the Gas (Theft Control and Recovery) Act, 2016 and the same cannot be bestowed or taken away by departmental notification issued for the purposes of internal working arrangement since the province of Punjab is divided into civil districts and only the Government can fix the limits of such districts and determine the headquarters of each such district as per Section 4 of The Punjab Civil Courts Ordinance 1962 to exercise jurisdiction thereon.

It is settled law that an administrative notification cannot take away the rights conferred upon a person by a codified law. The notification cannot take precedence over the codified law and in case of any conflict between an administrative notification and a law, latter will prevail.

Conclusion: The Gas Utility Court, Lahore has the territorial jurisdiction to entertain and adjudicate upon the suit filed by the Appellant Company.

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8. **Lahore High Court**
LPG Association of Pakistan v. Federation of Pakistan etc.
WP No.9518/2009
https://sys.lhc.gov.pk/appjudgments/2020LHC2274.pdf

Facts: A number of petitioners from different commercial/industrial/business sectors challenged show cause notices issued to them by the Competition Commission of Pakistan **(CCP)** alleging the abuse of dominant position, cartelization, bid rigging, collusive bidding, price manipulation, deceptive marketing practices etc. and resultant proceedings thereafter. Further, they also challenged the constitutionality of the former Competition Ordinances as well as the Competition Act, 2010 **(the Act)** on the grounds of legislative incompetence of Parliament to legislate upon the subject of competition, creation of parallel judicial system in violation of Article 175 and 203 of the Constitution and providing the remedy of direct appeal before the august Supreme Court of Pakistan in violation of Article 185 of the Constitution. They also threw challenge on section 62 of the Competition Act, 2010 providing no saving, reviving or continuance clause.

Issue: **1)** Whether Parliament has legislative competence to enact the Act and the earlier Ordinances?
2) 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 Competition Appellate Tribunal **(CAT)** exercise judicial power which is in violation of the Mehram Ali and others v. Federation of Pakistan and others (PLD1998 SC 1445)?

3) Whether Section 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?

4) 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?

Analysis:

1) The Court answered this question by looking into the historical context of the legislative power of Parliament to make law on free trade and competition and after examining the provisions of Article 151 of the Constitution, 1973 with their corresponding provisions in former Constitutions held that 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. Having examined the scheme of the Constitution, 1973 on Federal-Provincial relationship as set out in Articles 141 to 159 it was observed that the answer to the question was in the Constitution itself, which mandated legislative competence through specific provisions. It was noted that legislative competence for Parliament came from several sources i.e the FLL of the Constitution, express provisions of the Constitution and 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.

The Court with reference to Article 18 reiterated that the Federation was not absolved of its duty to enforce fundamental rights notwithstanding the 18th Amendment 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; hence regulating competition becomes a matter related to the Federation which falls under Entry 58 of the FLL. The Court while dilating upon the phraseology of Article 151 held that, the subject matter of trade, commerce and intercourse throughout Pakistan was directly related to the Federation (Entry 58) and the Parliament could 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. In view of above, the Court **(Minority)** held that Article 151(1) of the Constitution however applied throughout the country and was not limited to inter-provincial trade and commerce…..Hence the Act could not be restricted in its application to inter-provincial issues as the Act applied to the whole of Pakistan. However, the **Majority**, **to the extent that only Parliament can legislate upon the subject matter**, disagreed. It was held by that Parliament though had power to legislate for ensuring "Free Competition" through Act but only to the extent of 'Inter Provincial Trade and Commerce'… The 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 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 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.

To the extent of question whether the subject of competition falls within Parliament's competence, the Court held that its structures and behaviour sought to be regulated had its nexus with trade, commerce, industry and intercourse throughout Pakistan. Therefore, the 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 Court concluded that the Federal legislature was competent to enact law on the subject of competition under the Constitution.

2) To answer this question, the Court as a prelude to discussion, referred to principles as enunciated in Mahram Ali and Sharaf Faridi cases on the point of independence of judiciary from the executive due to reliance of the petitioners on former case. The Court discussed what constitutes "judicial powers" and also referred to the "purpose test" to determine whether a forum exercising judicial power is court in constitutional context of the word or regulatory or administrative authorities. In order to understand the objective and nature of the functions of the CCP, the Court discussed various provisions of the Act, and concluded that the CCP was a regulatory authority, with a regulatory objective and its purpose was not to exercise judicial power but its scope was limited to being preventive and restorative. The Court found that by its very nature the CCP did not perform judicial functions akin to a 'court'.

The Court noted that though all three functions of the state required to 'hear and decide' issues based on facts but the question was that whether the function to 'hear and decide' controversies was merely incidental to the regulatory objective hence administrative in nature or could all instances of 'hear and decide' be termed as judicial function. To answer this question, the Court referred to the characteristics of judicial action enumerated in case reported as (PLD 1958 SC (Pak.) 437) decided by august Supreme Court and concluded that in order to understand judicial power, the purpose for which the forum was established, the process and procedures the forum follows, the finality given to its decision, the rights and liabilities decided upon and the manner in which a dispute was brought to the forum was relevant. The Court ultimately found that the CCP was not established as part of the judicial hierarchy of courts nor are 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 anticompetitive behaviour. Although the process followed by the CCP while hearing cases must follow due process, they were not bound by the formal laws of evidence and procedure… Hence while exercising its functions under the Act the CCP was not a 'court' under Article 175 of the Constitution.

As regards CAT, it was observed by **Minority** that as the nature of the orders passed by the CCP are preventive and corrective, aimed at restoring

competition, the nature of the order remained the same in the appellate process……CAT was not a 'court' established under the law as contemplated under Article 175 of the Constitution. The Act did not establish a court rather it established an Authority and an Appellate Tribunal….CAT 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. The Act established an Appellate Tribunal which had to adjudicate upon matters arising out of and pursuant to the matters set out in the Act, hence it was not working as a 'court' as contemplated in Article 175 or a tribunal under Article 212 of the Constitution.

To the extent of CAT, however, **Majority** did not agree with the conclusion that it was an Administrative Tribunal. It, after discussing principles of administrative law, nature of judicial function and relevant case law held that CAT'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. Hence it was a judicial tribunal, therefore, its separation and independence from executive was mandatory under constitutional command.

3) The Court observed that there were two parts to Entry 55; the second part dealt with the enlargement of the jurisdiction of the Supreme Court of Pakistan and the conferring of supplemental powers thereon. This had been made subject to that which was authorized by or under the Constitution, meaning that where the Constitution conferred authority on Parliament, it could enlarge the jurisdiction and power of the Supreme Court of Pakistan and conferred supplemental powers as well..…. Article 175(2) of the Constitution gave Parliament competence to confer jurisdiction on the courts by or under a law. …. When Article 175(2) is read with Entry 55 of the First Part of the FLL and Article 142 of the Constitution, Parliament was competent to make law enlarging the jurisdiction of the Supreme Court of Pakistan and conferring supplemental powers, where it was provided by or under the Constitution meaning that the constitutional jurisdiction of the Supreme Court of Pakistan could not be taken away but where the Constitution authorized Parliament on jurisdiction it could be enlarged. While referring to some other laws providing direct appeal to Supreme Court, the Court concluded that where the Constitution declared Parliament competent to make law which regulated jurisdiction, Parliament could confer jurisdiction on the Supreme Court of Pakistan through a law as per Entry 55 of the FLL.

4) The Court while relying on The Nawaz Khokhar Case (PLD 2000 SC 26) held that the circumstances of this case were similar with the instant cases 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 Court while discussing deeming clause further found that the only intent that had come forward with reference to Section 62 of the Act was 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 was clear, which was to give legal cover to proceedings, decisions, actions and orders, amongst others, of the CCP. The effect of this declaration was 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.

Conclusion: **1)** The Ordinances and the Act are not ultra vires of Constitution. The Federal legislature is competent to enact law on the subject of competition under the Constitution but only to the extent of 'Inter Provincial Trade and Commerce'. The Provinces have also legislative power to ensure Free Competition within the territorial limits of the Province.

2) Competition Commission is performing administrative functions, therefore, its functions and appellate authority under its control are not covered under Article 175(3) of the Constitution, but **CAT** is a Judicial Tribunal, hence is to be separated from executive influence for being mandatory under constitutional command. 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.

3) Section 43 and 44 of the Act providing for an appeal before the august Supreme Court of Pakistan are not unconstitutional.

4) The proceedings and orders etc. under the Ordinance have been saved revived and continued pursuant to Section 62 of the Act; and Section 62 of the Act is not unconstitutional.

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9. **Peshawar High Court**
CM No. 974-A of 2020 in Cr.M(B.A) No. 884-A of 2020
Mst Safeena Shah Vs The State
https://peshawarhighcourt.gov.pk/PHCCMS//judgments/Cr.M-974-A-2020.pdf

Facts: The petitioner, who was granted post-arrest bail by the High Court in a case registered under section 302/109 PPC subject to furnishing bail bonds in the sum of Rs. 200,000/- with two sureties each in the like amount, sought permission to deposit the surety amount in cash as she is not local resident to find local sureties.

Issue: Whether Court can grant permission to deposit surety amount in cash instead of furnishing bail bonds along with local sureties?

Analysis: The words "permit him to deposit" used in Section 513 Cr.P.C, are not at all without significance and suggest of a situation where something is permitted upon the request of accused but never ordered by the Court, of its own. The object of this section is to enable an accused to deposit cash security in case he is unable to find out sureties.

Conclusion: Petition accepted and petitioner was permitted to deposit the surety amount in cash in the form of bank guarantee alongwith personal bond to the satisfaction of area magistrate.

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10. **Sindh High Court**
Dr. Mashhood-Uz-Zafar Farooq v. Province of Sindh
Constitutional Petition No. D –6499 of 2018
2020 SHC 944
https://eastlaw.pk/cases/Dr.-Mashhood-uz-ZafarVSProvince-of-Sindh.Mzk2NTEx

Facts: Petitioner has impugned the office order issued by respondent, whereby he was relieved to report his parent department. Petitioner extended satisfaction qua the impugned order to the extent of issuance of his retirement notification; however, he disagreed with the decision of the Syndicate to the extent of the decision in respect of the intervening period from 13.10.2017 to 26.10.2019 which has been treated as leave without pay. He has prayed for direction to the respondent to pay the service benefits for the intervening period.

Issue: Whether the decision of respondent to treat the intervening period as leave without pay, during which the petitioner remained absent from service, as "non-duty", is legally sustainable or not?

Analysis: According to the fundamental Rule 54, petitioner would not only be entitled to all his salaries from the date of impugned action till the date of his superannuation on the premise that the competent authority allowed the petitioner to join his duty with just after one day from his repatriation order, but he is also entitled to the increments and other benefits which were granted to other similarly placed colleagues from time to time including annual grade increments. Petitioner's absence from duty, which in any event was forced, could neither be converted into extraordinary leave without pay nor could he be denied annual grade increments for the year during which he was not in service. Denial by respondent-university to allow back benefits to the petitioner is patently violative of the 'right to equality' enshrined in Article 25 of the Constitution of Pakistan, 1973.

Conclusion: Petition in hand was accepted.

11. **Islamabad High Court**
W.P.No. 3383/2020
Islamabad Marquees, Catering and Banquet Hall Associations v. Federation of Pakistan
http://mis.ihc.gov.pk/frmRdJgmnt.aspx?cseNo=Writ%20Petition-3383-2020%20|%20Citation%20Awaited&cseTle=IMCBA-%20VS%20-FOP%20&%20others&jgs=The%20Honorable%20Chief%20Justice&jgmnt=/attachments/judgements/WP-3383-2020_____637413775854845074.pdf

Fact: The petitioner seeks to declare the Notification dated 06-11-2020, issued by the National Command and Operation Centre (NCOC), to the extent of "Ban on Indoor Marriages"

Issue. Whether ban on indoor marriages is violative of Articles 4, 18 and 25 of the Constitution?

Analysis The deadly pandemic has become a reality and no one is immune from its devastating harm. In Pakistan a second wave is spreading rapidly, which is reported to be more severe and deadlier than the previous….The measures and decisions taken by the Committee and its implementation are related to the right to life of every citizen and guaranteed under Article 9 of the Constitution. The freedom of an individual and rights are subservient to the interests and rights of the public at large. The Constitution guarantees fundamental rights but simultaneously contemplates corresponding duties. It is the duty of every citizen not to infringe the constitutionally guaranteed rights of others. When a citizen acts in disregard to the interests of the general public, the constitutionally guaranteed rights are breached. Article 5 of the Constitution declares obedience of the Constitution and the law as an inviolable obligation of every citizen…Policy making is within the exclusive domain of the executive and interference in such domain is not the function of this Court.

Conclusion: Ban on indoor marriages is valid. Writ Petition is dismissed.

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12. **Supreme Court of India**
Civil appeal no. 3687 of 2020
UMC Technologies Private Limited v. Food Corporation of India and Anr.
https://main.sci.gov.in/supremecourt/2019/18159/18159_2019_40_1501_24686_Judgement_16-Nov-2020.pdf

Facts: After issuance of a show cause notice, contract of a Government Contractor was cancelled on the allegation of violation of bidding terms and at the same time said Contractor was blacklisted by a Governmental Agency after issuance of a vague and ambiguous show cause notice, in which penalty/consequence of blacklisting was not mentioned.

Issue: Whether a show cause notice is necessary before blacklisting a contractor for future bidding? If yes, what should be the content of such a show cause notice?

Analysis: In the context of blacklisting of a person or an entity by the state or a state corporation, the requirement of a valid, particularized and unambiguous show cause notice is particularly crucial due to the severe consequences of blacklisting and the stigmatization that accrues to the person/entity being blacklisted. Blacklisting has the effect of denying a person or an entity the privileged opportunity of entering into government contracts. This privilege arises because it is the State who is the counterparty in government contracts and as such, every eligible person is to be afforded an equal opportunity to participate in such contracts, without arbitrariness and discrimination. Not only does blacklisting takes away this privilege, it also tarnishes the blacklisted person's reputation and brings the person's character into question. Blacklisting also has long-lasting civil consequences for the future business prospects of the blacklisted person.

Conclusion: Supreme Court upheld that for a show cause notice to constitute the valid basis of a blacklisting order, such notice must spell out clearly, or its contents be such that it can be clearly inferred therefrom, that there is intention on the part of the issuer of the notice to blacklist the notice. Such a clear notice is essential for ensuring that the person against whom the penalty of blacklisting is intended to be imposed, has an adequate, informed and meaningful opportunity to show cause against his possible blacklisting.

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13. **Supreme Court of India**
Civil appeal no. 3820 of 2020
Director General of Police, Railway Protection Force and Ors. V. Rajendra Kumar Dubey
https://main.sci.gov.in/supremecourt/2017/32813/32813_2017_33_1501_24824_Judgement_25-Nov-2020.pdf

Facts: On the charges of misconduct, a Railway Police Officer was compulsory retired by departmental authority on the recommendations of enquiry officer and said Police Officer approached the High Court against that order. High Court has set aside the order after discussing in detail, the evidence recorded against a delinquent officer.

Issue: Whether High Court can re-appreciate the evidence in Writ Proceedings under Article 226 of the Indian Constitution?

Analysis: The jurisdiction to issue a writ of certiorari under Article 226 is a supervisory jurisdiction. The court exercises the power not as an appellate court. The findings of fact reached by an inferior court or tribunal on the appreciation of evidence, are not re-opened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ court, but not an error of fact, however grave it may be. A writ can be issued if it is shown that in

recording the finding of fact, the tribunal has erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence. A finding of fact recorded by the tribunal cannot be challenged on the ground that the material evidence adduced before the tribunal is insufficient or inadequate to sustain a finding. The adequacy or sufficiency of evidence led on a point, and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the tribunal.

Conclusion: Supreme Court has set aside the findings of High Court and restored the order of departmental authority.

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14. **Supreme Court of India**
Transfer Petition (Criminal) No. 452 OF 2019
Jatinderveer Arora & Ors. V. State of Punjab
https://main.sci.gov.in/supremecourt/2019/27892/27892_2019_36_1501_24821_Judgement_25-Nov-2020.pdf

Facts: Petitioners have approached the Supreme Court seeking transfer of criminal cases to competent Court in Delhi or to any nearby State, out of Punjab as the matters relate to alleged sacrilege of the holy book of Sikhism, deep anguish and bitterness is generated amongst a particular religious group against the Petitioners' sect and they are facing bias and prejudice and are unlikely to get a fair trial in the face of strong presumption of culpability as one of the accused was already murdered inside Jail by other inmates.

Issue: What are the grounds to transfer criminal cases from one court to another?

Analysis: For transfer of trial from one Court to another, the Court must be fully satisfied about existence of such factors which would make it impossible to conduct a fair trial. General allegation of surcharged atmosphere is not however sufficient. The apprehension of not getting a fair and impartial trial cannot be founded on certain grievances or convenience of the accused but the reasons have to be more compelling than that. No universal Rules can however be laid down for deciding transfer petitions and each one has to be decided in the backdrop of that case alone. One must also be mindful of the fact that when trial is shifted out from one State to another, it would tantamount to casting aspersions on the Court, having lawful jurisdiction to try the case. Hence powers under Section 406 CrPC must be exercised sparingly and only in deserving cases when fair and impartial trial uninfluenced by external factors, is not at all possible. If the Courts are able to function uninfluenced by public sentiment, shifting of trial would not be warranted.

Conclusion: Supreme Court has declined to transfer the cases of the Petitioners by holding that the projection of surcharged atmosphere is not borne out by the corresponding reaction of the petitioners, who are out on bail. Being residents of Punjab, they

continue to reside at their usual place and are going about their routine affairs. If their threat perceptions were genuine, they could not have gone about their normal ways. For this reason, the Court is inclined to believe that the atmosphere in the State does not justify shifting of the trial venue to another State.

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15. **The United Kingdom Privy Council**
The Airport Authority v Western Air Ltd
[2020] UKPC 29
https://www.bailii.org/uk/cases/UKPC/2020/29.html

Facts: An aircraft of West Air Ltd (respondent) in Bahamas was stolen in the year 2007. The company claimed the damages against the Airport Authority of Bahamas (appellant) as having been solely responsible for the security of the airport. Both the courts below decided in favour of respondent. This appeal was filed to overturn the decisions of courts below.

Issue: Whether the appellant was liable for a criminal act committed on its premises by an act of an independent third party where that act resulted in damage or loss to the respondent?

Analysis: The Court applied the doctrine of *RES IPSA LOQUITUR* to determine the negligence on the part of the appellant which is a rule of evidence whereby the court may draw an inference of fault where "the nature of the accident" suggests both negligence and the defendant's responsibility. The doctrine would apply when (1) the occurrence is such that it would not have happened without negligence and (2) the thing that inflicted the damage was under the sole management and control of the defendant, or someone for whom he is responsible or whom he has a right to control. Provided those two conditions are satisfied, then, on a balance of probability, the defendant must have been negligent.

Conclusion: The appellant was held negligent and consequently responsible for the loss of the respondent. Appeal dismissed.

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16. **European Court Of Human Rights**
Case of Süleyman v. Turkey (Application no. 59453/10)
[2020 ECHR 811]
https://www.bailii.org/eu/cases/ECHR/2020/811.html

Facts: The testimony of sole eye witness X of a murder was recorded through commission as per direction of the domestic court whereupon the applicant was convicted for life imprisonment. The applicant challenged the conviction in the European Court of Human Rights claiming the violation of right to fair trial.

Issue: Whether inability to examine an anonymous witness as required by Article 6 § 3 (d) of the Convention was decisive for conviction?

Analysis: The European Court of Human Rights addressed the Government's submissions which were as follows:

(i) the applicant had failed to show why examining witness X had been important to him;
(ii) the applicant had failed to use his statutory right to put written questions to witness X after the trial court had read out the record of his statements at the trial; and
(iii) the applicant had failed to avail himself of the videotaped statement of witness X which had moreover made it possible for the trial court to form its own impression of his credibility.

The Court pointed out that it is not its task to assess in hindsight whether the overall fairness of the proceedings was guaranteed merely by statutory provisions providing for certain procedural safeguards. On the contrary, the Court must examine whether those procedural safeguards were applied and remedied the difficulties the defence had to encounter as a result of not being able to directly question or cross-examine witness X, whose statements were relied on by the trial court to a decisive extent to convict the applicant.

Having regard to the applicant's and his lawyer's submissions made before the trial court, the Court finds that the applicant was able to demonstrate why it was important for them to examine witness X in person.

The Court stressed that the underlying principle of Article 6 § 3 (d) of the Convention is that before an accused can be convicted, all evidence against her or him normally has to be produced in his presence at a public hearing with a view to adversarial. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him or her, whether during the investigation or at the trial.

The Court further noted that the possibility to put written questions to an absent witness should not be regarded as an answer remedying the absence of an important witness from the trial and the resulting prejudice the trial court's use of his or her evidence entailed to the rights of the defence irrespective of the individual circumstances of a given case. Neither should the right to put written questions to an absent witness be seen as a substitute in the abstract for the fundamental right to examine or have the absent witness examined in person in such a case.

Therefore, caution must be exercised before concluding that the possibility to put written questions to an absent witness is capable of compensating for the

difficulties arising from his or her unjustified absence, that is to say when there was no good reason for his or her non-attendance. Otherwise, the balance between the rights of the defence, the interest of the public and the victims in seeing crime properly prosecuted and, where necessary, the rights of witnesses risk being undermined in the absence of a good reason to depart from the underlying principle under Article 6 § 3 (d) of the Convention.

The court observed that the Government failed to explain on what legal basis the applicant requested for the video recording of the testimony of the witness X as the trial court had opted to protect him by withholding his true identity throughout the proceedings in accordance with Article 58 § 2 and 3 of the Code of Criminal Procedure. Indeed, had the applicant been allowed to obtain a copy of the videotaped statement, it would have effectively rendered that protection measure futile.

Conclusion: The Court is unable to conclude that the trial court administered the necessary safeguards in respect of the evidence given by witness X, a situation falling short of the requirements of a fair trial under Article 6 of the Convention.

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17. **Supreme Court of the United States**
Department of Homeland Security v. Regents of the University of California, 591 U.S. ___ (2020)
https://www.supremecourt.gov/opinions/19pdf/18-587_5ifl.pdf

Facts: This case is known as the "Dreamers Case". The US Department of Homeland Security (DHS) adopted a program in the year 2012 which was known as the Deferred Action for Childhood Arrivals (DACA) in order to postpone the deportation of undocumented immigrants who had been brought to the United States as children and to assign them work permits to integrate them in society of United States. Numerous lawsuits were filed including one by the University of California system. It was alleged by the University that the decision to rescind DACA violated the Administrative Procedure Act (APA) and denied the right to equal protection and due process. The district court issued a preliminary injunction barring the government from rescinding DACA. In appeal, the government defended its decision to end DACA as a lawful wind-down of a discretionary policy based on the dubious legal status of the program.

Issue: Whether DHS's decision to rescind DACA policy was judicially reviewable and concomitantly whether DHS's decision to strike down the DACA policy was lawful?

Analysis: It was opined inter alia that DHS's decision to rescind the DACA program was arbitrary and capricious under the APA. The U.S. Supreme Court vacated in part and reversed in part the decision of the 9th Circuit. It held that DHS's decision was judicially reviewable as it did not properly follow APA rulemaking

procedures. The court remanded the issue back to DHS. Chief Justice John Roberts observed that "*we do not decide whether DACA or its rescission are sound policies. The wisdom' of those decisions is none of our concern. We address only whether the agency complied with the procedural requirement that it provide a reasoned explanation for its action. Here the agency failed to consider the conspicuous issues of whether to retain forbearance and what if anything to do about the hardship to DACA recipients. That dual failure raises doubts about whether the agency appreciated the scope of its discretion or exercised that discretion in a reasonable manner*"

Conclusion: The US Supreme Court vacated in part, reversed in part the decision of the 9th Circuit and remanded the case.

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