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FORTNIGHTLY CASE LAW BULLETIN

(01-02-2023 to 15-02-2023)

A Summary of Latest Judgments Delivered by the Honourable Supreme Court & Lahore High Court, Legislation/Amendment in Legislation and important Articles

Prepared & Published by the Research Centre Lahore High Court

JUDGMENTS OF INTEREST

Sr. No.	Court	Subject	Area of Law	Page
1.	Supreme Court of Pakistan	Jurisdiction of civil courts over the property owned by Forest Department; Nature of ouster clause when alternate remedy available	Civil Law	1
2.		Prerequisites to avail benefits u/s 14 of Limitation Act; Forum for redressal for grievance of employees of Frontier Corps; Limitation against void order		2
3.		Effect of non-obstante clause in Sales Tax Special Procedure Rules, 2007 over charging sections of STA, 1990; Reliance on earlier decision and existence of same provision of relevant law		3
4.		Condonation of delay without valid reason		4
5.		Measures to calculate tax on income	Tax Law	4
6.		Determination of quantum of compensation for land acquired as eminent domain under LAA 1894; Directions court can pass when compensation not adequate; Yardstick for assessment of compensation; Section 34 of LAA, 1894 and injunctions of Islam	Civil Law	6
7.		Tariff imposition by NEPRA; Conditions on power of province to determine tariff u/A 175 of Constitution; Imposition of Consumer-end-Tariff; Constitutional jurisdiction in matters relating to determination of tariff; Interference into economic policy		9
8.		Presumption of existence of any fact; Benefit of doubt to accused for non-proving of motive by prosecution; Value of forensic report if crime empty sent to Laboratory after arrest of accused or together with crime weapon; Kind of evidence for conviction	Criminal Law	12

9.	Supreme Court of Pakistan	Law for recovery of damages; Types of torts & tort of interest in property; Vicarious liability of corporation for its officials; suit by or against television broadcasting	Civil Law	13
10.		Requirement of certification by ISO for establishment of Pesticide Laboratory; Rules inconsistent parent statute or any other law		16
11.		Incidental order by disciplinary authority due to absence of delinquent civil servant; Limit on penalty of forfeiture of period of past services; courses available to departmental authority in case of unauthorized absence of a civil servant from his duty	Service Law	17
12.		Reckoning of final Seniority list of Inspectors; Precedential value of Leave refusing order not deciding a question of law; Settlement of issues of posting transfer & seniority		19
13.		Inspection of books of accounts etc. u/s 230 of CO, 1984; ; Grounds for investigation under sections 263 & 265 of CO, 1984	Civil Law	20
14.		Jurisdiction of tribunal to reduce penalty; Circumstances for interference of Tribunal/Court for interference; Test of proportionality in cases of misconduct involving moral turpitude	Service Law	21
15.		Power of high Court u/s 561-A CrPC to quash an FIR or an investigation proceeding; Misuse of the authority entrusted to a public servant	Criminal Law	23
16.		Importance of ocular evidence; Effect of minor discrepancies in medical evidence; Effect of relationship of witnesses with deceased		25
17.		Stages of commission of crime; Ingredients for offence of abatement; Evidence required for proving charge of abetment		26
18.		Relevant considerations for case of further inquiry in post arrest bail		28
19.		Observance of principles of natural Justice in administrative proceedings	Service Law	29
20.	Lahore High Court	Composition of authority u/s 3 after modification in NEPRA Act, 1997; Tariff and obligation of consumer; Responsibility of NEPRA in determination of tariff; Process in case of application of wrong tariff; Power of judicial review of special tribunals constituted to settle different matters; Asking for change of charging method by consumer	Constitutional Law	29
21.		Jurisdiction of executing court to cancel the mutation sanctioned by judgment debtor after passing decree against him	Civil Law	33

22.	Lahore High Court	Reasons for decision on each separate issue by trial court	Civil Law	33
23.		Obligation of court to amend or frame additional issues after the submission of amended pleading		34
24.		Bringing on record evidence essential for just decision	Criminal Law	35
25.		Effect of flaw in fixation of precise time when matter was reported to police; Effect of delay in post-mortem and lodging FIR		36
26.		Jurisdiction of Service Tribunal and High court on matters of transfers and posting; Jurisdiction of Service Tribunal on question of fitness and eligibility	Service Law	37
27.		Grounds to amend or further amend assessment u/s-s 5(A) of ITO, 2001; Circumstances to exercise of Power by taxation officer to amend or further amend the assessment; Refund u/s 120 of ITO, 2001 for the purpose of section 171; Status of SBP	Tax Law	37
28.		Right of at least one appeal against order affecting right; Provision of section 23 (C) of FERA, 1947 unconstitutional	Constitutional Law	39
29.		Proving admitted facts; Right of profession as fundamental right and subject to qualifications; Power to strike down a legislative enactment; Prerogative to set eligibility criteria of a certain post; Examination by court of qualification and eligibility in recruitment process	Service Law	40
30.		Remedy against the decision of of first appellate court on objections to award	Arbitration Law	41
31.		Requirement of affiliation of medical teaching institutions with UHS; jurisdiction of the Federal Department/ authority to intrude onto domain of Provincial authorities	Constitutional Law	42
32.		Course to adopt when there are two possible interpretations of fiscal statute	Tax Law	43
33.		Provisions for cancellation of case in CrPC; Procedure for forwarding cancelation report; Status of magistrate while cancelling FIR; Right of hearing of parties in matter of cancellation report; Factors to be considered by magistrate while deciding cancellation report	Criminal Law	44
34.		Jurisdiction of High Court in the affairs of Federation within its territorial jurisdiction; Effect on rules on corporation adopting rules framed by government; Legal standing of statutory rules to service rules/bye laws	Service law	46

No.	Court	Subject	Law	Page
35.	Lahore High Court	Application of Article 105(3) of Constitution to situation when Provincial Assembly dissolved by efflux of time; Authority to declare the date of general election of provincial assembly by dissolution of Provincial Assembly by operation of law u/A 112(1) of Constitution; Doctrine of Penumbra	Constitutional Law	48
36.		Retraction from statement made under Special Oath & effect of order passed on basis of such statement; Paramount consideration for the welfare of minor	Family Law	50
37.		Unregistered award and conferment of title	Civil Law	51
38.		Production of adversary by party as its own witness; Circumstances for permission to produce adversary as a witness u/O XVI, R. CPC		52
39.		Burden to proof of oral transaction of tamleek and mutation		52
40.		Institution of fresh suit without compliance of condition of withdrawal		53
41.		Requirements of a buyer of the agreement to sell to prove willingness to perform his part of agreement; Limitation to file a suit for specific performance where date for performance is fixed		54
42.		Initiation of ex-parte proceedings on report of process server lacking detail of identification of respondent and simple postal receipt without acknowledgement due; Effect of not following section 21 of PRPA, 2009	Rent Law	55
43.		Retraction of valid & complete gift; Definition of kind of gift "Areeat"; Principle of reversion under law	Civil Law	56
44.		Remedy against order passed on application u/s 12 of G&WA, 1890; Welfare of minor in granting interim custody; Clause or the agreement having effect of surrendering or relinquishing right of custody of the mother	Family Law	58
45.		Filing of suit by or against minor; guardian ad litem other than appointed by court representing the court		60
46.		Extent of right of party of examination of witness u/s 13 of FCA, 1964; Right to fair trial under FCA, 1964		62
47.		Effect of failure to invoke of all modes of service simultaneously on a service duly effected through any mode; Annexing of copies of application and documents with notice	Rent Law	63

48.	Lahore High Court	Maintainability of writ against order of grant of interim custody; Natural guardian of minor; Jurisdiction of court in custody matters; Approach of court for procedure of constructions of repeal; Effect of provisions of MHO 2001 on section 5 read with items no. 5 & 6 of FCA, 1964	Family Law	64

LATEST LEGISLATION/AMENDMENTS

1.	Amendments in the Registration Act, 1908	66
2.	Amendments in the Punjab Environmental Tribunals Rules 2012	66
3.	Code of Criminal Procedure (Amendment) Act, 2022	67
4.	Amendments in the Punjab Specialized Healthcare and Medical Education Department (Medical and Dental Teaching Posts) Service Rules,1979	67
5.	Amendments in Pakistan Prisons Rules, 1978	67
6.	Amendments in Pakistan Prisons Rules, 1978	67

SELECTED ARTICLES

1.	An Analysis Of Legality Of Remix Culture: Compliance Or Violation Of Copyright Laws?By Swati Pragyan Sahoo	67
2.	Right to Privacy with special reference to Right to be Forgotten By Abhyuday	68
3.	Rights of The Under Trial Prisoner: An Analysis To Contemporary Issue and It Way Ahead By Kamlesh Singh	68
4.	Comparative Analysis of Mediation Laws in India and other countries By Abhyuday	69
5.	Moral Entanglement in Group Decision-Making: Explaining an Odd Rule in Corporate Criminal Liability By Sylvia Rich	69

1. **Supreme Court of Pakistan**
Shah Zaman Khan etc. v. Govt. of Khyber Pakhtunkhwa through its Chief Secretary, Peshawar and others etc.
Civil Appeals No. 329 to 346 of 2022
Mr. Justice Umar Ata Bandial, HCJ, Mr. Justice Qazi Faez Isa, Mr. Justice Syed Mansoor Ali Shah
https://www.supremecourt.gov.pk/downloads_judgements/c.a._329_2022.pdf

Facts: The private parties contended that they were the owners of lands which had been declared as 'protected forests', therefore, they challenged the Notification. Some filed suits, others directly filed writ petitions in the High Court and those whose plaints were rejected under Order VII Rule 11 of the Code of Civil Procedure, 1908 filed civil revisions in the High Court. The plaints were rejected because the suits were held to be barred under section 92 of the Forest Ordinance. In certain other cases the private parties, who had lost their cases on merit, re-agitated the matter by filing fresh suits. The learned Judges of the Division Bench, through the common judgment, decided all the writ petitions and civil revisions, and this judgment is assailed both by the private parties and the Government through these eighteen appeals arise out of petitions in which leave to appeal was granted, under Article 185(3) of the Constitution of the Islamic Republic of Pakistan ('the Constitution').

Issues: i) Whether the private persons can claim any right over the property on private documents or mere assertions; basically owned by the Forest Department and debarred from the jurisdiction of Civil Courts under the provision of Section 92 of the Forest Ordinance, 2002?
ii) Whether a provision of law ousting the jurisdiction of a civil court can be construed strictly, when an alternate remedy is available?
iii) Whether the civil court can assume the jurisdiction when the alleged mala fide or without jurisdiction of Notification over the land owned by the Forest Department is challenged?

Analysis: i) When the private parties neither allege nor show that they (or their stated predecessors-in interest) are the recorded owners of the said lands either under the land revenue or under any other law, nor they relied upon any official record of the Government or of its predecessor-in-interest (the State of Swat) in support of their claims. The private parties had based their claims on private documents or on mere assertions. The record showed that the Forest Department of the Government is the owner of the said lands. Such lands can be claimed by the forest department and assailing the same was not within the jurisdiction of the civil courts as provided under Section 92 of the Forest Ordinance, 2002.
ii) Undoubtedly, a provision ousting the jurisdiction of a civil court is to be construed strictly and established rights cannot be disturbed, nor can an ouster clause deprive anyone of property. An ouster clause can also not be used to create injustice or hardship. But, this does not mean that the ouster clause is of no legal

effect. Another factor to consider in determining the scope of the ouster of jurisdiction is to examine whether those who may be affected are provided with an alternative remedy.
iii) The private parties did not allege that the issuance of the Notification was mala fide or without jurisdiction, or that an order was passed against them which was coram non judice, which may have enabled them to access the courts.

Conclusion: i) No, the private persons cannot claim any right over the property on private documents or mere assertions; basically owned by the Forest Department and debarred from the jurisdiction of Civil Courts under the provision of Section 92 of the Forest Ordinance, 2002.
ii) Yes, a provision of law ousting the jurisdiction of a civil court can be construed strictly, when an alternate remedy is available.
iii) The civil court can assume the jurisdiction when the alleged mala fide or without jurisdiction of Notification over the land owned by the Forest Department is challenged.

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2. **Supreme Court of Pakistan**
Kiramat Khan v. IG, Frontier Corps & others
Civil Petition No. 3287 of 2019
Mr. Justice Umar Ata Bandial HCJ, Mr. Justice Ijaz ul Ahsan, Mr. Justice Sayyed Mazahar Ali Akbar Naqvi
https://www.supremecourt.gov.pk/downloads_judgements/c.p._3287_2019.pdf

Facts: The petitioner seeks leave to appeal against a judgment of the appeal which was dismissed in limine having been found to be barred by time by the Service Tribunal whereas the High Court dismissed the same for the want of jurisdiction.

Issues: i) What are the prerequisites to avail the benefit of sec. 14 of Limitation Act, 1908?
ii) Which is the proper forum for redressal of the grievance of the employees of Frontier Corps?
iii) Whether limitation would run against the void order?

Analysis: i) In order to avail the benefit of Section 14 of the Limitation Act, 1908 it is imperative that a litigant seeking benefit of the said provision must show that he was prosecuting his remedy with due diligence and in good faith in a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain it. The material words are, 'due diligence and good faith" in prosecuting a remedy before a wrong forum. The term "due diligence' entails that a person taken such care as a reasonable person would take in deciding on a forum to approach.
ii) This Court had as far back as 2004 clarified the law on the subject and held that employees of Frontier Corps will be deemed to be civil servants for the purpose of approaching the Tribunal for redressal of their grievances. Reference in this regard may be made to 1G. HO Frontier Corps v. Ghulam Hussain (2004 SCMR 1397).

iii) Limitation would run even against a void order and an aggrieved party must approach the competent forum for redressal of his grievance within the period of limitation provided by law.

Conclusion: i) Litigant must show that he was prosecuting his remedy with due diligence and in good faith in a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain it.
ii) Service Tribunal is the proper forum for redressal of the grievance of the employees of Frontier Corps.
iii) Limitation would run even against a void order.

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3. **Supreme Court of Pakistan**
The Commissioner Inland Revenue Zone-I etc., v.
M/s Hajvairy Steel Industries (Pvt.) Limited, Quetta etc.
Civil Petitions No. 3134 and 3135 of 2022
Mr. Justice Qazi Faez Isa, Mr. Justice Yahya Afridi, Mr. Justice Muhammad Ali Mazhar
https://www.supremecourt.gov.pk/downloads_judgements/c.p._3134_2022.pdf

Facts: The Commissioner Inland Revenue Zone-I, Regional Tax Office, Quetta has filed these two petitions for leave to appeal against three concurrent decisions, of the Commissioner Inland Revenue (Appeals), of the Appellate Tribunal Inland Revenue, Karachi Bench, and of the learned Division Bench of the High Court (‘the Commissioner’, ‘the Tribunal’ and ‘the High Court’ respectively).

Issues: i) Whether the Sales Tax Special Procedure Rules, 2007 (‘the Special Procedure’) contains an overriding, non obstante, clause which prevails over the general charging sections of the Sales Tax Act, 1990?
ii) If reliance is placed upon an earlier decision, whether it must first be established that the same provisions of the law were under consideration?

Analysis: i) Section 71 enables special procedure to be made with regard to the scope and payment of tax to be made and the said Special Procedure was made pursuant thereto, which contained an overriding, non obstante, clause, which uses categorical and clear language and must be given effect to, and the respondents were entitled to be treated in accordance therewith. A particular rate and mechanism for the imposition of sales tax on steel re-rollers was prescribed and it was stipulated that it ‘will be considered as their final discharge of tax liability’, which the respondents had discharged in accordance therewith.
ii) That as regards the case of Zak Re-Rolling Mills this Court had observed that it was not deciding ‘points which were not raised in the Reference application before the High Court nor are noted in the impugned judgment.’ In that particular case, the tax years under consideration were not mentioned, therefore, it cannot be stated with any certainty what the applicable law was then, and then to consider whether the decision therein is applicable hereto. The petitioner’s counsel also did not bring forth the facts of that case. If reliance is placed upon an earlier decision,

it must first be established that the same provisions of the law were under consideration.

Conclusion: i) The Sales Tax Special Procedure Rules, 2007 ('the Special Procedure') contains an overriding, non obstante, clause which prevails over the general charging sections of the Sales Tax Act, 1990.
ii) If reliance is placed upon an earlier decision, it must first be established that the same provisions of the law were under consideration.

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4. **Supreme Court of Pakistan**
Naeem Tahir and others Collector of Customs, MCC (E&C) Customs House, Peshawar and another v. Zain ul Abidin and others
Civil Petition No.4145 of 2022
Mr. Justice Qazi Faez Isa, Mr. Justice Muhammad Ali Mazhar
https://www.supremecourt.gov.pk/downloads_judgements/c.p._4145_2022.pdf

Facts: The petitioner has assailed the order passed in a Custom Reference by belatedly filing civil petition for leave to appeal with a delay of 11 days.

Issues: Whether delay in assailing decisions can be condoned without valid reason?

Analysis: If decisions are assailed they should be done within the prescribed period, and it should not be assumed that delay would be condoned when there is no valid reason to condone the same.

Conclusion: Delay in assailing decisions cannot be condoned without valid reason.

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5. **Supreme Court of Pakistan**
Commissioner Inland Revenue, Zone-II, Regional Tax Office, (RTO) Lahore v. Mian Liaqat Ali Proprietor
Civil Petitions No.648-L, 649-L and 650-L of 2021
Mr. Justice Ijaz Ul Ahsan, Mr. Justice Munib Akhtar, Mr. Justice Sayyed Mazahar Ali Akbar Naqvi
https://www.supremecourt.gov.pk/downloads_judgements/c.p._648_l_2021_detailed.pdf

Facts: The respondent was issued specific notices under s. 111(1)(d) of the Income Tax Ordinance, 2001 to show cause why, in terms of the said provision, the whole of the concealed sales ought not to be brought to tax. The replies filed by the respondent were found not to be satisfactory and the deemed assessment orders were amended against him in terms of s. 111(1)(d) of the Ordinance. Being aggrieved by the foregoing, the respondent filed appeals before the CIT (Appeals), which were dismissed by a consolidated order. The respondent took the matter further to the Appellate Tribunal, and there met with success. The learned Tribunal gave a consolidated decision after noting that the respondent had placed before the OIR the costs and expenses incurred in respect of the concealed sales. Being aggrieved by the decision of the learned Tribunal the Commissioner

filed tax references before the High Court, which were dismissed by (identical) orders. The learned High Court upheld the reasoning that had found favor with the learned Tribunal. It is against the said orders that the Commissioner sought leave to appeal from this Court.

Issues: i) Whether the greater latitude given to the State in respect of choosing what is to be taxed is an absolute rule, to be applied rigidly and strictly to the exclusion of all else?
ii) Whether treating only two types of income (production and sales) as "gross receipts" liable to tax, out of the vast categories of "income" is a correct approach?
iii) Whether the Income Tax Ordinance, 2001 provides any yardstick, guidance, standard or measure as to the applicability of s. 111(1)(d) or s. 122(5) in respect of the same thing (i.e., suppressed or concealed production or sales)?

Analysis: i) It is true that in respect of the interpretation of fiscal statutes the State is given greater latitude in respect of choosing what is to be taxed (or exempted) and if so, in what manner and to what extent. However, this approach is but a rule of interpretation (and one among several) that aids the Court in coming to the correct conclusion with regard to the provision under consideration. It is not an absolute rule, to be applied rigidly and strictly to the exclusion of all else.
ii) Production and sales are two types of activity that produce income. However, as is well established, income is a very broad and inclusive concept. In the felicitous words of Kanga and Palkhiwala: "The categories of income are never closed" (see Fawad Ahmad Mukhar and others v Commissioner Inland Revenue and another 2022 SCMR 426, para 9 and the authorities there cited). To pick out only two types of income (production and sales) and treat those "gross receipts" as liable to tax, out of the vast sea that otherwise constitutes "income" properly so-called ("any amount chargeable to tax") is not the correct approach. If "any amount" can be brought within the scope of sub-clause (i) of clause (d) only if, and to the extent, that it is "chargeable to tax" (i.e., constitutes "income" properly so called), then production and sales must be given the same treatment. Thus, it is only production or sales chargeable to tax that can be brought within the ambit of clause (d).
iii) The Ordinance provides no yardstick, guidance, standard or measure when or how, in respect of the same thing (i.e., suppressed or concealed production or sales), it is s. 111(1)(d) that is to be applied or s. 122(5). The matter is left at the unfettered discretion of the OIR. He is the sole judge of whether it is the former or the latter provision that is to be applied. It is his unencumbered wish and choice. But, as just seen, the tax liability is worked out quite differently under the two provisions. It follows that in this scenario the amount of tax with which the taxpayer is to be burdened is entirely at the arbitrary will of the tax authority. Both under s. 122(5) and s. 111(1)(d), the taxpayer is exposed to the same tax liability in respect of the income that has escaped assessment, or been suppressed, i.e., he is liable to tax on the "net" amount, or "income" properly so called.

Conclusion: i) No, the greater latitude given to the State in respect of choosing what is to be taxed is not an absolute rule, to be applied rigidly and strictly to the exclusion of all else.

ii) Out of the vast sea of categories of "income", by treating only two types of income (production and sales) as "gross receipts" liable to tax, is not a correct approach.

iii) No, the Income Tax Ordinance, 2001 does not provides any yardstick, guidance, standard or measure as to the applicability of s. 111(1)(d) or s. 122(5) in respect of the same thing (i.e., suppressed or concealed production or sales).

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6. **Supreme Court of Pakistan**
National Highway Authority v. Rai Ahmad Nawaz Khan etc.
Civil Appeals No. 140-L, 141-L& 142-L of 2015
Mr. Justice Ijaz Ul Ahsan, Mr. Justice Munib Akhtar, Mr. Justice Sayyed Mazahar Ali Akbar Naqvi
https://www.supremecourt.gov.pk/downloads_judgements/c.a._140_l_2015.pdf

Facts: For the purposes of constructing the National Highway, the Land Acquisition Collector of the National Highway Authority acquired the land of the respondents by Issuing notifications under Section 4 of the Land Acquisition Act of 1894 (the "LAA 1894"). The Respondents, by way of three independent reference petitions, challenged the quantum of compensation granted to them under the said awards. The three reference petitions were referred to the Referee Court by the Land Acquisition Collector and, subsequently, the Referee Court enhanced the quantum of compensation in each reference petition. All three judgments and decrees of the Referee Court were assailed by the Appellant before the High Court. The High Court, through the impugned judgments, upheld the findings of the Referee Court but modified the judgments and decrees of the Referee Court in the terms of the rate of interest on the solatium from 6% per annum to 8% per annum. The impugned judgments are now being assailed before this Court by way of these Appeals.

Issues: i) How the Court should determine the quantum of compensation to be awarded to those who had been subjected to exercise of the power of eminent domain under the LAA 1894?

ii) Which direction can be passed by the Court whenever it is of the opinion that the quantum of compensation determined by the Land Acquisition Collector under an award is not adequate?

iii) Whether one year's average of the sales taking place before the publication of the notification under section 4 of similar land is an absolute yard stick for assessment of compensation?

iv) Whether a Court can enhance the rate of compensation; in the terms of the rate of interest on the solatium from 6% per annum to 8% per annum?

v) Whether the benefit provided under Section 34 of the LAA 1894 in which the State compensates citizens whose lands have been acquired through compulsory

acquisition constitutes riba and goes against the injunctions of Islam?

Analysis: i) A bare perusal of Section 23 shows that according to the LAA 1894, there are six factors that need to be taken into consideration by a Referee Court in determining compensation for land acquired under the LAA 1894. Instead, the other five considerations, from their very text, imply that whenever a Court is to consider the quantum of compensation, it must duly consider the loss being caused to property owned by the Federal or Provincial Government's exercise of eminent domain under the LAA 1894. In essence, whenever a government, be it Federal or Provincial or any other entity acting on behalf of the state exercises the power of eminent domain under the LAA 1894, property owners are deprived of their constitutionally guaranteed proprietary rights under Article 24 of the Constitution of Pakistan, 1973. It is important to state that the intention of the legislature behind Section 23 was that whenever a Court is determining the quantum of compensation to be awarded to those who had been subjected to exercise of the power of eminent domain under the LAA 1894, it needs to be considerate and sympathetic towards the claims made by those whose property was compulsorily taken by the state against their will for a public purpose. Section 23 allows a Court to compensate such landowners for giving up their properties for the greater good, on the doctrine of individual rights must give way to the greater public interest (salus populi suprema lex esto).

ii) A bare reading of Section 28 shows that whenever a Court is satisfied that the quantum of compensation announced under an award is not adequate after consideration of the factors mentioned in Section 23, the Court may direct the Collector to pay interest on the difference (of the amount awarded by the Land Acquisition Collector and the Referee Court) if it is of the opinion that the quantum of compensation determined by the Land Acquisition Collector is insufficient.

iii) Section 23 makes mention of various matters to be considered in determining the compensation. One of such factors enumerated therein is that the date relevant for determination of market value is the date of the notification under section 4. Not unoften the market value has been described as what a willing purchaser would pay, to the willing seller. It may,' be observed that in assessing the market value of the land, its location, potentiality and the price evidenced by the transaction of similar land at the time of notification are the factors to be kept in view. One year's average of the sales taking place before the publication of the notification under section 4 of similar land is merely one of the modes for ascertaining the market value and is not an absolute yard stick for assessment.

iv) Prior to the amendment in the LAA, 1894 by virtue of the Land Acquisition (West Pakistan) Amendment Act of 1969, indeed the maximum interest rate that a Court could impose under Section 28 was six percent. However, post-amendment, the said section now provides that once the Court is satisfied that legal and factual grounds exist to enhance the rate of compensation; it is obligated to award interest on the differential at the rate of eight percent.

v) It is important to clarify that unlike riba/interest that arises/accrues in a financial transaction between parties, the word "interest" in Section 34 of the LAA 1894 is not interest stricto sensu. The interest which is imposed on the State or land-acquiring entity is awarded to the affectees of compulsory acquisition by way of compensation and where compensation originally awarded is found to be inadequate and is later enhanced by a competent forum, to cover the property owner by way of compensation for the time lag between when the property was taken and the time that he receives compensation for the same. The power of compulsory acquisition is, after all, unilaterally exercised by the government and no consent from the affected property owners is required under the law. The benefit of Section 34 is statutory in nature and its benefit cannot be withheld from property owners on the ground that the benefit of Section 34 of the LAA 1894 constitutes riba and goes against the injunctions of Islam. The said Section in our opinion is meant to ensure that the State compensates citizens whose lands have been acquired through compulsory acquisition as soon as possible and any delay in compensating affected citizens would entail penal consequences. Whilst riba/usury may be predatory in nature, the interest under Section 34 of the LAA 1894 is beneficial since it ensures that property owners are compensated in a timely manner.

Conclusion: i) While determining the quantum of compensation to be awarded to those who had been subjected to exercise of the power of eminent domain under the LAA 1894, the Court needs to be considerate and sympathetic towards the claims made by those whose property was compulsorily taken by the state against their will for a public purpose.

ii) The Court may direct the Collector to pay interest on the difference (of the amount awarded by the Land Acquisition Collector and the Referee Court) whenever it is of the opinion that the quantum of compensation determined by the Land Acquisition Collector under an award is not adequate.

iii) No, One year’s average of the sales taking place before the publication of the notification under section 4 of similar land is not an absolute yard stick for assessment of compensation but is merely one of the modes for ascertaining the market value of the land.

iv) Yes, after post-amendment a Court can enhance the rate of compensation; in the terms of the rate of interest on the solatium from 6% per annum to 8% per annum.

v) The benefit provided under Section 34 of the LAA 1894 in which the State compensates citizens whose lands have been acquired through compulsory acquisition is compensatory in nature and neither constitutes riba nor goes against the injunctions of Islam.

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7. **Supreme Court of Pakistan**
Peshawar Electric Supply Company Ltd (PESCO) etc. v.
SS Ploypropylene (Pvt) Ltd, Peshawar & others etc.
Civil Appeals Nos. 513 to 586 of 2014 and
CMA No. 3671 of 2014 in Civil Appeal No. 542 of 2014
Mr. Justice Ijaz Ul Ahsan, Mr. Justice Sayyed Mazahar Ali Akbar Naqvi, Mrs. Justice Ayesha A. Malik
https://www.supremecourt.gov.pk/downloads_judgements/c.a._513_2014.pdf

Facts: The Respondents had challenged the imposition of Fuel Price Adjustment/Consumer-end Charges through writ petitions before the Peshawar High Court, Peshawar whereupon the High Court declared the imposition of Charges as unconstitutional and illegal. The Appellants challenged the said consolidated decision of the High Court through Civil Appeals.

Issues: (i) Whether NEPRA has the authority to impose Tariff on the Consumers?
(ii) Whether the courts can interfere with policy matters of the executive?
(iii) Whether the power of a province to determine tariff as provided under Article 157 of the Constitution is subject to any condition?
(iv) Whether the supply, distribution or generation of electricity can be regulated through provincial legislation?
(v) Whether the Council of Common Interests is vested with the exclusive authority to determine tariffs?
(vi) Whether imposition of Consumer-end-Tariff can be declared as ultra vires the Constitution on the ground of non-payment of share/profit of hydel power generation to a province?
(vii) Whether the constitutional jurisdiction of courts can be directly invoked in matters relating to determination of tariff?
(viii) Whether courts can regulate an economic policy?

Analysis: (i) Under Section 7 of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997, NEPRA has been assigned the exclusive power to regulate the provision of electric power services. One of the steps that NEPRA may take to regulate the electricity sector, is the determination of tariffs which, as per Act 1997, is a revenue requirement. This is provided in Section 7(2)(ac), which states that NEPRA is responsible for infer alia, ensuring efficient tariff structures for sufficient liquidity in the power markets. Section 7 read with the preamble of the Act, 1997, leaves no doubt in our minds that the determination of tariffs falls within the exclusive domain of NEPRA. This is also in line with Item No. 4 of Part II of the Federal Legislative List which lists electricity as a federal subject pursuant to which, the Act, 1997 was promulgated as well…It is a cardinal principle of statutory interpretation that a law must be read holistically. Even if Rule 2(m) of the NEPRA Rules 1998 does not specifically mention the words “fuel adjustment charges”, Section 7 (2)(i) gives NEPRA wide powers to issue guidelines and standard operating procedures which comprehensively outline the mechanism through which various tariffs, including

the Charges, ought to be factored in the tariff. This is provided in the NEPRA Determination of Consumer-end-Tariff (Methodology and Process) Guidelines, 2015. As such, when NEPRA has been empowered by the legislature and its authority has not been questioned, then, the formulae based on which consumer-end-tariff is determined could not have been called into question since the said matter pertains to electricity, which is the domain of the Federal Government.

(ii) It is not the role of the Courts to determine policies and especially those, in which the Court lacks technical expertise. It is the mandate of the Constitution and, is also trite that Courts must confine themselves to legal interpretation. The courts must satisfy itself that there is a breach of fundamental rights vested constitutional/legal rights before any direction is issued. Such directions must not be based on an understanding of the law which is contrary to the Constitution. Doing so goes against the principle of trichotomy of powers and is against the mandate of the Constitution. Courts, while acting under the Constitution, must not encroach upon the domain of the executive branch unless there is violation of fundamental rights guaranteed under the Constitutional or the executive branch oversteps its legal and constitutional limits.

(iii) The power of a Province under Article 157(2)(d) is premised upon two conditions. First, the province purchases electricity in bulk from the national grid for distribution and second, the province constructs power houses and grid stations and lays transmission lines for use within the province…It has been held by this Court that Article 157(2)(d) of the Constitution is an enabling provision of the Constitution and, it is therefore not make it mandatory for Provincial government to determine the rate of tariff.

(iv) It is an admitted position that after the unbundling of WAPDA, the National Transmission and Dispatch Company was responsible to dispatch electricity to all provinces from the national basket. It is important to note that the Act, 1997 applies to the whole of Pakistan per Section 1 of the said Act. There is nothing on the record which could show that there is provincial legislation in vogue which regulates the supply, distribution or generation of electricity. The only legislation in this respect is the Act, 1997. The vires of Act, 1997 has not been challenged on the touch stone of being beyond the legislature competence of the federation. Even otherwise, it is important to note that even if any province legislates on the matter of electricity, the same would not only be against Part II of the Federal Legislative List but, in the event of any provision of provincial law dealing with the subject in conflict with being federal law; provisions of the latter would prevail. This interpretation of the law is in line with the Constitution and with the Act, 1997 which admittedly has an overriding effect as provided in Section 45 of the Act, 1997.

(v) It has been held by this Court in the judgment of Gadoon Textile Mills that the Council of Common Interests cannot interfere with the day-to-day affairs of an Authority which include the determination of tariffs… even if the Council of Common Interests devises guidelines for the imposition of tariffs, the same cannot contradict the legislation under which an authority functions. Since the legislature

in its wisdom and under its authority provided by Article 70 of the Constitution, promulgated the Act, 1997 to specifically address matters pertaining to the supply, generation, and distribution of electricity, therefore, any guideline which is issued must be in line with the Act, 1997 and not inconsistent therewith.

(vi) The concept of net profits is covered by Article 161(2) whereas, the concept of tariffs is covered by Article 157 of the Constitution. If the Government of a Province has not been paid net profits, the same ought to be taken up by the provincial government at the appropriate level before the appropriate forum. The High Court could not have declared the Charges as ultra vires the Constitution on the basis that the province has not been paid its dues. The said matter relates to policy and governance and ought to be raised before the appropriate forum…. High Court arrogated to itself matters of executive policy and by connecting two different matters namely non-payment of share, profits of hydel power generation on the one hand and determination of tariff to be recovered from consumers/ including the component of fuel adjustment surcharge delved into a legal and constitutional area which at best relates to the claim of a province against the federation.

(vii) The Respondents had an alternate efficacious remedy available to them under the Act, 1997. Appellate Tribunal of NEPRA consists of specialized members and must be resorted to in the first instance. A right of second appeal has also been given to the High Court concerned. It is well-settled that without availing/exhausting remedies provided by law, a party cannot directly invoke the constitutional jurisdiction of the High Court more so in highly technical matters including those relating to determination of tariff.

(viii) The High Court appears to have arbitrarily interfered in a policy matters which it should have been reluctant to do considering that such matters concern complex factors which have a direct impact on the economy of the country. Where the legislature has expressly provided an authority for determination in such matters, in the shape of NEPRA, then, such authority allowed to perform its functions because it has technical knowhow owing to the fact that it comprises members from various technical fields. It has been held by this Court that in cases involving utilities and economic regulation, there are good reasons for judicial restraint and/or judicial deference to legislative judgment. It is not the responsibility of the Court to regulate economic policy. The responsibility of the Courts is limited to legal interpretation. The Court is expected to enforce fundamental rights reasonably and not in a manner which creates hurdles and unnecessary complications.

Conclusion: (i) The determination of tariffs falls within the exclusive domain of NEPRA.

(ii) The courts cannot interfere with policy matters of the executive unless there is violation of fundamental rights guaranteed under the Constitutional or the executive branch oversteps its legal and constitutional limits.

(iii) The power of a province to determine tariff as provided under Article 157 of the Constitution is subject to two conditions as mentioned above.

(iv) The supply, distribution or generation of electricity cannot be regulated through provincial legislation.
(v) The Council of Common Interests is not vested with the exclusive authority to determine tariffs.
(vi)Imposition of Consumer-end-Tariff cannot be declared as ultra vires the Constitution on the ground of non-payment of share/profit of hydel power generation to a province.
(vii) The constitutional jurisdiction of courts cannot be directly invoked in matters relating to determination of tariff.
(viii) Courts cannot regulate an economic policy.

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8. **Supreme Court of Pakistan**
Sarfraz and Allah Ditta v. The State
Criminal Appeal No. 560 of 2020
Mr. Justice Ijaz Ul Ahsan, Mr. Justice Sayyed Mazahar Ali Akbar Naqvi, Mr. Justice Athar Minallah
https://www.supremecourt.gov.pk/downloads_judgements/crl.a._560_2020.pdf

Facts: The appellants were tried by the learned Additional Sessions Judge under sections 302/34 PPC. The learned Trial Court convicted the appellants under Section 302(b) PPC and sentenced them to death on two counts. In appeal the learned High Court maintained the conviction and sentence of death awarded to the appellants by the learned Trial Court. Being aggrieved by the impugned judgment, the appellants filed Jail Petition before this Court wherein leave was granted by this Court and the present appeal has arisen thereafter.

Issues: i) Whether court is empowered to presume the existence of any fact, in relation to the facts of the particular case?
ii) Whether any benefit goes in favour of the accused when specific motive has been alleged by the prosecution but failed to establish?
iii) What is evidentiary value of positive report of Forensic Science Laboratory when crime empty is sent to Laboratory after the arrest of the accused or together with the crime weapon?
vi) Whether only one doubt can give benefit to the accused?
v) What kind of evidence on which conviction can be based?

Analysis: i) Article 129 of the Qanoon-e-Shahadat Order, 1984, empowers the court to presume the existence of any fact, which it thinks likely to have happened with regard to common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.
ii) It is now well established that if a specific motive has been alleged by the prosecution then it is duty of the prosecution to establish the said motive through cogent and confidence inspiring evidence. Otherwise, the same would go in favour of the accused.
iii) This Court in a number of cases has held that if the crime empty is sent to the Forensic Science Laboratory after the arrest of the accused or together with the

crime weapon, the positive report of the said Laboratory loses its evidentiary value. Sending the crime empties together with the weapon of offence is not a safe way to sustain conviction of the accused and it smacks of foul play on the part of the Investigating Officer simply for the reason that till recovery of weapon, he kept the empties with him for no justifiable reason.

iv) It is a well settled principle of law that for the accused to be afforded this right of the benefit of the doubt, it is not necessary that there should be many circumstances creating uncertainty and if there is only one doubt, the benefit of the same must go to the accused.

v) It is settled principle of law that the conviction must be based on unimpeachable, trustworthy and reliable evidence.

Conclusion: i) Article 129 of the Qanoon-e-Shahadat Order, 1984, empowers the court to presume the existence of any fact, which it thinks likely to have happened with regard to common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

ii) Benefit goes in favour of the accused when specific motive has been alleged by the prosecution but failed to establish.

iii) When crime empty is sent to Laboratory after the arrest of the accused or together with the crime weapon, it loses its evidentiary value.

iv) If there is only one doubt, the benefit of the same must go to the accused.

v) Conviction must be based on unimpeachable, trustworthy and reliable evidence.

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9. **Supreme Court of Pakistan**
Pakistan Television Corporation v. Noor Sanat Shah
Civil Appeal No. 284 of 2017
Mr. Justice Ijaz Ul Ahsan, Mr. Justice Sayyed Mazahar Ali Akbar Naqvi
https://www.supremecourt.gov.pk/downloads_judgements/c.a._284_2017.pdf

Facts: The respondent being employee of the appellant instituted a suit for recovery of damages against the Appellant, on the basis of unnecessary litigation in service matters to secure his right, which was decreed by the learned Civil Court (the "Trial Court") and was upheld by the Additional District Judge (the "Appellate Court"). Both of these judgments were upheld by the High Court in the impugned judgment which has now been assailed by the Appellant by way of the instant Appeal.

Issue: **i)** Under what law are suits for recovery of damages regulated in Pakistan?

ii) What are the types of Torts and what is the tort of interest in property?

iii) Whether a corporation can be held vicariously liable for the acts of its officials?

iv) What are the considerations to hold a corporation vicariously liable for the acts of its officials?

v) Whether the state-owned television broadcaster which falls within the

administrative competence of the Information and Broadcasting Division of the Government of Pakistan but being a non-statutory body having its own Service Rules as well as Memorandum & Articles of Association can sue or be sued in its own name?

Analysis: i) It is settled law; based on a Latin maxim recognized by our jurisprudence, that *ubi jus ibi remedium* (where there is a right, there is a remedy). It postulates that where law has established a right, there should be a corresponding remedy for its breach. The right to a remedy is one such fundamental right that has historically been recognized by our legal system However, the recovery of the said resources (in this case, monetary expenses) is not covered or regulated by any law in Pakistan for the time-being other than awarding costs. Since the said suit is not regulated by any specific law for the time being in Pakistan, section 9 of the Civil Procedure Code, 1908 (the "CPC") would operate and vest jurisdiction in the Civil Court to adjudicate the suits for recovery of damages of the nature filed by the Respondent.

ii) Torts, broadly speaking, tend to fall within four categories. They are: 1) torts of physical integrity; 2) torts of interests in property; 3) torts of use and enjoyment of land; and 4) torts of reputation. The torts of importance for the purposes of this instant Appeal are tort of interest in property. In its essence, the Respondent in his suit claimed that by virtue of litigation that had ensued between the parties, the Appellant had committed a tort of interest in property. In this case, his financial resources as well as physical integrity insofar as he was subjected to face anxiety, mental stress of having to approach various legal fora, arrange legal representation and expend his limited financial resources for enforcement of his legitimate rights. However, the main physical, perceivable and ostensible damages that the Respondent had arguably suffered were monetary/ economic in nature.

iii) It is imperative to note that vicarious liability can only arise if the employee of the organization has committed a tort during the course of his employment. The United Kingdom's House of Lords in the case of Lister vs. Hesleu Hall Ltd. ([2002] 1 AC 215) has found that actions that were so "closely connected" to what a person was employed to do opened up the employing organization to vicarious liability and held that it would be fair and just to hold such organizations vicariously liable if the said act that ended up becoming a tort was "closely connected" to the duties normally performed by an employee during the course of his employment. … It would therefore appear that the concept of vicarious liability for tort is not something that arises out of a law or a legal principle but is instead guided by policy reasons that are expanded and determined by courts of law in the absence of any legislation which regulates the specific tort in question.

iv) The first consideration is that the courts have to look at when deciding whether an entity / organization is vicariously liable for breaches in tort committed by its employees is whether or not a tortious breach has actually been committed in the first place. The next consideration would be whether or not the tortious acts had been committed by an employee of an organization during the course of his

employment and the final consideration would be whether it would be fair, just and reasonable to hold an organization / entity vicariously liable for the actions of its employees during the course of their employment which resulted in tortious acts.

v) The Appellant in the instant case is a state-owned television broadcaster and falls within the administrative competence of the Information and Broadcasting Division of the Government of Pakistan (Schedule II Heading 16 (13) (i) (a) read with Rule 3 (3) of the Rules of Business, 1973). However, admittedly, the Appellant is a non-statutory body having its own Service Rules as well as Memorandum & Articles of Association. Whilst it may be controlled and directed by the Government of Pakistan through the Information and Broadcasting Division, it is, for all intents and purposes, a separate corporate entity. Therefore, the Respondent was not bound to follow the requirement laid down in Section 79 of the CPC read with Article 174 of the Constitution of Pakistan since the Appellant cannot be considered a part of the Government of Pakistan for the sole reason that the Government of Pakistan administers the Appellant. The Appellant has its own corporate personality and cannot be considered a part of the Government of Pakistan. It can therefore sue or be sued in its own name and there is no requirement for potential claimants/ plaintiffs to implead the Government of Pakistan when they wish to sue the Appellant.

Conclusion: i) Since the suits for recovery of damages are not regulated by any specific law for the time being in Pakistan, section 9 of the Civil Procedure Code, 1908 (the "CPC") would operate and vest jurisdiction in the Civil Court to adjudicate such suits like the one in hand.

ii) Torts, broadly speaking, fall within four categories which are: 1) torts of physical integrity; 2) torts of interests in property; 3) torts of use and enjoyment of land; and 4) torts of reputation.

iii) A corporation can be held vicariously liable for the acts of its officials.

iv) The considerations to hold a corporation vicariously liable are whether or not a tortious breach has actually been committed in the first place, whether or not the tortious acts had been committed by an employee of an organization during the course of his employment and the final consideration would be whether it would be fair, just and reasonable to hold an organization / entity vicariously liable for the actions of its employees during the course of their employment which resulted in tortious acts.

v) The state-owned television broadcaster which falls within the administrative competence of the Information and Broadcasting Division of the Government of Pakistan but being a non-statutory body having its own Service Rules as well as Memorandum & Articles of Association can sue or be sued in its own name.

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10. **Supreme Court of Pakistan**
Province of Punjab through Secretary Agriculture Department, Lahore v. Saleem Ijaz, etc.
C.P.1336-L of 2021 to C.P.1340-L of 2021
Mr. Justice Syed Mansoor Ali Shah, Mr. Justice Amin-ud-Din Khan
https://www.supremecourt.gov.pk/downloads_judgements/c.p._1336_l_2021.pdf

Facts: Through these civil petitions the petitioner assailed the order of the High Court, whereby, it held that the pesticide laboratories had to be certified by the ISO and in the absence thereof their Reports cannot be relied upon or form basis of any criminal proceedings against the respondents.

Issues: i) Whether the pesticide laboratory established under section 13 of the Agricultural Pesticides Ordinance, 1971 is required to be certified by the ISO as prescribed in Rule 22 of the Punjab Agricultural Pesticides Rules, 2018?
ii) Whether a rule can be framed so as to be in conflict with or in derogation from the statute under which it is framed or in conflict with any other statute, which is not inconsistent with the parent statute under which the rule is framed?

Analysis: i) Section 13 of the Ordinance provides for the establishment of pesticide laboratories. The above shows that the pesticide laboratory is to be set up by the Provincial Government, which is to carry out its functions entrusted to it by or under the Ordinance. Section 13 (2) provides that the functions of the pesticide laboratory and the mode of submissions of samples for analysis or test to the Laboratory shall be such as may be “prescribed”. The word “prescribed” under Section 3 (o) means as prescribed under the Rules. Under Section 13 (2) of the Ordinance Rules can only provide the procedure for the functions of the pesticide laboratory and the mode of submissions of samples for analysis or tests, while the laboratory is set up as a pesticide laboratory under section 13 by the Provincial Government. Rules enjoy no power to set up or establish the pesticide laboratory, which is the sole prerogative of the Provincial Governments under Section 13 (1) of the Ordinance. The power to make Rules under Section 29 of the Ordinance also does not authorise the Provincial Government to make Rules regarding the setting up of the pesticide laboratory. The above Rule shows that the pesticide laboratory has to be duly certified by the International Organization for Standardization (ISO). Certification of the pesticide laboratory is a matter relating to its setting up and cannot be regulated by the Rules as the prerogative of setting up the pesticide laboratory is that of the Provincial Government under Section 13. Further, under the Act, 2017 the Pakistan National Accreditation Council (“PNAC”) has been established for providing accreditation/certification of Conformity Assessment Body (Laboratories) across the country in order to enable the laboratories to assure the quality of products, services and management system in accordance with national and international standards for sustainable socio economic development. Two main functions of the PNCA under Section 4 (a) and (d) of Act, 2017 are to establish an internationally recognized

accreditation system and accredit the conformity assessment bodies. Therefore, under the Act, 2017 the conformity assessment bodies or laboratories in the country have to be accredited and certified by the PNAC. Rule 22 requiring the certification to be done by ISO is offensive to the provisions of Act, 2017. In Pakistan laboratories can only be accredited or certified by PNAC. Reliance on Muhammed Asghar is also misplaced as the said opinion revolves around the mandatory and directory nature of Rule 22 and does not discuss the vires of the Rule when compared with the provisions of the Ordinance and the Act, 2017. The said opinion is also silent regarding the fact that ISO is not a certifying or a conformity assessment organization but an organization that only develops standards as discussed hereunder.

ii) No rule can be framed so as to be in conflict with or in derogation from the statute under which it is framed or in conflict with any other statute, which is not inconsistent with the parent statute under which the rule is framed. However, before declaring so, the court should endeavor to reconcile the rule, that is to say, the rule may be so read, if the phraseology permits it, as to make it consistent with the provisions of the statute.

Conclusion: i) The pesticide laboratory established under section 13 of the Agricultural Pesticides Ordinance, 1971 is not required to be certified by the ISO as prescribed in Rule 22 of the Punjab Agricultural Pesticides Rules, 2018.

ii) A rule cannot be framed so as to be in conflict with or in derogation from the statute under which it is framed or in conflict with any other statute, which is not inconsistent with the parent statute under which the rule is framed.

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11. **Supreme Court of Pakistan**
Ijaz Akbar v. The Director General (Ext.) L&DD, Punjab, Lahore and others
C.P. 4835 of 2019
Mr. Justice Syed Mansoor Ali Shah, Mr. Justice Jamal Khan Mandokhail, Mr. Justice Shahid Waheed
https://www.supremecourt.gov.pk/downloads_judgements/c.p._4835_2019.pdf

Facts: The petitioner seeks leave to appeal against a judgment of the Punjab Service Tribunal, whereby the Tribunal while maintaining the findings of the departmental authorities as to his guilt on the charge of willful absence from duty, has partly allowed his appeal by reducing his penalty from forfeiture of two-year service to forfeiture of one year service.

Issues: i) What does act of unauthorized absence of a civil servant from his duty constitutes?

ii) When and what incidental order a disciplinary authority has to pass as a legal consequences of absence of delinquent civil servant from duty?

iii) Whether there is any limit on penalty of forfeiture of period of past services?

iv) What courses are available to departmental authority in case of unauthorized absence of a civil servant from his duty?

Analysis: i) The unauthorized absence of a civil servant from his duty is an act which is prejudicial to ‘good order’ and ‘service discipline’, and thus constitutes misconduct for taking disciplinary action against him.

ii) In view of legal consequence of the absence from duty, a disciplinary authority, or an appellate authority, tribunal or court, when imposes a penalty lesser than dismissal or removal from service on a delinquent civil servant for his misconduct of being absent from duty, it has to make an incidental order as to what treatment should be given to the period of his absence for the purpose of giving continuity to his service; otherwise, the whole past service of the civil servant will stand forfeited, which would be the imposition of an additional penalty neither prescribed by the law nor imposed by the authority. The best possible incidental order, which may be made in such a situation, is therefore to make a fictional arrangement to account for such period of absence from duty in the service record of the civil servant by treating (deeming) the same as an extraordinary leave without pay, rather than any other kind of leave; as in case of treating the said period as a leave of some other kind of leave (even if found due), the delinquent civil servant may claim pay of that period also, which would amount to awarding him a benefit rather than awarding a penalty for his fault. Where the penalty imposed on the delinquent civil servant is dismissal or removal from service, it may not be necessary to pass any incidental order relating to the period of absence, unless it is deemed necessary to recover any amount of pay, or other service benefits, received by the civil servant during the period of his absence from duty.

iii) Although Section 4(b)(iii) of the PEEDA Act provides for the penalty of forfeiture of past service for a specific period, it has also limited the same to a maximum of five year period and thus does not permit the forfeiture of the whole past service exceeding a period of five years.

iv) In case of an unauthorized absence of a civil servant from his duty, two courses are open to the departmental authority: (i) to condone the unauthorized absence by accepting his explanation (if found justified) and sanction the ex-post facto leave under the relevant leave rules, or (ii) to initiate the disciplinary proceedings against him and impose a penalty for the misconduct.

Conclusion: i) The unauthorized absence of a civil servant from his duty constitutes misconduct.

ii) When penalty of dismissal from service is imposed for unauthorized absence of civil servant it may not be necessary to pass any incidental order relating to the period of absence, unless it is deemed necessary to recover any amount of pay, or other service benefits, received by the civil servant during the period of his absence from duty. Whereas when penalty lesser than dismissal or removal from service on a delinquent civil servant is imposed for his misconduct of being absent from duty, it has to make an incidental order as to what treatment should be given to the period of his absence for the purpose of giving continuity to his

service.

iii) Section 4(b)(iii) of the PEEDA Act provides for the penalty of forfeiture of past service for a specific period, it has also limited the same to a maximum of five year period.

iv) In case of an unauthorized absence of a civil servant from his duty, two courses are open to the departmental authority: (i) to condone the unauthorized absence by accepting his explanation (if found justified) and sanction the ex-post facto leave under the relevant leave rules, or (ii) to initiate the disciplinary proceedings against him and impose a penalty for the misconduct.

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12. **Supreme Court of Pakistan**
Syed Hammad Nabi and others v. Inspector General of Police Punjab, Lahore and others.
Civil Appeals No.1172 to 1178 of 2020 etc.
Mr. Justice Syed Mansoor Ali Shah, Mrs. Justice Ayesha A. Malik
https://www.supremecourt.gov.pk/downloads_judgements/c.a._1172_2020.pdf

Facts: The Appellants claimed seniority as per police rules and prayed to set aside the impugned judgment passed by the Punjab Service Tribunal through instant civil appeals.

Issues: i) Whether final seniority list of Inspectors may be reckoned from the date of confirmation of the officers or from the date of appointment?

ii) Whether leave-refusing orders which has neither decided any question of law nor enunciated any principle of law constitute binding precedents?

iii) Whether all issues of posting, transfer and seniority must be settled by the Courts?

Analysis: i) Once police officer has successfully undergone the said courses he stands confirmed at the end of the probationary period. The seniority is once again settled, this being the final seniority from the date of confirmation. The above rule is, therefore, very clear that final seniority list of Inspectors will be reckoned from the date of confirmation of the officers and not from the date of appointment.

ii) We have gone through Qayyum Nawaz and find that it is a leave-refusing order (described as a judgment), which has neither decided any question of law nor enunciated any principle of law in terms of Article 189 of the Constitution. Such leave-refusing orders do not constitute binding precedents. The impression that a leave-refusing order endorses the statements of law made in the impugned orders and thus enhances the status of those statements as that of the apex court is fallacious. This impression is based on inference drawn from the leave-refusing orders, while ‘a case is only an authority for what it actually decides’ and cannot be cited as a precedent for a proposition that may be inferred from it.

iii) The issues of posting, transfer and seniority must be settled within the department strictly in accordance with the Rules and only matters requiring legal interpretation may come up before the Courts. Several junior officers approaching the courts for redressal of their grievance reflects poorly on the internal

governance of the Police department when the elaborate Police Rules and the Police Order provide for such eventualities in detail.

Conclusion: i) As per rule 12.2(3), final seniority list of Inspectors will be reckoned from the date of confirmation of the officers and not from the date of appointment.
ii) Leave-refusing order which has neither decided any question of law nor enunciated any principle of law do not constitute binding precedent.
iii) The issues of posting, transfer and seniority must be settled within the department and only matters requiring legal interpretation may come up before the Courts.

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13. **Supreme Court of Pakistan**
Saif Power Limited v. Federation of Pakistan through Secretary, Ministry of Law, Civil Secretariat Islamabad and others
Civil Petition No.3263 of 2022
Mr. Justice Syed Mansoor Ali Shah, Mrs. Justice Ayesha A. Malik
https://www.supremecourt.gov.pk/downloads_judgements/c.p._3263_2022.pdf

Facts: This Civil Petition under Article 185(3) of the Constitution of the Islamic Republic of Pakistan, 1973, has arisen out of judgment, passed by the Islamabad High Court, Islamabad (High Court) whereby writ petition filed by the Petitioner, was dismissed.

Issues: i) Whether under section 231 of the Companies Ordinance, 1984, the inspection is limited to books of account and related papers and books?
ii) Whether an investigation under sections 263 and 265 of the Companies Ordinance, 1984 can be ordered on statutory grounds which include allegations of fraud, illegalities into the affairs of the company, or misuse and misappropriation of funds of the company?

Analysis: i) Section 231 of the Ordinance empowers the SECP, as a regulator, to inspect the books of account and related books and papers of a company. So, inspection is limited to books of account and related papers and books, and it does not include other record of the company which is unrelated to the accounts of the company. The exercise of this power is administrative in nature, essentially to ensure compliance with the regulatory requirements pertaining to the books of account. Books of account are the journals and ledgers which contain financial information related to the business and include books such as purchase books, cash books, sales books, debit ledger and credit ledger amongst others. There is also a corresponding obligation on the directors, officers and employees of the company to provide all books of account and papers and to give all assistance in connection with the inspection. An inspection under Section 231 of the Ordinance is, therefore, restricted in its scope and requires every director, officer or employee of the company to produce the books of account and is not an open ended inspection.
ii) Sections 263 and 265 of the Ordinance deals with the exercise of power of

investigation by the SECP. The powers under Sections 263 and 265 are wider and also come with more procedural requirements. The SECP is empowered to initiate an investigation on an application by the members or on the basis of a report of the Registrar or it can initiate an investigation if there are circumstances suggesting that the business of the company is being conducted with intent to defraud the creditors, members or any other person, or if the business is being conducted for a fraudulent or unlawful purpose, or if the members concerned with the formation of the company are guilty of fraud, misfeasance, breach of trust or other misconduct. The spirit of Sections 263 and 265 of the Ordinance is to ensure that the business is managed in accordance with sound business principles or prudential commercial practice and that the financial position of the company is not threatened. The scope of the investigation is based on the allegations pertaining to the affairs of the company and requires a probe into the allegations to ascertain their veracity. An investigation against a company is a serious matter, as it is capable of entailing consequences both financial and penal which will impact the goodwill of the company. Consequently, an investigation cannot be ordered except on statutory grounds which include allegations of fraud, illegalities into the affairs of the company, or misuse and misappropriation of funds of the company.

Conclusion: i) Under section 231 of the Companies Ordinance, 1984, the inspection is limited to books of account and related papers and books and it does not include other record of the company which is unrelated to the accounts of the company.
ii) An investigation under sections 263 and 265 of the Companies Ordinance, 1984 cannot be ordered except on statutory grounds which include allegations of fraud, illegalities into the affairs of the company, or misuse and misappropriation of funds of the company.

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14. **Supreme Court of Pakistan**
Divisional Superintendent, Postal Services, D.G. Khan v. Nadeem Raza & another
Civil Petition No.3855 of 2022
Mr. Justice Syed Mansoor Ali Shah, Mrs. Justice Ayesha A. Malik
https://www.supremecourt.gov.pk/downloads_judgements/c.p._3855_2022.pdf

Facts: The department imposed a major penalty of "Removal from Service" on respondent No.1 for misappropriation of government money, against which he preferred a departmental appeal, which was rejected. Thereafter, on an appeal filed by respondent No.1 before the Tribunal, the penalty was reduced from "Removal from Service" to "reduction to three stages lower in pay scale for two years". The instant petition has been filed seeking leave to appeal against the said judgment.

Issues: i) Whether a Tribunal or the Court can interfere or reduce the penalty imposed by the department on a civil servant?
ii) Under what circumstances, the imposition of the penalty becomes

unsustainable under the law and the Tribunal or Court is justified for interference?
iii) When the Tribunal or the Court interferes in the quantum or nature of the penalty imposed by the competent authority by terming the same as unreasonable, perverse or harsh, or by exercising leniency?
iv) Whether the test of proportionality is more stringent in cases of misconduct involving moral turpitude?

Analysis: i) Under Section 5 of the Service Tribunals Act, 1973 ("Act") the Tribunal is empowered to confirm, set aside, vary or modify the order appealed before it; however, such powers are to be exercised carefully, judiciously and after recording reasons for the same. This Court has repeatedly held that the Tribunal has no jurisdiction to grant arbitrary relief to any person as the powers of the Tribunal under Section 5 of the Act are neither unqualified and nor unlimited. It is also settled law that the imposition of punishment under the law is primarily the function and prerogative of the competent authority and the role of the Tribunal or the Court is secondary unless it is found to be against the law or is unreasonable. This is because the department/competent authority, being the fact finding authority, is best suited to decide the particular penalty to be imposed keeping in view a host of factors such as the nature and gravity of the misconduct, past conduct, the nature and the responsibility of the duty assigned to the delinquent, previous penalty, if any, and the discipline required to be maintained in the department, as well as any extenuating circumstances. The question of interference with relation to the quantum or the nature of the penalty imposed by the department only arises when the Tribunal or the Court, in consonance with the decision of the competent authority, has also found the delinquent guilty of the same or some form misconduct or inefficiency. It is, therefore, only in the above exceptional circumstances, i.e. where it is against the law or is unreasonable, that the Tribunal or the Court can interfere in the penalty imposed by the department.
ii) The imposition of the penalty being against the law would entail that it cannot be held as legally sustainable, such as, when misconduct or inefficiency for which the penalty has been imposed has not been proved and a lesser form of misconduct or inefficiency, in the opinion of the Tribunal or the Court, is proved, or the procedure provided under the law for imposing the penalty has not been followed or the penalty imposed has not been provided for in the law or rules applicable, and therefore, the imposition of the penalty itself is not sustainable under the law, thereby, justifying interference.
iii) Reasonableness for the purposes of assessing the quantum or nature of a penalty imposed by the department is to be gauged by applying the test of proportionality. In ***Sabir case*** (PLD 2019 SC 189) it was held that proportionality is a standard that examines the relationship between the objective the executive branch wishes to achieve, which has the potential of infringing upon a human right, and the means it has chosen in order to achieve that infringing objective. In essence, an administrative decision must not be more drastic than necessary and therefore, it follows that the penalty imposed must be commensurate with the

misconduct or inefficiency that has been proved. Where the Tribunal or the Court interferes in the quantum or nature of the penalty imposed by the competent authority by terming the same as unreasonable, perverse or harsh, or by exercising leniency, such interference is, in effect, only made when the Tribunal or the Court concludes that the penalty is disproportionate to the misconduct proved by employing the test of proportionality.

iv) Another question that arises is with regards to the applicability of the test of proportionality to interfere with a penalty imposed for misconduct which involves moral turpitude. "Moral turpitude" was defined in Imtiaz Ahmed case (2008 PLC (CS) 934) as "the act of baseness, vileness or the depravity in private and social duties which man owes to his fellow man, or to society in general contrary to accepted and customary rule of right and duty between man and man." In Ghulam Hussain case (2002 SCMR 1691), it was held that moral turpitude includes anything which is done contrary to the good principles of morality, any act which runs contrary to justice, honesty, good moral values or established judicial norms of a society. The modern notion of proportionality requires that the punishment ought to reflect the degree of moral culpability associated with the offence for which it is imposed. The test of proportionality is, therefore, more stringent in cases of misconduct involving moral turpitude in view of the depravity or moral culpability involved.

Conclusion: i) Only in exceptional circumstances where the order is against the law or unreasonable or fails the test of proportionality, a Tribunal or the Court can interfere or reduce the penalty imposed by the department on a civil servant.

ii) The imposition of the penalty becomes unsustainable under the law and the Tribunal or Court are justified for interference when a lesser form of misconduct or inefficiency is proved; or procedure provided under the law is not followed; or the penalty imposed has not been provided for in the law or rules applicable.

iii) The Tribunal or the Court interferes in the quantum or nature of the penalty imposed by the competent authority by terming the same as unreasonable, perverse or harsh, or by exercising leniency, such interference is, in effect, only made when the Tribunal or the Court concludes that the penalty is disproportionate to the misconduct proved by employing the test of proportionality.

iv) Yes, the test of proportionality is more stringent in cases of misconduct involving moral turpitude.

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15. **Supreme Court of Pakistan**
FIA through Director General, FIA and others v.
Syed Hamid Ali Shah and others
C.P. 1257 of 2020
Mr. Justice Syed Mansoor Ali Shah Mrs. Justice Ayesha A. Malik
https://www.supremecourt.gov.pk/downloads_judgements/c.p._1257_2020.pdf

Facts: The petitioners seek leave to appeal against a judgment of the Islamabad High Court, whereby the writ petition of the respondents, has quashed FIR registered against them at Police Station FIA, Islamabad, for offences punishable under Sections 409/109 of the Pakistan Penal Code 1860 (“PPC”) and Section 5(2) of the Prevention of Corruption Act 1947 (“PCA”).

Issues: i) Whether a High Court has power under Section 561-A Cr.P.C to quash an FIR or an investigation proceeding?
ii) Whether the misuse of the authority entrusted to a public servant would constitute the offence of criminal breach of trust punishable under section 409 of PPC and section 5(2) of PCA 1947?

Analysis: i) The jurisdiction of a High Court to make an appropriate order under Section 561-A Cr.P.C necessary to secure the ends of justice, can only be exercised with regard to the judicial or court proceedings and not relating to proceedings of any other authority or department, such as FIR registration or investigation proceedings of the police department. This has been authoritatively held by a five-member bench of this Court in Shahnaz Begum’s case. A High Court, therefore, can quash a judicial proceeding pending before any subordinate court under Section 561-A Cr.P.C, if it finds it necessary to make such order to prevent the abuse of the process of that court or otherwise to secure the ends of justice; however, it should not ordinarily exercise its power under Section 561-A Cr.P.C to make such an order unless the accused person has first availed his remedy before the trial court under Section 249-A or 265-K, Cr.P.C. If an accused thinks that the FIR has been registered, and the investigation is being conducted, without lawful authority, he may have recourse to the constitutional jurisdiction of the High Court under Article 199 of the Constitution for judicial review of the said acts of the police officers.
ii) The argument of the learned counsel for the petitioner is totally misconceived, that the authority conferred upon the accused public officers, who granted the illegal upgradations, was a trust and by misusing that authority, they have committed the offence of criminal breach of trust punishable under section 409 PPC and the offence of criminal misconduct punishable under Section 5(2) PCA. No doubt, the powers of the public servants are like a trust conferred upon them and they should exercise them fairly, honestly and in good faith as a trustee; but the entrustment of the power to upgrade his subordinate officials is not equivalent to the entrustment of property as mentioned in Section 405 PPC and its misuse, or use in violation of the relevant rules and regulations, does not constitute the cognizable offences punishable under Section 409 PPC and Section 5(2) PCA. The misuse of such a power may constitute misconduct under the service laws but does not attract criminal misconduct punishable under the criminal laws.

Conclusion: i) A High Court has no power to quash an FIR or investigation proceedings under section 561-A of Cr.P.C 1898, however, this power can be exercised under Article 199 of the Constitution of 1973.

ii) The misuse of the authority entrusted to a public servant shall not constitute the offence of criminal breach of trust punishable under section 409 PPC and section 5(2) of PCA. However, the misuse of such a power may constitute misconduct under the services laws.

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16. **Supreme Court of Pakistan**
Aman Ullah etc. v. The State etc.
Jail Petition No. 883 of 2017 and Criminal Petition No. 1793-l of 2017
Mr. Justice Sayyed Mazahar Ali Akbar Naqvi, Mr. Justice Jamal Khan Mandokhail, Mr. Justice Athar Minallah
https://www.supremecourt.gov.pk/downloads_judgements/j.p._883_2017.pdf

Facts: The petitioner assailed the judgment of the learned High Court, whereby, the learned High Court while maintaining the conviction of the petitioner under Section 302(b) PPC, altered the sentence of death into imprisonment for life. The other conviction and sentences were maintained. The amount of compensation and the sentence in default whereof was also maintained. Benefit of Section 382-B Cr.P.C. was also extended in favour of the petitioner.

Issues: i) Where ocular evidence is found trustworthy and confidence inspiring, whether the same is given preference over medical evidence and the same alone is sufficient to sustain conviction of an accused?
ii) Whether minor discrepancies, if any, in medical evidence relating to nature of injuries do negate the direct evidence?
iii) Whether mere relationship of the prosecution witnesses with the deceased can be a ground to discard the testimony of such witnesses?

Analysis: i) It is settled law that where ocular evidence is found trustworthy and confidence inspiring, the same is given preference over medical evidence and the same alone is sufficient to sustain conviction of an accused.
ii) Casual discrepancies and conflicts appearing in medical evidence and the ocular version are quite possible for variety of reasons. During occurrence witnesses in a momentary glance make only tentative assessment of the distance between the deceased and the assailant and the points where accused caused injuries. It becomes highly improbable to correctly mention the number and location of the injuries with exactitude. Minor discrepancies, if any, in medical evidence relating to nature of injuries do not negate the direct evidence as witnesses are not supposed to give photo picture of ocular account. Even otherwise, conflict of ocular account with medical evidence being not material imprinting any dent in prosecution version would have no adverse effect on prosecution case.
iii) As far as the question that the prosecution witnesses are interested and related, therefore, their evidence has lost its sanctity is concerned, it is now settled that mere relationship of the prosecution witnesses with the deceased cannot be a ground to discard the testimony of such witnesses.

Conclusion: i) Where ocular evidence is found trustworthy and confidence inspiring, the same is given preference over medical evidence and the same alone is sufficient to sustain conviction of an accused.
ii) Minor discrepancies, if any, in medical evidence relating to nature of injuries do not negate the direct evidence as witnesses are not supposed to give photo picture of ocular account.
iii) Mere relationship of the prosecution witnesses with the deceased cannot be a ground to discard the testimony of such witnesses.

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17. **Supreme Court of Pakistan**
Mst. Hajira Bibi @ Seema and Mst. Shaina Hameed v.
Abdul Qaseem and another
Criminal Appeal No. 39-K of 2022 & Criminal M.A. No. 113-K of 2022
Abdul Qaseem v. The State
Criminal Petition No. 613 of 2022
Mr. Justice Sayyed Mazahar Ali Akbar Naqvi, Mr. Justice Jamal Khan Mandokhail, Mr. Justice Athar Minallah
https://www.supremecourt.gov.pk/downloads_judgements/crl.a._39_k_2022.pdf

Facts: Appellants were tried by the learned Additional Sessions Judge under charge of abatement of murder of brother of the complainant, with co-accused. The main co-accused did not join trial and was declared a proclaimed offender. Another co-accused, who allegedly facilitated the main absconding accused by driving motorcycle, being juvenile, was tried separately by the learned Additional Sessions Judge. The learned Trial Court vide two separate judgments convicted the appellants and co-accused. In appeal, the learned High Court while maintaining the conviction of the appellants under Section 302(b) PPC, altered the sentence of death into imprisonment for life. However, the learned High Court acquitted juvenile co-accused. Hence instant criminal appeals have been filed against the judgments of the learned High Court.

Issues: i) What are the stages in the commission of a crime?
ii) What are ingredients which constitute an offence of abetment?
iii) What evidence is required to prove the charge of offence of abetment?
iv) What kind of evidence on which conviction can be based?
v) Whether any doubt arising in prosecution case is to be resolved in favour of the accused?

Analysis: i) There are three stages in the commission of a crime, i.e. (i) the mental stage in which the crime is considered and determined upon, (ii) the preparatory stage, and (iii) the stage of execution.
ii) A bare perusal of Section 109 PPC shows that the same comes into operation if there is abetment of an offence. Section 107 deals with abetment of a thing. Abetment under the said provision involves active complicity on the part of the abettor at a point of time prior to actual commission of offence. It is essence of

crime of abetment that the abettor should substantially assist the principal culprit towards commission of offence. Concurrence in the criminal acts of another without such participation therein does not per se become culpable. Mere negligence in an act also does not bring in a person within the purview of the offence of abetment. Perusal of Section 107 PPC reveals that three ingredients are essential to dub any person as conspirator i.e. (i) instigation, (ii) engagement with co-accused, and (iii) intentional aid qua the act or omission for the purpose of completion of abetment. Expression "abettor" has been defined in Section 108 PPC to mean a person who abets either commission of an offence or commission of an act which would be an offence if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor. Intention to aid commission of the crime is the gist of offence of abetment and in the absence of necessary intention, such offence is not made out. Liability of an abettor of a crime is generally co-extensive with the principal offender.

iii) To establish the charge under section 109 PPC, it is the duty of the prosecution to produce evidence of conclusive nature in order to prove the ingredients as mentioned in the definition of abetment, referred above.

iv) It is settled principle of law that the conviction must be based on unimpeachable, trustworthy and reliable evidence.

v) Any doubt arising in prosecution case is to be resolved in favour of the accused and burden of proof is always on prosecution to prove its case beyond reasonable doubt. It is also an established principle of law and equity that it is better that 100 guilty persons should let off but one innocent person should not suffer… For the accused to be afforded this right of the benefit of the doubt, it is not necessary that there should be many circumstances creating uncertainty and if there is only one doubt, the benefit of the same must go to the accused.

Conclusion: i) There are three stages in the commission of a crime, i.e. (i) the mental stage in which the crime is considered and determined upon, (ii) the preparatory stage, and (iii) the stage of execution.

ii) Three ingredients are essential (i) instigation, (ii) engagement with co-accused, and (iii) intentional aid qua the act or omission for the purpose of completion of abetment.

iii) It is the duty of the prosecution to produce evidence of conclusive nature in order to prove offence of abetment.

iv) Conviction must be based on unimpeachable, trustworthy and reliable evidence.

v) Any doubt arising in prosecution case is to be resolved in favour of the accused and burden of proof is always on prosecution to prove its case beyond reasonable doubt.

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18. **Supreme Court of Pakistan**
Gul Muhammad v. The State
Criminal Petition No. 1557 of 2022
Mr. Justice Sayyed Mazahar Ali Akbar Naqvi, Mr. Justice Jamal Khan Mandokhail, Mr. Justice Athar Minallah
https://www.supremecourt.gov.pk/downloads_judgements/crl.p._1557_2022.pdf

Facts: Through the instant petition under Article 185(3) of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has assailed the order passed by the High Court of Sindh with a prayer to grant post-arrest bail in case registered under Sections 302 / 324 / 337-A(i) / 337-F(i) / 337-H(ii) / 504 / 506 / 114 / 147/ 148 / 149 PPC.

Issues: What are the relevant considerations for a case of further inquiry in a post arrest bail?

Analysis: The allegation against the petitioner is that he while armed with pistol .30 bore launched an attack on the complainant party and made straight fire from his pistol on the complainant which hit on his ear and shoulder. However, it is stance of the petitioner that in fact the complainant party while armed with firearms came at his village, attacked on him and caused injury on his left arm, due to his left arm has been which amputated. The medical evidence available on record prima facie supports the stance of the petitioner. The petitioner has also got registered a counter FIR against the complainant party. The crime report was lodged after an inordinate delay of two days for which not even a single word has been put forward by the complainant. The delayed registration of FIR prima facie shows deliberations and consultation on the part of the complainant. The injuries of the injured witness have been declared as ghayr jaifah mutalahimah and shaijah-i-khafifah falling within the ambit of Sections 337 F(iii) and 337-A(i) PPC for which the maximum punishment provided under the statute is three and two years respectively. The petitioner is behind the bars for the last more than five months. Liberty of a person is a precious right, which cannot be taken away unless there are exceptional grounds to do so.

Conclusion: Unexplained delay in lodging of the FIR, case of counter versions, role and overt act ascribe to the petitioner, nature of injury (if any) caused by petitioner, maximum sentence of the alleged offence, and petitioner's period behind the bars are the few relevant considerations for a case of further inquiry in a post arrest bail.

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19. **Supreme Court of Pakistan**
Federation of Pakistan through Chairman Federal Board of Revenue FBR House, Islamabad and others v. Zahid Malik
Civil Appeal No.33-K of 2018
Mr. Justice Jamal Khan Mandokhail, Mr. Justice Muhammad Ali Mazhar, Mr. Justice Syed Hasan Azhar Rizvi
https://www.supremecourt.gov.pk/downloads_judgements/c.a._33_k_2018.pdf

Facts: This appeal is filed against the judgement passed by the Federal Service Tribunal whereby the appeal filed by the respondent was allowed and the major penalty of dismissal from service was converted into the minor penalty of stoppage of one increment for a period of one year and the respondent was also reinstated in service.

Issues: Whether the principles of natural justice are mandatory to be observed in the administrative proceedings?

Analysis: The principles of natural justice require that the delinquent should be afforded a fair opportunity to converge, give explanation and contest it before he is found guilty and condemned. The doctrine of natural justice is destined to safeguard individuals and whenever the civil rights, human rights, Constitutional rights, and other guaranteed rights under any law are found to be at stake, it is the religious duty of the Court to act promptly to shield and protect such fundamental rights of every citizen of this country. The principle of natural justice and fairmindedness is grounded in the philosophy of affording a right of audience before any detrimental action is taken, in tandem with its ensuing constituent that the foundation of any adjudication or order of a quasi-judicial authority, statutory body or any departmental authority regulated under some law must be rational and impartial and the decision maker has an adequate amount of decision making independence and the reasons of the decision arrived at should be amply well-defined, just, right and understandable, therefore it is incumbent that all judicial, quasi-judicial and administrative authorities should carry out their powers with a judicious and even handed approach to ensure justice according to tenor of law and without any violation of the principle of natural justice.

Conclusion: The observance of the principles of natural justice is mandatory for all judicial, quasi-judicial and administrative proceedings.

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20. **Lahore High Court**
Muhammad Azhar Siddique v. Federation of Pakistan etc.
W.P. No. 50725 of 2022
Mr. Justice Ali Baqar Najafi
https://sys.lhc.gov.pk/appjudgments/2023LHC203.pdf

Facts: The petitioners domestic, industrial and commercial consumers herein have challenged the imposition of FUEL PRICE ADJUSTMENT (FPA) and

QUARTER TARIFF ADJUSTMENT (QTA) etc. change of tariff from Industrial to Commercial and seek a direction to the National Electric Power Regulatory Authority (NEPRA) and Distributing Companies (DISCOs) not to charge them illegally in violation of Article 4, 9 & 38 of the Constitution of Islamic Republic of Pakistan, 1973.

Issues: i) What is the composition of the authority defined under Section 3 after the modification in the NEPRA Act, 1997 and as per the judgments of the Supreme Court?
ii) What does Tariff mean and what is the obligation of consumer?
iii) What is the responsibility of NEPRA and Federal Government while determining the tariff?
iv) When the tariff should be determined on regular basis?
v) What is the procedure of fuel adjustment in approved tariff?
vi) What is fuel cost adjustment?
vii) What are the parameters/ guidelines if alternate remedy is allowed to be resorted?
viii) What would be the process in case of the application of wrong tariff?
ix) Whether the special tribunals constituted to settle different matters have the power of Judicial Review?
x) Whether the consumer can be asked for the change of method of charging agreed at the time of obtaining the supply?

Analysis: i) By means of the amendment in 2021, sub clause (2) of Section 3 has now made it obligatory upon the Federal Government to appoint a Chairman and 4 specialized Members experts in the field of tariff and finance, chartered accountant, etc. Each of these Members is to be rotated so that the 4 Provinces of the Federation, namely Punjab, Baluchistan, Sindh, KPK are continuously represented as a part of the authority which would make it fully functional. This policy of rotational representation enumerated in sub section (2) is to ensure the equal and equitable representation of the Provinces. However, under section 31(2) (4a) the authority as a whole was to comply with the requisite range of skills.
ii) Under Section 31(2) Tariff means a final cost of energy offered to consumer determined on the basis of reference fuel price and any subsequent difference in the fuel price, added by NEPRA, therefore, it should be in the knowledge of the consumer that they were required to pay the price of energy on the basis of tentative fuel price and that the actual price would be payable on the receipt of the actual invoice of the fuel. Thus, it was a pre-agreed but reasonably contemplated liability of the consumer payable as and when finally determined, therefore, no question of vested right and legitimate expectancy arises if it not unjust.
iii) It is the heavy responsibility of the NEPRA to adjudge against the power generation companies if they wrongly claimed fuel adjustment costs and other expenses in order to transfer its burden to the consumers. Federal Government and NEPRA will also be responsible to determine the transmission losses after

holding detailed probe and to fix the responsibility and then to take appropriate action against the culprits as held in Muhammad Yasin's case. More so as under section 31(2) the NEPRA is bound to protect consumers against monopolistic and oligopolistic prices as the electricity was a monopoly product of WAPDA thus it is required to examine each and every component used for generation and transmission of energy while determining the tariff as held in Noorani Steel Mills's case.

iv) Under Section 3 the tariff is to be determined regularly and mandatorily on yearly, quarterly and monthly basis so as to demand the exact amounts from the domestic, industrial and commercial consumers. The broad reasoning is that the timely demand with legitimate expectancy is essential for the budgetary and to prepare a profit-loss balance sheet ever essential for payments, therefore, the timeframe so given in the said provision cannot be extended as it is mandatory and not directory.

v) Section 31(7)(IV) of the NEPRA Act, 1997 , deals with the monthly fuel adjustments while working out fuel adjustments, no other factor other than fuel changes can be considered and the decision has to take place not later than a period of 7 days, from the date the application is made to the Federal Government as per the dictum laid down in the Mustafa Impex's case 32 which means the Prime Minister and the Cabinet, otherwise it will undermine the power of the Federal Government which is against the spirit of the law.

vi) According to NEPRA, fuel cost adjustment is mechanism for recovery of left-over fuel cost component. It is determined and notified under section 31(7)(iv) read with section 7(1) & 7(3)(a) of NEPRA, the fuel price adjustment was determined on monthly basis to settle the variation due to cost of fuel (major component of tariff) and as such one month bill represent the fuel price adjustment of that month only. The fuel price adjustment variations due to generation mix and prices. The variation is subject to the final adjustment and settlement of the obligation of the consumers to pay the fuel charges. The increase of fuel price adjustment is obviously on account of increase of fuel price in the international market.

vii) For adequate and alternate remedy the test and guidelines for this court under Article 199 of the Constitution lies in efficacious, convenient, beneficial, effective and speedy, inexpensive and expeditious. The alternate remedy if allowed to be resorted to must be able to accomplish the same purpose, which depends upon the circumstances of each case.

viii) Application of a correct tariff is the responsibility of DISO at the time of sanction of connection. In case of application of wrong tariff, which is lower than the applicable tariff, no differential bill will be debited against the consumer account. However, in case where high tariff has been charged to the consumer than adjustment/credit for six (6) months be allowed retrospectively, from the date of pointing out of such discrepancy.

ix) The power of Judicial Review is conferred only upon the High Courts and Supreme Court of Pakistan by virtue of the Constitution of Islamic Republic of

Pakistan, 1973 and therefore, the Special Tribunals constituted to settle different matters between Governmental Departments do not have the authority to exercise this power.

x) The relationship of the consumer with the WAPDA is created on the basis of Abridged Conditions of Supply and according to clause 19 the methods of charging for the supply shall be those prescribed in the authority's schedule of electricity tariff enforced from time to time and no consumer shall be entitled to asked for any change if the method of charging agreed to at the time of obtaining the supply. However, clause 27 the authority has a right to refuse the condition of supply, the schedule of the electricity tariff rates and schedule of service/general charges without giving any previous notice to the consumer to that effect. Meaning thereby that the schedule can be changed unilaterally depending on post of conditions which obviously are justiciable and supported by good reasons.

Conclusion: i) By means of the amendment in 2021, sub clause (2) of Section 3, Federal Government appoint a Chairman and 4 specialized Members experts in the relevant field from each province representing their respective province.

ii) Tariff means a final cost of energy offered to consumer as it was a pre-agreed but reasonably contemplated liability of the consumer payable as and when finally determined.

iii) Federal Government and NEPRA will be responsible to determine the transmission losses after holding detailed probe and to fix the responsibility and then to take appropriate action against the culprits as held in Muhammad Yasin's case as well as NEPRA is bound to protect consumers against monopolistic and oligopolistic prices.

iv) Tariff is to be determined regularly and mandatorily on yearly, quarterly and monthly basis so as to demand the exact amounts from the domestic, industrial and commercial consumers.

v) Fuel adjustments in the approved tariff on account of any variations in the fuel charges and policy guidelines as the Federal Government may issue and notify the tariff so adjusted in the official Gazette are made not later than a period of 7 days.

vi) According to NEPRA, fuel cost adjustment is mechanism for recovery of left over fuel cost component.

vii) The alternate remedy if allowed to be resorted to must be able to accomplish the same purpose, which depends upon the circumstances of each case.

viii) In case of application of wrong tariff, which is lower than the applicable tariff, no differential bill will be debited against the consumer account.

ix) The special tribunals constituted to settle different matters do not have the power of Judicial Review.

x) The consumer cannot be asked for the change of method of charging.

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21. **Lahore High Court**
Mst. Robina Shehnaz, etc v. Mukhtar Begum, etc.
Civil Revision No. 2701 of 2016
Mr. Justice Shahid Bilal Hassan
https://sys.lhc.gov.pk/appjudgments/2023LHC168.pdf

Facts: The petitioners moved an application before the learned Executing Court for cancellation of mutations which were sanctioned by the judgment debtor after decree and recovery of decretal amount of maintenance allowance. The application was allowed. The respondents being aggrieved preferred an appeal and the same was accepted and application was dismissed. Hence, the instant revision petition has been filed by the petitioners.

Issues: Whether Executing Court is vested with jurisdiction to cancel the mutation sanctioned by the judgment debtor after passing decree against him?

Analysis: Therefore, the learned Executing Court was vested with jurisdiction to undo the said illegal act committed by the deceased (judgment debtor) and rightly cancelled the said mutations by allowing application, filed by the petitioners in this regard.

Conclusion: Executing Court is vested with jurisdiction to cancel the mutation sanctioned by the judgment debtor after passing decree against him.

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22. **Lahore High Court**
Mubashar Ahmad Ayaz v. Late (Moulana) Manzoor Ahmad Chinioti Thorugh L.Rs. etc.
R.S.A.No.46 of 2009
Mr. Justice Shahid Bilal Hassan
https://sys.lhc.gov.pk/appjudgments/2023LHC171.pdf

Facts: The respondent No. 1 instituted a suit for recovery of damages against the present appellant and respondent No.2, which was duly contested and on application of appellant, two additional issues were framed. The learned trial court decreed the suit but did not give findings on additional issues. Appeal was preferred but it was dismissed, hence, the instant regular second appeal has been filed.

Issues: Whether it is mandatory for trial court to give reasons for decision on each separate issue?

Analysis: According to Rule 5 of Order XX, Code of Civil Procedure, 1908, “In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit.” In the instant case, the learned trial Court framed additional issues 1-A and 1-B on the application of the appellant but while reducing the judgment into writing the learned trial Court totally ignored the said issues, which otherwise go to the root of the case and

without deciding the same, the fate of the case cannot be decided finally, because by using word “Shall” the said provision has been made mandatory unless the issues are interlinked and interconnected.

Conclusion: It is mandatory for trial court to give reasons for decision on each separate issue unless the issues are interlinked and interconnected.

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23. **Lahore High Court**
Muhammad Yousaf (deceased) through L.Rs. v. Naila Shaheen and others
R.S.A. No.129 of 2010
Mr. Justice Shahid Bilal Hassan
https://sys.lhc.gov.pk/appjudgments/2023LHC295.pdf

Facts: The appellants through this regular second appeal have assailed judgment and decree of the appellate court whereby appeal against preliminary decree passed in judgment and decree in suit for partition was dismissed.

Issues: Whether the court is under obligation to amend or frame additional issues after submission of amended plaint and written statement?

Analysis: The Court is under obligation to amend or frame additional issues after submission of amended plaint and written statement. The parties have to lead evidence keeping in mind the burden of proof placed upon their shoulders while formulating issues. If the issues framed by the Court are not proper with regard to rival claims of the parties then the provisions of Order XIV, Rule 1 of the Code of Civil Procedure, 1908 have been defiled. The stage of framing of issues is very important in trial of civil suit because at this stage the real controversy between the parties is summarized in the shape of issues and narrowing down the area of conflict and determination where the parties differ and then parties are required to lead evidence on the said issues. The importance of framing correct issues can be seen from the fact that parties are required to prove issues and not pleadings as provided by Order XVIII, Rule 2, C.P.C. The Court is bound to give decision on each issue framed as required by Order XX, Rule 5, C.P.C. Therefore, the Courts while framing issues should pay special attention to Order XIV of CPC and give in deep consideration to the pleadings etc. for the simple reason that if proper issues are not framed, then entire further process will be meaningless, which will be wastage of time and energy and would further delay the final decision of the suit.

Conclusion: The court is under obligation to amend or frame additional issues after submission of amended plaint and written statement.

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24. **Lahore High Court**
Zaheer Ahmed v. Judge, Special Court, etc.
Criminal Revision No.23556 of 2022
Miss. Justice Aalia Neelum, Mr. Justice Farooq Haider
https://sys.lhc.gov.pk/appjudgments/2023LHC192.pdf

Facts: Through instant revision petition, petitioner has challenged the vires of order passed by learned Judge Special Court (OIB-II), Lahore, whereby application filed by the petitioner for having comparison of signatures of his deceased father, was dismissed.

Issues: i) Whether any piece of evidence which is essential for just decision of the case, has to be brought on record irrespective of the fact that either it favours one party or goes against other?
ii) Whether filling lacuna in the case is immaterial if any piece of evidence is otherwise necessary for securing ends of justice?

Analysis: i) Any piece of evidence which is essential for just decision of the case, has to be brought on record irrespective of the fact that either it favours one party or goes against other. It goes without saying that Ch.1-E of the Volume III of Lahore High Court Rules and Orders deals with recording of evidence in criminal cases and relevant portion of its Rule 2 clearly reflects as under: -
"2. Duty of Court to elucidate facts.---...
……………………………………………………………………….....................
.............a Judge in a Criminal trial is not merely a disinterested auditor of the contest between the prosecution and the defence, but it is his duty to elucidate points left in obscurity by either side, intentionally or unintentionally, to come to a clear understanding of the actual events that occurred and to remove obscurities as far as possible. The wide powers given to the court by [Article 161 of the Qanun-e-Shahadat, 1984] ***[…] should be judiciously utilized for this purpose when necessary". Similarly, Article 161 of the Qanun-e-Shahadat Order, 1984 and Section 94 Cr.P.C., are also relevant.
ii) As far as filling lacuna left by any party is concerned, if such evidence/material is necessary for just decision of the case, then it becomes mandatory for the Court to summon and examine such evidence/material.

Conclusion: i) Any piece of evidence which is essential for just decision of the case, has to be brought on record irrespective of the fact that either it favours one party or goes against other.
ii) Filling lacuna in the case is immaterial if any piece of evidence is otherwise necessary for securing ends of justice.

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25. **Lahore High Court**
The State v. Bilal Hassan.
Murder Reference No. 81 of 2019
Bilal Hassan v. The State.
Crl. Appeal No. 19109 of 2019
Justice Miss Aalia Neelum, Mr. Justice Farooq Haider
https://sys.lhc.gov.pk/appjudgments/2023LHC411.pdf

Facts: The appellant was tried by the learned Additional Sessions Judge under Sections 302,324 P.P.C, sentenced to death with a direction to pay compensation, and also sentenced to undergo ten years R.I. under section 324 PPC. The appellant filed criminal appeal against his conviction and sentences and the learned trial court transmitted murder reference for confirmation of death sentence of the appellant. Murder reference and criminal appeal have been decided through single judgment.

Issues: i) Whether flaw in fixation of exact time when the incident was reported to the police is sufficient to cast doubt about the authenticity of the F.I.R?
ii) Whether unexplained delay of postmortem of the dead body is sufficient to cast doubt about the authenticity of the F.I.R?
iii) Whether delay in lodging FIR often resulted in exaggeration and treated as afterthought?

Analysis: i) When in the prosecution evidence, there is a severe flaw, to precisely fix the time when the incident was reported to the police. This aspect of the matter is sufficient to cast doubt about the authenticity of the F.I.R. This creates serious doubt about the genuineness of the prosecution story, including the presence of the complainant at the scene of occurrence.
ii) There is no plausible explanation as to why the postmortem of the dead body was delayed for 11 hours and 45 minutes. This aspect of the matter is sufficient to cast doubt about the authenticity of the F.I.R. This creates serious doubt about the genuineness of the prosecution story.
iii) Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought.

Conclusion: i) Flaw in fixation of exact time when the incident was reported to the police is sufficient to cast doubt about the authenticity of the F.I.R.
ii) Unexplained delay of postmortem of the dead body is sufficient to cast doubt about the authenticity of the F.I.R.
iii) Unexplained delay in lodging FIR often resulted in exaggeration and treated as afterthought.

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26. **Lahore High Court**
Hafiz Riaz Ahmad etc. v. Province of Punjab etc.
Writ Petition No.6917 of 2023
Mr. Justice Abid Aziz Sheikh
https://sys.lhc.gov.pk/appjudgments/2023LHC311.pdf

Facts: The petitioners through this Constitutional Petition have challenged the order passed by respondent No.2, whereby petitioners' posting against the post of Executive Engineer on their Own Pay and Scale was set-aside.

Issues: i) Whether Service Tribunal has exclusive jurisdiction on transfer and posting matters and jurisdiction of High Court is barred?
ii) Whether Service Tribunal has jurisdiction on the question of fitness and the question of eligibility?

Analysis: i) The Hon'ble Supreme Court in various judgments repeatedly held that in respect of transfer and posting matters, the exclusive jurisdiction is of the PST and jurisdiction of this Court is barred under Article 212 of the Constitution of Islamic Republic of Pakistan, 1973 (Constitution).
ii) There is no cavil that PST has no jurisdiction on the question of "fitness", however, the question of eligibility is different from the question of fitness. The eligibility primarily relates to the terms and conditions of service and their applicability to the Civil Servants concerned, and therefore, the PST has jurisdiction on the question of eligibility, whereas the question of fitness is a subjective evaluation on the basis of objective criteria, where substitution for an opinion of the competent authority is not possible by that of a Tribunal, therefore, the Tribunal has no jurisdiction on the question of fitness.

Conclusion: i) Service Tribunal has exclusive jurisdiction on transfer and posting matters and jurisdiction of High Court is barred.
ii) Service Tribunal has no jurisdiction on the question of fitness however, Service Tribunal has jurisdiction on the question of eligibility.

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27. **Lahore High Court**
Commissioner Inland Revenue v. M/s Prime Commercial Bank Ltd.
P.T.R No. 173 of 2013
Mr. Justice Shahid Karim, Mr. Justice Raheel Kamran
https://sys.lhc.gov.pk/appjudgments/2023LHC148.pdf

Facts: This P.T.R along with a number of reference applications under Section 133 of the Income Tax Ordinance, 2001 in which the same questions of laws are involved are to be decided together through the instant judgment as they arise out of a common judgment rendered by the Appellate Tribunal Inland Revenue.

Issues: i) Whether the power conferred upon the Commissioner envisaged by sub-section (5A) of Income Tax Ordinance, 2001 to amend or further amend an assessment order negate sub-section (5) of the Ordinance in its material particulars that an

amendment can only be made on the basis of definite information acquired?
ii) Under what circumstances, a Taxation Officer is equipped with the power to amend or further amend the assessment order in respect of a tax year?
iii) For the purpose of section 171 of the Ordinance, when the refund becomes due u/s 120 (1) of the Income Tax Ordinance, 2001?
iv) Which agreement could only be characterized as a loan agreement?
v) Whether SBP is a banking company or a development financial institution according to the term 'banking company' as given in the Banking Companies Ordinance, 1962?

Analysis: i) Section 122 grants power to the Commissioner to amend an assessment order treated as issued under Section 120 by making such alteration or addition as the Commissioner considers necessary. By virtue of sub-section (5) such an amendment can only be made on the basis of definite information acquired from an audit or otherwise. (Subsection (5) was amended by the Finance Act, 2020 but we are concerned with the contents of sub-section (5) at the relevant time of the passing of the assessment order). As stated above, sub-section (5A) does not negate sub-section (5) in material particulars and the only distinction is that the power to amend or further amend conferred upon the Commissioner may be exercised under distinct circumstances. The power is conditional upon definite information acquired from an audit or otherwise as far as sub-section (5) is concerned whereas the power to amend or further amend is not dependent upon such a pre-condition as envisaged by sub-section (5A).
ii) If an audit is conducted and discrepancies are noted by the Taxation Officer, this would clearly constitute definite information to clothe Taxation Officer with the power to amend or further amend the assessment order in respect of a tax year. The intention of the legislature has been expressed in the words "definite information acquired from an audit or otherwise" and no ambiguity can be read into these words to hold that there was no definite information with the department for completion of assessment. The only condition to be satisfied priorly is that invocation of the powers is subject to sub-section (9) which merely provides that an amendment or further amendment can only be made if a taxpayer has been provided with an opportunity of being heard.
iii) For the purpose of section 171 of the Ordinance, the refund becomes due on the date it was treated to have made under Section 120(1). Hence, the purpose of sub-section (1) of section 171 of the Ordinance the refund becomes due on the date of the assessment order made under Section 120 (1).
iv) The repurchase agreement could only be characterized as a loan agreement. While relying upon the book published by SBP in collaboration with Institute of Banks Pakistan and other institutions, came to the conclusion that the agreement was indeed a loan agreement to be caught by the exception given in section 151 (1)(d).
v) By the definition, a banking company is the one as defined in the Banking Companies Ordinance, 1962 and includes anybody corporate which transacts the

business of banking in Pakistan. When the loan agreement is with State Bank of Pakistan, it is not covered by the exclusion of clause (d) of sub-section (1) of section 151 as SBP is not a banking company or a development financial institution by any stretch of imagination nor by the definition of the term 'banking company' as given in the Banking Companies Ordinance, 1962.

Conclusion: i) The power conferred upon the Commissioner envisaged by sub-section (5A) of Income Tax Ordinance, 2001 to amend or further amend an assessment order does not negate sub-section (5) of the Ordinance in its material particulars and the only distinction is that the power under sub-section (5A) may be exercised under distinct circumstances.
ii) If an audit is conducted and discrepancies are noted by the Taxation Officer, a Taxation Officer has the power to amend or further amend the assessment order in respect of a tax year subject to providing him an opportunity of being heard.
iii) For the purpose of section 171 of the Ordinance, the refund becomes due on the date of the assessment order made under Section 120 (1) of the Income Tax Ordinance, 2001.
iv) The repurchase agreement could only be characterized as a loan agreement.
v) SBP is neither a banking company nor a development financial institution according to the term 'banking company' as given in the Banking Companies Ordinance, 1962.

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28. **Lahore High Court**
Jan Muhammad Tayab v. Federation of Pakistan & others
W.P.No.36748 of 2022
Mr. Justice Shahid Karim
https://sys.lhc.gov.pk/appjudgments/2023LHC429.pdf

Facts: The petitioner challenged the order passed by the Presiding Officer of the Foreign Exchange Regulation Appellate Board in which he was required to deposit a surety equivalent to the amount of penalty imposed upon him and this was held to be a sine qua non for the appeal to be entertained and decided. The petitioner prayed for holding the provisions of Section 23C (4) of the Foreign Exchange Regulation Act, 1947 to be unconstitutional on the ground that it offends the rights of the petitioner.

Issues: i) Whether unimpeded right of an aggrieved person to file at least one appeal against the order which affects his rights is a fundamental right?
ii) Whether provision of Section 23C (4) of the Foreign Exchange Regulation Act, 1947 is unconstitutional?

Analysis: i) One of the most important planks of the right of access to justice is the right to file at least one appeal against the order which affects the rights of a person. The right to file an appeal must be unimpeded and should not be circumscribed by a condition which surely takes away that right… Sub-section (4) of Section 23C is a clog on the right of the petitioner to be dealt with in accordance with law. The

petitioner has the right of filing at least one appeal and for that appeal to be heard without any pre-conditions attached to it. This is a fundamental right under the Constitution and springs from Article 10A (Right to fair trial) which provides, inter alia, that for the determination of civil rights and obligations, a person shall be entitled to due process. It also emanates from Article 4. This right has been established in a plethora of superior court judgments.
ii) Consequently, it is held that sub-section (4) of Section 23C of the Act, 1947 as well as rule 8 of the Rules (to the extent that rule makes the receipt of an appeal subject to the compliance with sub-section (4) of Section 23C of the Act) as unconstitutional and violative of the fundamental rights of the petitioner and they are hereby struck down.

Conclusion: i) Unimpeded right of an aggrieved person to file at least one appeal against the order which affects his rights is a fundamental right.
ii) Provision of Section 23C (4) of the Foreign Exchange Regulation Act, 1947 is unconstitutional and violative of the fundamental rights.

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29. **Lahore High Court**
Province of the Punjab through Chief Secretary etc. v.
Syed Danish Hussain Shah.
I.C.A. No.31531 of 2022
Mr. Justice Ch. Muhammad Iqbal, Mr. Justice Muzamil Akhtar Shabir
https://sys.lhc.gov.pk/appjudgments/2023LHC184.pdf

Facts: Through this Intra Court Appeal, the appellants have challenged the order of learned Single Judge whereby writ petition filed by respondent was allowed.

Issues: i) Whether admitted facts need to be proved?
ii) Whether it is mandate of law that anything to be done in a particular manner as prescribed by it?
iii) Whether the right of profession is treated as a fundamental right subject to such qualification as settled by the law?
iv) Whether power to strike down or declare a legislative enactment as void is to be exercised with great care and caution?
v) Whether prerogative of setting the eligibility criteria of a certain post exclusively falls within the domain of the concerned authority?
vi) Whether the Courts can examine the qualification and eligibility in a recruitment process of the employing institution?

Analysis: i) It is settled law that admitted facts need not to be proved.
ii) When law prescribes anything to be done in a particular manner, it is to be done as mandated by law.
iii) There is no cavil or cudgel that the right of profession is treated as a fundamental right but it is subject to such qualification as settled by the law and every citizen has to follow the commandments of the law in this regard.

iv) The power to strike down or declare a legislative enactment as void is to be exercised with great care and caution and Hon'ble Apex Court of the country has laid down certain conditions for exercising such power.
v) The prerogative of setting the eligibility criteria of a certain post exclusive falls within the domain of the concerned authority/executive and interfering in that domain would amount to committing judicial overreach which is unwarranted by law.
vi) It is settled law that it is not for the Court to examine the qualification and eligibility in a recruitment process and it cannot delve deeper into the design and need of the employing institution or second guess their selection criteria and job recruitment and these matters can be best resolved by the institution itself according to the suitability and requirements of a certain post. The autonomy and free choice of the employing institution/ appellants must be respected and be allowed to recruit according to the criteria advertised.

Conclusion: i) Admitted facts need not to be proved.
ii) Yes, it is mandate of law that anything to be done in a particular manner as prescribed by it.
iii) Yes, the right of profession is treated as a fundamental right but subject to such qualification as settled by the law.
iv) Yes, power to strike down or declare a legislative enactment as void is to be exercised with great care and caution.
v) Yes, prerogative of setting the eligibility criteria of a certain post exclusively falls within the domain of the concerned authority.
vi) The Courts should not examine the qualification and eligibility in a recruitment process of the employing institution.

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30. **Lahore High Court**
Mst. Hajra Bibi (deceased) through her legal heirs v.
Bashir Ahmad (deceased) through his legal heirs etc.
W.P.No.57166 of 2019
Mr. Justice Ch. Muhammad Iqbal, Mr. Justice Muzamil Akhtar Shabir
https://sys.lhc.gov.pk/appjudgments/2023LHC322.pdf

Facts: Respondents filed an application under Sections 30 & 33 of The Arbitration Act, 1940 for cancellation of agreements for appointment of arbitrators & arbitration decisions which was accepted by learned Civil Judge. Against the said decision, the petitioners filed an appeal under Section 39 of the Act ibid which was dismissed by the learned Additional District Judge, The petitioners have assailed the aforesaid orders through this writ petition.

Issues: Whether the remedy against first appellate court deciding objections to the award under Section 30/33 of the Arbitration Act, 1940 would be revision petition under Section 115 C.P.C or constitutional petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973?

Analysis: The Arbitration Act, 1940 is a special statute having limited application relating to matters governed by the said Act. The revisional jurisdiction of the High Court under the C.P.C or under any other statute therefore shall not stand superseded under the Act ibid and if the Act does not contain any express bar against exercise of revisional power by the high Court provided exercise of such revisional power does not militate against giving effect to the provision of the Act ibid. There is no express provision in the Arbitration Act putting an embargo against filing a revisional application against appellate order under Section 39 of the Act. The Arbitration Act has put an embargo on filing any second appeal from appellate order under Section 39 of the Act. It may be stated that even if a special statute expressly attaches finality to an appellate order passed under that statute, such provision of finality will not take away revisional powers of the High Court under Section 115 of C.P.C.

Conclusion: The remedy against first appellate court deciding objections to the award under Section 30/33 of the Arbitration Act, 1940 would be revision petition under Section 115 C.P.C.

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31. **Lahore High Court**
University of Health Sciences, Lahore v. Government of Pakistan through the Secretary, Ministry of Inter Provincial Coordination, Islamabad etc.
W.P.No.29214 of 2011 & 19848 of 2011
Mr. Justice Ch. Muhammad Iqbal
https://sys.lhc.gov.pk/appjudgments/2022LHC8888.pdf

Facts: Through first writ petition, the petitioner/UHS has challenged the validity of notification issued by the Deputy Director General (Health), Ministry of Inter Provincial Coordination (Health Wing), Government of Pakistan in violation of Section 37 of the University of Health Sciences Ordinance 2002. As common questions of law and facts are involved so in another writ petition, the Superior College, Lahore has challenged the validity of Notice whereby the UHS directed the petitioner to get Medical College affiliated with UHS and press releases issued by the UHS whereby the recognition of said College was declared as false and illegal.

Issues: i) Whether the affiliation of medical teaching institutions located within the territorial boundaries of the Province of Punjab with UHS is mandatory?
ii) Whether any Federal Department/Authority has jurisdiction to intrude into the domain of the provincial authorities or frustrate the objective and spirit of the law?

Analysis: i) Under Section 34(1) (iv) of the Ordinance 2002, the Syndicate of the UHS has been authorized to make Statutes to prescribe and regulate the matters regarding affiliation and disaffiliation of medical institutions. Pursuant to Section 34(iv) of the Ordinance 2002 statutes for Affiliation of Medical Institutions of 2011 was promulgated (which was repealed upon promulgation of Statutes for Affiliation of

Medical Institutions 2022) wherein a procedure is provided for application to be filed by all medical institutions seeking affiliation with UHS. Section 37 of the Ordinance ibid requires mandatory affiliation of all the medical colleges/ institutions, whether in public or private sector, located within the geographical boundaries of the province of the Punjab with the UHS. Under section 37 of the Ordinance 2002, it is mandatory that all medical colleges or institutions, whether in public or private sector, located within the territorial boundaries of the Province of Punjab, whether affiliated with any other University, Examination Board or a Medical Faculty, notwithstanding anything contained in any other law for the time being in force, shall affiliate with UHS. It is not out of place to mention here that the question of mandatory affiliation of medical colleges with UHS was earlier arisen in the year 2003, when concurrent list was still in vogue, a few of the medical colleges/ universities/students challenged the vires of Ordinance 2002. Through Section 37 of the Ordinance 2002, the exclusive jurisdiction was/is given to UHS for the affiliation of the medical teaching institutions either in public or private sector, located within the territorial jurisdiction of the Province of Punjab.

ii) After promulgation of the above said 18th Constitutional amendment, the subject of education comes within the exclusive legislative domain of the provinces, thus, any Federal Department/Authority lacks jurisdiction to intrude into the domain of the provincial authorities or impede or frustrate the objective and spirit of the law. Therefore, the government functionaries [as in this case the Ministry of Inter Provincial Coordination (Health Wing), Government of Pakistan] are debarred from performing any act in deviation to the mandatory statutory provision of Section 37 of Ordinance 2002, allowing a medical College to escape from the mandatory affiliation.

Conclusion: i) Yes, the affiliation of medical teaching institutions located within the territorial boundaries of the Province of Punjab with UHS is mandatory.

ii) Any Federal Department/Authority has no jurisdiction to intrude into the domain of the provincial authorities or frustrate the objective and spirit of the law.

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32. **Lahore High Court**
M/s Basfa Textile (Pvt.) Limited, Lahore v.
Deputy Director (Customs), Lahore & others
Customs Reference No.52 of 2016
Mr. Justice Muhammad Sajid Mehmood Sethi, Mr. Justice Asim Hafeez
https://sys.lhc.gov.pk/appjudgments/2023LHC349.pdf

Facts: The applicant imported a consignment of Indian Raw Cotton and claimed benefit of SRO 1125(I)/2011 dated 31.12.2011 to pay sales tax @ 2%, which was allowed. However, during course of audit, it was observed that applicant was liable to pay sales tax @ 16%, which culminated in passing order creating demand of said defaulted amount and penalty of Rs.15,000/-. Feeling aggrieved, applicant filed appeal against said order before Appellate Tribunal, which was rejected. Hence, the instant Reference Application.

Issue: When there are two possible interpretations of fiscal statute / notification; one favoring the taxpayer and other not; which one has to be adopted?

Analysis: It is now settled that while interpreting a taxing statute / notification, equitable consideration, the Court must look squarely at the words of the statute / notification and interpret them. The court cannot imply anything that is not expressed; it cannot import provisions in the statute / notification so as to supply an assumed deficiency. Moreover, interpretation of fiscal statute / notification had to be made strictly and any doubts arising therefrom must be resolved in favour of taxpayer and even if two reasonable interpretations were possible, one favouring taxpayer had to be adopted.

Conclusion: When there are two possible interpretations of fiscal statute / notification; one favoring the taxpayer and other not; the one favoring the taxpayer has to be adopted.

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33. Lahore High Court
Madiha Ammad v. The State etc.
Writ Petition No. 21725 of 2021
Mr. Justice Tariq Saleem Sheikh
https://sys.lhc.gov.pk/appjudgments/2022LHC8859.pdf

Facts: This petition, filed under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, seeks annulment of the order passed by the Judicial Magistrate, whereby he concurred with the police report and cancelled FIR, for an offence under section 382 PPC.

Issues: i) Whether Cr.P.C. contain any specific provision regarding cancellation of case?
ii) Whether it is mandatory that cancellation report be submitted by S.P. to the magistrate?
iii) If cancellation report is not forwarded or countersigned by S.P, whether said defect is curable?
iv) Whether the Magistrate acts as a court when he cancels a criminal case?
v) Whether SHO is required to notify the complainant, if he decides not to investigate the case u/s Section 157(2) Cr.P.C?
vi) Whether complainant has the right to be heard by the Magistrate, when cancellation report is submitted?
vii) Whether accused has right to be heard when cancellation report is decided by Magistrate?
viii) What are the factors to be considered by the magistrate while deciding the cancellation report?

Analysis i) It is important to note that the expression "cancellation report" does not occur in either the Code or Police Rules. Section 173 Cr.P.C. refers to "a report," whereas Rules 24.7 and 25.57 of the Police Rules use the phrase "final report." The High Court Rules & Orders, supra, use the same terminology. However, sections 9, 12

& 13 of the Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2006, employ the wording "a report for cancellation of the first information report." The Rule 10 of the Punjab Anti-Corruption Establishment Rules, 2014, includes the phrase "cancellation report."

ii) Rule 24.7 outlines the grounds and procedure for cancelling a criminal case. Except where the investigation is transferred to another police station or district (in which case Rule 25.7 applies), only the Magistrate of the Ist Class can cancel the FIR by an order. Rule 24.7 requires the S.P. to submit the cancellation report to the Magistrate. (…)The purpose of Rule 24.7 for requiring the S.P. to submit the cancellation report to the Magistrate is to provide a mechanism for checking genuine lapses and misconduct on the part of the investigating officer. Since the case closes when the Magistrate concurs with the cancellation report, that oversight is critical. Rule 24.8 obligates the S.P. to keep a register of cognizable offences in the prescribed form and discharge various tasks in connection therewith. All these factors when considered in conjunction with the language of Rule 24.7 clearly show that it is mandatory.

iii) In the present case, it is observed, the SHO submitted the cancellation report dated 25.2.2021 before the Judicial Magistrate. The S.P. neither signed nor countersigned nor forwarded it. In view of what I have discussed above, the said submission was illegal and without lawful authority. The argument that it was valid according to the departmental practice is not tenable. The Assistant District Public Prosecutor's recommendation also does not cure the defect.

iv) In Bahadur, the Hon'ble Supreme Court was called upon to determine whether the Magistrate acts as a court when he cancels a criminal case. It held that he works in an administrative capacity.

v) The complainant/informant in a criminal case does not fade away after the FIR is registered. He is deeply concerned about the response of the officer in-charge of the police station to the FIR. Section 157(2) requires the officer in-charge of a police station to notify the complainant if, despite the FIR, he decides not to investigate the case on the ground there is insufficient evidence to warrant an investigation.

vi) the complainant of FIR has a right to know the progress of the case unless the authorities have a legitimate reason to keep the information confidential. If they go for its cancellation, he has the right to be informed and heard by the Magistrate. The complainant derives these rights under Article 4 and Article 10A of the Constitution, which includes the concept of procedural fairness. Whether a cancellation report constitutes an adverse order or not is irrelevant.

vii) This opinion has primarily focused on the rights of a complainant of FIR in relation to its cancellation because one such person has filed this petition. Procedural fairness implies equity for all. Hence, I must emphasize that the accused also has a right to be heard before the Magistrate when he decides on the cancellation report.

viii) To that end, he must inter alia consider the following factors: (a) the nature of the allegations against the accused, (b) the evidence collected, and (c) the

accused's defence plea and any evidence presented in support thereof. Besides, the Magistrate should thoroughly examine the police diaries and document his reasoning.

Conclusion: i) The Code does not contain any specific provision for cancelling criminal cases.
ii) Rule 24.7 of police rules 1934requires the S.P. to submit the cancellation report to the Magistrate. Said Rule clearly shows that it is mandatory.
iii) If cancellation report is neither signed nor countersigned nor forwarded by S.P., the said defect is not curable; even the Assistant District Public Prosecutor's recommendation also does not cure the defect.
iv) When magistrate cancels the FIR he works in an administrative capacity.
v) Section 157(2) requires the officer in-charge of a police station to notify the complainant if, despite the FIR, he decides not to investigate the case on the ground there is insufficient evidence to warrant an investigation.
vi) If Police submit cancellation report, complainant has the right to be informed and heard by the Magistrate.
vii) Accused has a right to be heard before the Magistrate when he decides on the cancellation report.
viii) Following factors must be considered by magistrate while deciding cancellation report: (a) the nature of the allegations against the accused, (b) the evidence collected, and (c) the accused's defence plea and any evidence presented in support thereof. Besides, the Magistrate should thoroughly examine the police diaries and document his reasoning.

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34. **Lahore High Court**
Bashir Ali Shahzad v. The Bank of Punjab etc.
Writ Petition No. 10403 of 2019
Mr. Justice Tariq Saleem Sheikh
https://sys.lhc.gov.pk/appjudgments/2023LHC367.pdf

Facts: By this petition, filed under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (the "Constitution"), the Petitioner seeks the quashing of orders (the "Impugned Orders") and his reinstatement in service with back benefits.

Issues: i) Whether an aggrieved party can invoke the High Court's jurisdiction under Article 199(1)(a) of the Constitution against a person performing, within its territorial jurisdiction, functions in connection with the affairs of the federation or a province or local authority?
ii) Whether the rules become statutory merely because a corporation has adopted any rules framed by the Government or has made them applicable by reference?
iii) Whether the service rules/bye-laws do have the legal standing of statutory rules?
iv) Whether the principle of master and servant would apply if some enactment or statutory rule intervenes and limits the parties' freedom to negotiate the terms of the contract?

Analysis: i) An aggrieved party can invoke the High Court's jurisdiction under Article 199(1)(a) of the Constitution against a person performing, within its territorial jurisdiction, functions in connection with the affairs of the federation or a province or local authority. Article 199(5) elucidates that "person" includes any body politic or body corporate, any authority under the control of the Federal Government or a Provincial Government, and any court or tribunal, other than the Supreme Court, a High Court, or a court or tribunal established under a law relating to the armed forces of Pakistan. To determine whether an organization is a "person" within the meaning of Article 199, the courts generally apply the "function test."

ii) The rules do not become statutory merely because a corporation has adopted any rules framed by the Government or has made them applicable by reference.

iii) In Arshad Ahmad Khan v. Chairman, The Bank of Punjab, and others [2000 PLC (C.S.) 1355 : 2001 PLC (C.S.) 207], a Division Bench of this Court considered the question as to whether the aforementioned service rules/bye-laws could be said to be statutory. It held that those service bye-laws were distinct from the bye-laws made under section 25 of the BoP Act – which may be described as the "general bye-laws" – and one cannot equate them. It determined that the service rules/bye-laws do not have the legal standing of statutory rules.

iv) In Anwar Hussain v. Agricultural Development Bank of Pakistan and others (PLD 1984 SC 194), a junior officer in the ADBP submitted his resignation which he wanted to withdraw afterward. Meanwhile, the ADBP accepted his resignation and notified him about it. The officer instituted a suit challenging the acceptance of his resignation. ADBP contended that the suit was not maintainable. The Hon'ble Supreme Court upheld the objection, holding that section 30 of the Agricultural Development Bank of Pakistan Ordinance, 1961, empowered the ADBP to appoint officers upon terms and conditions as may be prescribed by the Regulations framed under section 39 of the said Ordinance. Thus, it left the subject of hiring and the terms of employment of staff to the ADBP. In the circumstances, the general law of master and servant applied. The apex Court further stated that this principle would not apply if some enactment or statutory rule intervenes and limits the parties' freedom to negotiate the terms of the contract.

Conclusion: i) An aggrieved party can invoke the High Court's jurisdiction under Article 199(1)(a) of the Constitution against a person performing, within its territorial jurisdiction, functions in connection with the affairs of the federation or a province or local authority.

ii) The rules do not become statutory merely because a corporation has adopted any rules framed by the Government or has made them applicable by reference.

iii) The service rules/bye-laws do not have the legal standing of statutory rules.

iv) The principle of master and servant would not apply if some enactment or statutory rule intervenes and limits the parties' freedom to negotiate the terms of the contract.

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35. **Lahore High Court**
Pakistan Tehreek-e-Insaaf through its General Secretary Asad Umar v. Governor of Punjab and another
Writ Petition No. 5851 of 2023
Munir Ahmad v. The Governor of Punjab and others
Writ Petition No. 6118 of 2023
Zaman Khan Vardag v. Province of Punjab and another
Writ Petition No. 6093 of 2023
Sabir Raza Gill v. Governor of Punjab
Writ Petition No. 6119 of 2023
Mr. Justice Jawad Hassan
https://sys.lhc.gov.pk/appjudgments/2023LHC395.pdf

Facts: The Petitioners sought issuance of writ of mandamus in terms of Article 199 of the Constitution directing the Respondents to announce date of holding elections of Provincial Assembly, Punjab within ninety (90) days as mandated by the Constitution of Pakistan, 1973.

Issues: (i) Whether clause (3) of the Article 105 of the Constitution applies to a situation when a Provincial Assembly is dissolved by efflux of time stipulated in the said Article?
(ii) When a provincial assembly stands dissolved by operation of law as envisaged under Article 112(1) of the Constitution, which authority is to declare the date of election to comply with the time frame mentioned in Article 224(2) of the Constitution?
(iii) What is the Doctrine of Penumbra?

Analysis: (i) Perusal of Article 105 of the Constitution makes it quite clear that it covers two eventualities; the first eventuality deals with the situation where on the advice of the Chief Minister, the Governor exercises his constitutional power to dissolve the assembly while second eventuality deals with a situation where on such advice by the Chief Minister, he abstains from exercising his constitutional powers and the assembly stands dissolved by operation of law. In the first eventuality, where the Governor uses his constitutional powers to dissolve the assembly, he is clearly bound under Article 105(3)(a) to appoint a date not later than ninety days from the date of dissolution, for the holding of general elections to the Assembly but Article 105 is silent and does not clearly specify as to who is the authority to declare the date of election in the above-mentioned second eventuality…On the other hand, careful perusal of Article 112 of the Constitution also shows that the said two eventualities are duly separated by insertion of semi-colon, separating the eventuality when the Governor so exercises his constitutional powers to dissolve the assembly, from the eventuality when it stands dissolved by the operation of law.
(ii) Article 224(2) also does not specifically mentions the authority who is constitutionally bound to declare the date of election of the Provincial Assembly in such eventuality. To resolve this controversy, it is necessary to look into the

nature, scope, constitutional mandate and constitutional responsibility of the ECP…perusal of Part-VIII of the Constitution shows that the Constitution in Articles 213 to 226 contained in Chapters 1 and 2 of the said Part, defines and elaborates the nature, scope, powers and purposes of the ECP. Article 218(3) of the Constitution provides that "It shall be the duty of the Election Commission to organize and conduct the election and to make such arrangements as are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against." Article 219(d) of the Constitution further provides that the ECP is charged with the duty of "the holding of general elections to the National Assembly, Provincial Assemblies and the local governments". Similarly, Article 220 provides that "it shall be the duty of all executive authorities in the Federation and in the Provinces to assist the Commissioner and the Election Commission in the discharge of his or their functions"…The interpretation of Article 218(3) by the Hon'ble Supreme Court clearly indicates that the Election Commission of Pakistan is the ultimate authority to ensure the conduct of elections in accordance with law i.e. the provisions of the Constitution as well as the Elections Act, and such authority is not limited to the election day or subsequent to it but also to all stages prior to it, while the election process starts with issuance of election program which in turn starts with the declaration of date of election…Although, Article 224(2) read with Article 105 and 112 of the Constitution does not specifically mentions the authority to declare a date of election in a provincial assembly in case it stands dissolved by operation of law but in the light of jurisprudence developed in the judgments of the Hon'ble Supreme Court, it can safely be concluded that the ECP being apex, independent and neutral constitutional authority mandated under the Constitution to hold, organize and conduct elections in Pakistan in accordance with law is the ultimate constitutional authority to ensure compliance of Article 224(2) of the Constitution under the doctrine of Penumbra…Keeping the aforesaid doctrine in view, when Articles 218(3) read with Article 219(d), Article 224(2) and 220 of the Constitution are being considered together being connecting and relevant provisions, the obligation and duty of the ECP to declare the date of general election for the Province comes within the penumbra of these constitutional provisions and elections laws.

(iii) The doctrine of Penumbra refers to a legal principle that recognizes certain unenumerated rights and obligations as implicit in the guarantees of the Constitution which can also be termed as constitutional penumbras. Under this doctrine, a specific provision of a Constitution or a Statute should not be read in isolation and it must be considered in the context of other relevant and connecting provisions of a Constitution or a statute and the underlying values and principles of the Constitution as a whole. The doctrine of penumbra enable the Courts in interpreting various provisions of the Constitution in order to enforce those rights and obligations which are explicitly mentioned in the text of a particular provision of the Constitution or a law.

Conclusion: (i) Clause (3) of the Article 105 of the Constitution does not apply to a situation when a Provincial Assembly is dissolved by efflux of time stipulated in the said Article.

(ii) When a provincial assembly stands dissolved by operation of law as envisaged under Article 112(1) of the Constitution, Election Commission of Pakistan is to declare the date of election to comply with the time frame mentioned in Article 224(2) of the Constitution.

(iii) The doctrine of Penumbra refers to a legal principle that recognizes certain unenumerated rights and obligations as implicit in the guarantees of the Constitution which can also be termed as constitutional penumbras.

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36. **Lahore High Court**
Mst. Alia Sehr v. Mushtaq Ahmed and others
W.P. No.61653 of 2020
Mr. Justice Rasaal Hasan Syed
https://sys.lhc.gov.pk/appjudgments/2022LHC8835.pdf

Facts: The instant Constitutional petition has been filed to call into question judgment/order of the learned Addl. District Judge, whereby the appeal was accepted and the case was remanded to the learned Guardian Judge/Family Court for de novo decision.

Issues: i) Whether a party making an offer for decision on Special Oath by the opposite side which is accepted and statement is duly recorded, could challenge the decision on the basis thereof or could retract from his statement and if not then what will be effect of the order passed on such statement?

ii) What is paramount consideration of the welfare of minor and whether the company of mother is essential for minor daughter for proper upbringing?

Analysis: i) it was observed to the effect that having made an offer for decision on Special Oath and after its acceptance by the opposite side, the party making the offer cannot be allowed to raise objection as to the jurisdiction of the Family Court or to take up the plea that the Special Oath could not be given in matrimonial proceedings.(…) The respondent was bound by the order of dismissal of the earlier application which was passed in result of an agreement to abide by the statement on Special Oath and could not possibly re-agitate the same grounds or facts which would stand concluded by the earlier decision.

ii) It is settled rule that the minor daughters needs the company of their real mother for their proper upbringing and guidance and for other matters which they could not discuss with anyone except their actual mother who is the best protector of her daughters as against the stepmother. The paramount consideration in the matter being the welfare of the minors when examining the question of custody, the real mother of the child is the pristine source of unconditional love and affection which nature has put into her heart for her children and for which there could be no other substitute. Daughters require company and association of their

real mother for preparing their personalities to shoulder the responsibilities in the future. Welfare of the minors would of course play a pivotal role in determining the controversy in hand i.e. question of custody.

Conclusion: i) If the decision is made on oath, then the party making the offer cannot be allowed to raise objection as to the jurisdiction of the Family Court or to take up the plea that the Special Oath could not be given in matrimonial proceedings .
ii) The paramount consideration in the matter being the welfare of the minors when examining the question of custody, is the real mother of the child, and especially minor daughters needs the company of their real mother for their proper upbringing and guidance.

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37. **Lahore High Court**
Mahboob Ahmad and others v. Ayub Ahmad and others
Civil Revision No. 2494 of 2022
Mr. Justice Rasaal Hasan Syed
https://sys.lhc.gov.pk/appjudgments/2022LHC8851.pdf

Facts: Through this civil revision, the petitioners question the validity of the judgments and decree of the courts below whereby the suit for declaration, partition and other reliefs was dismissed under Order VII, Rule 11, C.P.C. and appeal there against also met the same fate.

Issue: Whether the Award declaring partition of property or making a declaration of separate entitlement of the property through arbitration can confer title without being registered?

Analysis: It is settled rule that where the Award declared partition of property or makes a declaration of separate entitlement of the property through arbitration, it could not confer title unless the same is registered and no title in the property could be confirmed in the absence of such registration of the Award in respect of the immovable property. Reference may be made to the case of “Haji Nawab Din v. Sh. Ghulam Haider and another” (1988 SCMR 1623). … The same view was reaffirmed in the case of “Mst. Farida Malik and others v. Dr. Khalida Malik and others” (1998 SCMR 816).

Conclusion: The Award declaring partition of property or making a declaration of separate entitlement of the property through arbitration cannot confer title without being registered and no title in the property could be confirmed in the absence of such registration of the Award in respect of the immovable property.

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38. **Lahore High Court**
Muhammad Arif v. Province of Punjab and others
C.R. No.23580 of 2022
Mr. Justice Rasaal Hasan Syed
https://sys.lhc.gov.pk/appjudgments/2022LHC8827.pdf

Facts: Through this Civil Revision, the petitioner has called into question the validity of order of learned Addl. District Judge whereby order of the learned Civil Judge was set aside by accepting the objection and production of defendant as a witness of plaintiff was declined.

Issues: i) Whether there is any bar regarding the production of adversary by a party as its own witness?
ii) Under what circumstances permission to produce adversary as a witness can be accorded under Order XVI, Rule 21, C.P.C.?

Analysis: i) It is correct that C.P.C. does not contain any specific provision that bars the production of adversary by a party as their own witness but at the same time it is also true that there is no provision therein that permits such an exercise. The practice of summoning or producing an adversary as witness by the opposite party, in the ordinary course, has not been approved as it leads to unnecessary embarrassment for the opponent to face the cross-examination of his own counsel or the counsel of his co-defendants having common interest and, thereafter, reappear as a witness in support of their own case.
ii) The permission to produce adversary as a witness can be accorded when the plaintiff has already alleged in his plaint that his adversary has executed a document or has direct knowledge of a certain fact. Nevertheless the court, if at any stage, feels that examination of any of the parties who had not entered appearance in the witness-box is necessary it can exercise of its jurisdiction under Order XVI, Rule 20, C.P.C. to direct any of the parties in the suit to appear in the court and give evidence or produce documents in their possession and power and the rules regulating the witnesses shall apply in such eventuality.

Conclusion: i) There is no bar regarding the production of adversary by a party as its own witness but it leads to unnecessary embarrassment for the opponent to face the cross-examination of his own counsel.
ii) The permission to produce adversary as a witness can be accorded when the plaintiff has already alleged in his plaint that his adversary has executed a document or has direct knowledge of a certain fact.

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39. **Lahore High Court, Lahore**
Raheela Begum and others v. Nargis Bano and others
C.R. No. 55453 of 2022
Mr. Justice Rasaal Hasan Syed
https://sys.lhc.gov.pk/appjudgments/2022LHC8873.pdf

Facts: This civil revision impugns judgments and decrees of the courts below, whereby declaratory suit of the respondents, challenging sanctity of an oral tamleeq mutation involving transfer of subject property from one of respondents in favour of her deceased husband as well as a subsequent inheritance mutation allocating

share to his allegedly divorced wife, was partly decreed and appeal there against was dismissed.

Issues: Who is required in law to prove the oral transaction of tamleeq and the alleged mutation thereof if they are disputed by the owner/transferor?

Analysis: As per rule where a transaction by way of oral gift/tamleeq is claimed and its existence is disputed by the owner/transferor who states that no such oral gift/tamleeq was made nor was properly transferred by way of such mode, the onus of proof shifts on to the beneficiary and he is under heavy onus to prove the stance.

Conclusion: Beneficiary is required in law to prove the oral transaction of tamleek and also the alleged mutation thereof if they are disputed by the owner/transferor.

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40. **Lahore High Court**
Sh. Sajjad Umer v.Muhammad Din and others
F.A.O. No.101195 of 2017
Mr. Justice Rasaal Hasan Syed
https://sys.lhc.gov.pk/appjudgments/2022LHC8878.pdf

Facts: Appellant in this appeal seeks annulment of judgment/order of the learned Addl. District Judge whereby the case was remanded for trial on merits.

Issues: i) Whether suit is competent which was earlier withdrawn with permission to file a fresh subject to payment of costs without deposit of such costs?
ii) Whether Court has power to condone the omissions in payment of such cost?

Analysis i) Deeper review of the cases cited supra manifests that the consistent view expressed by the honourable Supreme Court of Pakistan in respect of the provisions of Order XXIII, Rules 1 to 3, C.P.C. has been that in case a suit is allowed to be withdrawn with liberty to file a fresh one subject to payment of costs, the filing of the suit without compliance of condition of deposit of costs will not be a proper presentation or institution of the suit; nevertheless the Court is not denuded of its jurisdiction to condone the default or omission of plaintiff.
ii) The criteria for the exercise of discretion laid in the case of Haji Abdul Rashid Sowdagar is that the order for dismissal of suit could only be passed after it is found that the plaintiff, on an objection taken, is unwilling to comply with the terms on which he was permitted to withdraw the suit with liberty to institute a fresh one and that in case on an objection as to the competency of the suit, the plaintiff is willing to comply with the terms on which he was permitted to withdraw the suit, the Court will have inherent power to condone the bona fide delay or omissions, etc.

Conclusion: i) In case a suit is allowed to be withdrawn with liberty to file a fresh one subject to payment of costs, the filing of the suit without compliance of condition of

deposit of costs will not be a proper presentation or institution of the suit; nevertheless the Court is not denuded of its jurisdiction to condone the default or omission of plaintiff.

ii) In case on an objection as to the competency of the suit, the plaintiff is willing to comply with the terms on which he was permitted to withdraw the suit, the Court will have inherent power to condone the bona fide delay or omissions, etc.

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41. **Lahore High Court**
Muhammad Alam v. Darbari Khan
C.R. No.40284 of 2020
Mr. Justice Rasaal Hasan Syed
https://sys.lhc.gov.pk/appjudgments/2023LHC341.pdf

Facts: Petitioner in this civil revision has challenged judgments and decree of the courts below in terms whereof the suit for specific performance of the petitioner was dismissed and return of earnest money was allowed which judgment was affirmed in appeal.

Issues: i) What are the requirements of a buyer of the agreement to sell to prove that he was ready and willing to perform his part of agreement?

ii) What is the limitation to file a suit for specific performance of sale agreement in which a date is fixed for the performance of the agreement?

Analysis: i) As far as the relief of specific performance is concerned which is discretionary in its nature, the buyer was expected to prove that he was ready and willing to perform his part of agreement from the date of its execution till the date fixed for payment of balance sale consideration; and also to prove that he did take steps necessary for the performance of his part. Reference can be made to the case of "Nazar Hussain and another v. Syed Iqbal Ahmad Qadri (Deceased) through his L.Rs. and another" (2022 SCMR 1216) where it was observed to the effect that a buyer's primary obligation in a contract of sale is to make payment of the balance sale consideration as stipulated in the contract and that if the seller refuses to receive payment the buyer must establish that he had the required money which was kept aside for the seller, for instance, by making a pay order or cashier cheque in his name as this would show that the buyer no longer had access to the sale consideration and that alternatively the buyer could have deposited it in court.

ii) Limitation to file a suit for specific performance of sale agreement is regulated by Article 113 of Limitation Act, 1908 which provides that if a date is fixed for the performance, the suit could be instituted within three years from the date so fixed and if no such date is fixed the suit could be filed when the vendee has noticed that the performance has been refused.

Conclusion: i) In order to prove willingness of the buyer to perform his part of agreement; a buyer of the agreement to sell has to prove his willingness for payment of balance sale consideration and also to prove that he did take steps necessary for the performance of his part.

ii) Under Article 113 of Limitation Act, 1908, the limitation to file a suit for specific performance of sale agreement in which a date is fixed for the performance of the agreement is three years from the date so fixed.

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42. **Lahore High Court**
Waqar Ali v. Addl. District Judge and others
Writ Petition No. 17643 of 2020
Mr. Justice Rasaal Hasan Syed
https://sys.lhc.gov.pk/appjudgments/2023LHC330.pdf

Facts: This Constitutional petition calls into question orders of the forums below in terms whereof petitioner's application for setting aside of ex parte proceedings order was dismissed, an ex parte ejectment order was passed, and the order was affirmed in appeal.

Issue: i) Whether the ex-parte proceedings can be initiated on the report of process server which lacks the details about how he identified the respondent and upon simple postal receipt without acknowledgement due?

ii) Whether the tenant can be non-suited if the requirements of section 21 of the Punjab Rented Premises Act, 2009 are not properly followed for his service?

Analysis: i) The report of process server shows that it does not indicate as to who identified the petitioner and in whose presence the notice was delivered. So much so, no CNIC of the addressee is mentioned nor any copy of the same was secured. Obviously, the Process Server did not claim that he knew the petitioner. It was necessary for him to have mentioned the name of person who had identified the addressee and, in whose presence, he had allegedly delivered the notice. … A copy of the postal receipt in respect of registration of the notice was placed on record but no "acknowledgement due" showing any service of the notice was placed on record. The Rent Tribunal did not deem it necessary to examine the Process Server with a view to satisfy the manner in which he allegedly delivered the notice and to whom it was delivered and casually proceeded to pass an order for ex-party proceedings which could not be approved.
ii) The requirements of the provisions of section 21 of Act have been considered in number of cases by this Court wherein it was observed that if the notice has not been served actually upon the tenant in the manner as prescribed by schedule annexed to the Act and along with the documents like pleadings, affidavits and other appended documents, the opposite side could not be non-suited on the plea that application was not accompanied by the application for Leave to Contest or filed later. Reference can be made to the cases of "Mureed Hussain v. Additional District Judge and others" (2018 MLD 162), "Bakht Munir v. Qadir Khan and another" (PLD 2014 Lah. 87), "Babar Ali v. Additional District Judge, Sargodha and 2 others" (2012 YLR 2933) and "Younas Siddique v. Mst. Tahira Jabeen" (PLD 2009 Lah. 469).

Conclusion: i) Ex-party proceedings cannot be initiated on the simple report of process server

which lacks the details about how he identified the respondent and upon simple postal receipt without acknowledgement due.

ii) The tenant cannot be non-suited if the requirements of section 21 of the Punjab Rented Premises Act, 2009 are not properly followed for his service.

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43. **Lahore High Court**
Mian Manzoor Ahmad through L. Rs. V.
Mian Muhammad Akbar and 5 others
C. R. No. 174-D of 2009
Mr. Justice Abid Hussain Chattha,
https://sys.lhc.gov.pk/appjudgments/2023LHC175.pdf

Facts: The Petitioners filed civil revision against the impugned judgments and decrees passed by Learned Senior Civil Judge and Learned Additional District Judge, respectively, whereby, the suit for declaration filed by Respondents No. 1 and 2 was concurrently decreed against predecessor-in-interest of the Petitioners.

Issues: i) Whether a valid and complete gift can be retractable without the consent of both parties or by a decree?
ii) Whether any condition attached to a valid completed gift can be considered as void?
iii) How kind of gift "Areeat" can be defined?
iv) Whether protection to property is a fundamental right and no person can be compulsorily deprived of his property?
v) Whether principle of reversion is recognized by law?

Analysis: i) Generally, a valid and complete gift is not retractable without the consent of both parties or by a decree since retraction of gift as a deed of conveyance is the very opposite of conveyance. Section 167 of Muhammadan Law by D. F. Mulla enunciates this principle. Gift is essentially without consideration. It is of two kinds, Hiba pertaining to corpus of property or Hiba pertaining to Areeat, which is a transfer of some limited interest for a limited time with the objective to allow the enjoyment or benefit of usufruct of gifted property.
ii) Any condition attached to a valid completed gift falling within the ambit of first kind is considered void, whereas, lawful conditions are recognized with respect to second kind of gift…It was held that where a condition is attached to a gift of 'corpus' of the property, the gift is valid and the condition attached thereto is illegal. However, when gift is regarding 'usufruct' of the property, any condition attached thereto is valid and is liable to be given effect.
iii) Section 170 thereof defines Areeat as grant of a license, resumable at the grantor's option, to take and enjoy the 'usufruct' of a thing. It follows that an Areeat is not a complete and absolute transfer of ownership but a temporary license in the nature of revocable and conditional transfer of ownership allowing the benefit of 'usufruct' without any consideration. The grantor's option can be validly capped or made conditional. As such, in common parlance, it may be

termed as a conditional gift which operates and is revocable subject to conditions attached thereto. The determination as to whether a gift relates to 'corpus' or 'usufruct' of the property depends upon the facts and circumstances of each case to be inferred from relevant evidence after discovering the real intention of the donor and no hard and fast rule can be laid down for this purpose.

iv) Articles 23 and 24 of the Constitution of the Islamic Republic of Pakistan, 1973 (the "Constitution") grants protection to property rights as a fundamental right of the citizens. The principles enshrined therein stipulate that every citizen shall have the right to acquire, hold and dispose of property subject to the Constitution and any reasonable restrictions imposed by law in the public interest. Further, no person shall be compulsorily deprived of his property save in accordance with law. It is further articulated that no property shall be compulsorily acquired save for a public purpose and after payment of due and adequate compensation. It, therefore, follows that the public welfare schemes initiated by the State for the benefit of its citizens are required to be executed after acquisition of land subject to determination and payment of due and adequate compensation in accordance with law. However, due to financial constraints, it is customary for the Government to execute various welfare schemes, such as, farm to market roads, schools, health and provision of other civic facilities on land volunteered by the residents. Such schemes generally require that free of cost land must be transferred in the name of concerned Government Department before a scheme is executed.

v) The land is generally mutated in the villages in the name of the concerned Government Department through gift mutation as a convenient mode of transfer of land to satisfy the mandatory condition of the concerned Government Department. The intention of the party while executing such a transfer is unequivocally restricted to benefit from the project and the gift of land is intrinsically linked to the purpose of donation. Such gift of land is liable to be construed as a limited or conditional gift which is valid till the life of the project. Such land, in all fairness and equitable considerations, must revert to the owners once the purpose of donation extinguishes and the project is abandoned. The principle of reversion is also recognized in terms of Article 493 of Chapter XIV (Acquisition of Land for Public Purposes) of Punjab Land Administration & Management Manual administered by the Board of Revenue, Punjab even with respect to unutilized lands that may have been acquired. Therefore, gifts regarding 'usufruct' of the property in the name of the State should be encouraged as this would give incentive and security to the donors to freely donate land to the Departments of the Government as the donors would know that the donated land would revert back to them including their legal heirs after the life of the project. Needless to reiterate that State is mandated by Article 3 of the Constitution to eliminate all forms of exploitation.

Conclusion: i) Generally, a valid and complete gift is not retractable without the consent of both parties or by a decree since retraction of gift as a deed of conveyance is the

very opposite of conveyance.
ii) A condition attached to a gift of 'corpus' of the property, the gift is valid and the condition attached thereto is illegal. However, when gift is regarding 'usufruct' of the property, any condition attached thereto is valid.
iii) Areeat as grant of a license, resumable at the grantor's option, to take and enjoy the 'usufruct' of a thing.
iv) Protection to property is a fundamental right and no person can be compulsorily deprived of his property save in accordance with law.
v) The principle of reversion is recognized in terms of Article 493 of Chapter XIV (Acquisition of Land for Public Purposes) of Punjab Land Administration & Management Manual administered by the Board of Revenue, Punjab.

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44. **Lahore High Court**
Ayesha Tahir v. Additional District & Sessions Judge, etc.
Writ Petition No.36910 of 2022
Mr. Justice Anwaar Hussain
https://sys.lhc.gov.pk/appjudgments/2023LHC434.pdf

Facts: The petitioner has assailed order of the learned Appellate Court, whereby, the order passed by the learned Trial Court in application under Section 12 of the Guardians and Wards Act, 1890 filed by the petitioner was set aside and the findings of the learned Guardian Court, Lahore were reversed and interim custody the Minor who is approximately three and half years of age, was allowed to be retained by the respondent.

Issues: i) Whether the order passed on application under Section 12 of the Guardians and Wards Act, 1890 is appealable or not?
ii) Whether the welfare of a minor in granting his permanent custody under Section 25 of the Act is equally applicable to the grant of interim custody under Section 12 of the Act?
iii) Whether in a clash between the rights of parents and the welfare of a minor, the latter must prevail?
iv) Whether any clause or the agreement having effect of surrendering or relinquishing right of custody of the mother is void and unlawful?

Analysis: i) Section 47 of the Act deals with the appealable orders and admittedly, order passed under Section 12 of the Act is not mentioned thereunder. However, after insertion of the word „Guardianship" in the First Schedule of The West Pakistan Family Courts Act, 1964 ("the Act 1964"), the remedy by way of the appeal is available against an order under Section 12 of the Act before the learned Appellate Court. As per Section 47 of the Act, an order under Section 12 thereof is apparently not appealable, however, provisions of the Act must be read in conjunction with the provisions of the Act 1964 as the legislature in its wisdom has brought the matters pertaining to „Guardianship" under the jurisdiction of the Family Courts by contemplating that all the matters pertaining to „Guardianship" shall be exclusively triable by the Family Courts created under the Act 1964

which is a latter enactment. It is settled principle of interpretation that the latter enactment shall prevail over the earlier legislation. One cannot lose sight of the fact that subsection (1) of Section 14 of the Act 1964 begins with the words „notwithstanding anything provided in any other law for the time being in force, a decision given or a decree passed by a Family Court shall be appealable", thus the latter provision has an overriding effect. Meaning thereby that in spite of the fact that order under Section 12 of the Act is not mentioned under Section 47 thereof, an appeal can be preferred against an order passed under Section 12 as the same is a „decision" given by a Family Court as mentioned in Section 14(1) of the Act 1964, and also not hit by Section 14(3) thereof as such decision disposes of the application under Section 12 of the Act.

ii) The overarching and controlling position held by the welfare of a minor in granting his permanent custody under Section 25 of the Act is equally applicable to the grant of interim custody under Section 12 of the Act. The order under Section 12 of the Act is tentative in nature and passed at a stage when the evidence is not yet recorded. Hence, the order under Section 12 of the Act is subservient to the order passed under Section 25 thereof. However, welfare of a minor remains central even at the time of deciding application under Section 12 of the Act. It is imperative to note that it defeats the legislative intent and object of the law if the paramount interest of welfare of a minor is considered supreme and dominant feature only at the time of deciding application under Section 25 of the Act and not so at the time of deciding an application under Section 12 thereof. However, the decision under Section 12 of the Act should not put on semblance or attire of an order under Section 25 thereof as the former is tentative in nature. Thus, the welfare of a minor is always to be controlling force at every stage and decision made under Section 12 is no exception.

iii) Similarly, it is well settled principle of law that the combat between the parents as to custody of a minor should never be allowed to morph into a battle which makes the welfare of a minor a collateral damage rather the welfare of a minor should get precedence over the egoistic battle between the competing parents. In a clash between the rights of parents and the welfare of a minor, the latter must prevail. Similarly, to be in proper custody is a right of a child and not of either of the parents meaning thereby that it is the welfare of minor that ought to be considered and not that of the person seeking custody.

iv) Any clause or the agreement having effect of surrendering or relinquishing right of custody of the mother is void and unlawful being against the public policy and without consideration.

Conclusion: i) The order passed on application under Section 12 of the Guardians and Wards Act, 1890 is appealable as the same is a „decision" given by a Family Court as mentioned in Section 14(1) of The West Pakistan Family Courts Act, 1964.

ii) The welfare of a minor in granting his permanent custody under Section 25 of the Act is equally applicable to the grant of interim custody under Section 12 of the Act.

iii) In a clash between the rights of parents and the welfare of a minor, the latter

must prevail.
iv) Any clause or the agreement having effect of surrendering or relinquishing right of custody of the mother is void and unlawful being against the public policy and without consideration.

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45. **Lahore High Court**
Ariba Naeem and another v. Additional District Judge, etc.
Writ Petition No. 1222 of 2017
Mr. Justice Anwaar Hussain
https://sys.lhc.gov.pk/appjudgments/2023LHC444.pdf

Facts: Through this petition the petitioners have challenged the judgment through next friend, who was admittedly their real maternal aunt, whereby the revision petition filed by respondent no. 3 against the order of trial court, in which the learned Trial Court accepted the application filed by one respondent/mother on her own behalf and on behalf of the petitioners/minors, for setting aside ex-parte judgment and decree, was accepted. The respondent/mother has independently filed connected constitutional petition against the said impugned judgment. In the same way along with these petitions another party also assailed the dismissal order in connection with its application filed under Order I, Rule 10 of the Code of Civil Procedure, 1908 by the learned Revisional Court.

Issues: i) Whether minor can sue by himself or can he be sued without being represented by someone else?
ii) Whether the non-representation of minor in suit and/or non-compliance of the statutory provisions regarding appointment of Guardian ad Litem thereof is just a procedural irregularity without causing any prejudice to the minors?
iii) Whether non-compliance with the provisions of Order XXXII, Rule 3 of the CPC and concomitant non- representation of the minors render the ex- parte judgment voidable at the option of minors or is void and nullity in the eye of law?
iv) Whether the Courts are always under an obligation to remain vigilant and watchful to protect the interest of minor?
v) Whether any guardian ad litem other than appointed by the court will be debarred to represent the minor?

Analysis: i) Order XXXII of the CPC indicates that a minor neither can sue by himself nor can he be sued without being represented by someone else. The “someone else” is considered as “a next friend” when a minor brings an action as a plaintiff/petitioner, whereas, it is referred as “a Guardian ad Litem” when the minor is a defendant/respondent. In fact, this nomenclature does not matter much and the intent of the legislature is well evident in as much as both the next friend or the Guardian ad Litem represent the interest of the minor and/or are under an obligation to remain watchful and in case the Guardian ad Litem is not performing his duties, the Court is under a bounden duty to remove the Guardian ad Litem and appoint a new guardian instead.

ii) The appointment of Guardian ad Litem in terms of Order XXXII, Rule 3 of the CPC is to protect the interest of minor. However, any irregularity in the appointment of the Guardian ad Litem may be overlooked as a procedural irregularity but this is subject to an overriding condition that such irregularity ought not to have prejudiced the minor and that his right to due representation in the proceedings must not have suffered any injury. Thus, it is obligatory upon the Court to overlook the procedural irregularity in the appointment of Guardian ad Litem where the minor has been duly represented by irregularly appointed Guardian ad Litem. However, where the minor is deprived of due representation, such irregularity transforms into and takes up the proportion of substantial deprivation of due process to the minor and cannot be allowed to sustain the subsequent decree or order which is void and nullity in the eye of law.

iii) If a minor is not effectively represented in a suit or in any proceedings, such a defect is not one of mere form, but of substance, and it goes to the root of the jurisdiction of the Court, hence, such a minor in the eye of law is not a party to such a suit or proceedings. As a natural corollary, no order or decree can be validly passed against a minor in such a suit, and any ex-parte proceedings conducted against him will not bind him or his estate at all. Order XXXII, Rule 3 read with Rule 11 of the CPC is mandatory and imperative, and must be strictly complied with in cases where defendant is a minor. Failure on part of the learned Court to follow these mandatory provisions leads to the consequence that there is no proper party to the suit, in the eye of law, though his name appears on the record, therefore, such minor must be deemed in law to be wholly unrepresented, and consequently the jurisdiction of the Court to proceed against such a minor will be ousted and the Court will have no jurisdiction to render any judgment, or pass any order against a minor.

iv) Even if the plaintiff of a suit is not coming forth with a fair approach by seeking an appointment of Guardian ad Litem for the minors/defendants against whom he has instituted a suit, or if a guardian is appointed and neglects to perform his/her duty towards the interest of the minors, the Courts are always under an obligation to remain vigilant and watchful to protect the interest of such minor and in the first place ensure that a person from the near relatives (preferably father and mother) are appointed as the Guardian ad Litem to defend the interest of the minor and in the absence of the same or the neglect of such Guardian ad Litem once appointed to pursue the matter vigilantly, should appoint its own staff to act in the said capacity and, in no eventuality, the minor can be proceeded ex-parte.

v) The term Guardian ad Litem implies guardian for the litigation (suit) appointed in accordance with law by the Court in which a suit is instituted against the minors and may be removed by the same Court in terms of Rule 11 of Order XXXII of the CPC and is confined to the same as compared to guardian appointed by the Guardian Court under the Act, 1890. An appeal or further proceedings by some Guardian ad Litem other than the one appointed by the learned Trial Court seem

not to be envisaged unless such Guardian ad Litem is removed in terms of Rule 11 of Order XXXII of the CPC.

Conclusion: i) A minor neither can sue by himself nor can he be sued without being represented by someone else.

ii) Yes, the non-representation of minor in suit and/or non-compliance of the statutory provisions regarding appointment of Guardian ad Litem thereof is just a procedural irregularity but this is subject to an overriding condition that such irregularity ought not to have prejudiced the minor.

iii) Yes, non-compliance with the provisions of Order XXXII, Rule 3 of the CPC and concomitant non- representation of the minors render the ex- parte judgment voidable at the option of minors or is void and nullity in the eye of law.

iv) Yes, the Courts are always under an obligation to remain vigilant and watchful to protect the interest of minor.

v) Yes, any guardian ad litem other than appointed by the court will be debarred to represent the minor.

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46. **Lahore High Court**
Muhammad Zuhaib Ishaq v. SCJ, etc.
W.P. No.81179 of 2022
Mr. Justice Raheel Kamran
https://sys.lhc.gov.pk/appjudgments/2023LHC284.pdf

Facts: In the instant petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 ('Constitution"), the petitioner has assailed the order passed by the learned Senior Civil Judge (Family Division), dismissing application of the petitioner for cross-examination of the PWs once again on the ground that it slipped from mind of his counsel during earlier cross-examination that suit for dissolution of marriage, maintenance and recovery of dowry articles filed by respondents was consolidated with the custody petition filed by the petitioner and his counsel did not cross-examine the said witnesses to the extent of custody petition.

Issues: i) Whether Section 11(3) of the Family Courts Act, 1964 provide unlimited right to the party to further examine, cross examine or re-examine the witnesses?

ii) What is the scope of right to fair trial and whether section 13 (3) of Family Court Act provides also right to fair trial?

Analysis: i) No doubt Section 11(3) of the Act provides that the parties or their counsels may further examine, cross examine or re-examine the witnesses, however, it has been held by the Hon'ble Supreme Court of Pakistan that such provisions are not meant and designed for enabling a party to fill up the omissions in the evidence of witness who has already been examined, due to negligence and lapse of a party, rather the purpose, the nature and the scope of the power available to the Court in that regard is to enable it to seek clarification on any issue or to have a doubt

cleared in the statement of a witness which if left outstanding and without which it would be difficult for the Court to take a right decision.

ii) Even otherwise, Section 13(3) of the Act must necessarily be construed keeping in view the principle of an equality of arms that lies at the heart of fair trial right guaranteed under Article 10A of the Constitution (…)The text of the above fundamental right has been partly adopted from Article 6 of the European Convention on Human Rights. The principle of equality of arms, which is a judicial construct adopted by the European Court of Human Rights, means giving each party a reasonable possibility to present its cause in such conditions as would not put one party in disadvantage to its opponent. In other words, there must be a fair balance between the opportunities afforded to the parties involved in litigation. (…) It has been held by the Hon'ble Supreme Court of Pakistan that the principles of fair trial, as guaranteed by Article 10A of the Constitution, are to be read as an integral part of every sub-constitutional legislative instrument that deals with determination of civil rights and obligations of any person

Conclusion: i) The right to cross examine or re-examine is not unlimited and the same are not meant and designed for enabling a party to fill up the omissions in the evidence of witness who has already been examined.

ii) Section 13(3) of the Act must necessarily be construed keeping in view the principle of an equality of arms that lies at the heart of fair trial right guaranteed under Article 10A of the Constitution. This be read as an integral part of every sub-constitutional legislative instrument that deals with determination of civil rights and obligations of any person.

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47. **Lahore High Court, Lahore**
Younas Rasheed v. Muhammad Kashif Iqbal & Another
W.P. No.75857 of 2022
Mr. Justice Raheel Kamran
https://sys.lhc.gov.pk/appjudgments/2023LHC288.pdf

Facts: Through this writ petition, the validity of order of Rent Tribunal is challenged, whereby the application for setting aside *ex-parte* proceedings and leave to contest the eviction petition was dismissed.

Issues: i) Whether failure to invoke all modes of service simultaneously would render a service duly affected through any of the specified modes as invalid?

ii) Whether copies of the application and the documents are compulsory to be annexed with notice?

Analysis: i) Section 21 of the Punjab Rented Premises Act, 2009 regulate the procedure qua appearance of parties and consequences of non-appearance before the Rent Tribunal. In Section 21(1) of the Act, service of the notice is required to be affected not only through the process server but also through acknowledgement due and courier service and all such modes of service are to be invoked simultaneously. Section 21(3)(a) of the Act stipulates alternative or substituted

modes of service of notice through affixation or publication in the press or through electronic media to be invoked in cases of failure of the respondent to appear where the Rent Tribunal is satisfied that either the notice could not be served on the respondent or he was 64illfully avoiding service thereof. The requirement to serve notice by invoking three modes of service simultaneously under Section 21(1) of the Act has been prescribed to avoid unnecessary delays and service of the notice can be affected in a timely manner.

ii) The requirements to issue notice in the form prescribed in the Schedule to the Act and deliver copy of the application along with annexures attached therewith have been prescribed in section 21(2) of the Punjab Rented Premises Act, 2009 to duly provide all necessary information and documents to the respondent in a case so that he may be able to prepare and file his leave to contest within the period of limitation prescribed. That makes the requirement of service of notice in the form prescribed along with copy of the application and annexures thereto to be mandatory as without satisfying that right of defence of the respondent in a case shall be in jeopardy.

Conclusion: i) No service duly effected through any of the specified modes shall be rendered invalid on account of failure to invoke all modes of service simultaneously.

ii) Copies of the application and the documents are compulsory to be annexed with notice in the prescribed form, as mandated under Section 21 (2) of the Punjab Rented Premises Act, 2009.

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48. **Lahore High Court**
Saima Nazir v. Guardian Judge (IV), Lahore and another
W.P. No.41017 of 2022
Mr. Justice Raheel Kamran
https://sys.lhc.gov.pk/appjudgments/2023LHC354.pdf

Facts: The petitioner has assailed the order passed by the learned Guardian Judge, whereby application of the petitioner under section 12 of the Guardians and Wards Act, 1890 ('Act') to the extent of her one minor daughter suffering from mental disability has been returned for being not proceedable in view of the provisions of the Mental Health Ordinance, 2001 (MHO 2001). Additionally, her request for interim custody of other two minors, who are in the custody of their father-respondent No.2, has been declined while allowing her visitation rights to meet the minors in terms of meeting schedule specified therein.

Issues: i) Whether a writ petition is maintainable against the order of an application for the grant of interim custody?

ii) Who is considered to be a natural guardian of a minor even in situations when the guardian does not have domain over the corpus of the child?

iii) If there is dispute inter-se parents of a mentally disabled minor for his/her custody and/or guardianship, which court will have jurisdiction either Family Court or the court constituted under Mental Health Ordinance, 2001?

iv) Whether the courts should adopt the procedure of constructions of repeal by

implication of one enactment by the other?

v) Whether the provisions of MHO 2001 contradict and repeal the provisions of section 5 read with items No. 5 & 6 of the Schedule to the FCA 1964 to take away jurisdiction of the Family Court in disputes amongst parents regarding guardianship and/or custody of minors who are suffering from any mental disability?

Analysis: i) The titled writ petition has been preferred against order passed on an application of the petitioner for the grant of interim custody of minors against which the remedy of appeal is not available in view of the provision of section 14(3) of the Family Courts Act, 1964, therefore, the same is maintainable.

ii) Law maintains a distinction between custody and guardianship and respective rights and obligations in that regard under the Act. The definition of 'guardian' in section 4(2) seems to include the concept of custody, unless the same has been exclusively awarded by the court to a party who is not the guardian of a minor. Custody under the Act involves a right to upbringing of a minor. On the other hand, guardianship entails the concept of taking care of the minor even in situations when the guardian does not have domain over the corpus of the child. A father is considered to be a natural guardian of a minor, since even after separation with the mother, and even when the mother has been granted custody of a minor, he is obligated to provide financial assistance to the minor. The liability to maintain the minor is not only religious and moral but also is legal. The right of custody of father is subordinate to the fundamental principle i.e. welfare of the minor.

iii) Unless there is something repugnant in the subject or context, section 4 of the Act defines the 'Minor' to mean a person who, under the provisions of the Majority Act, 1875, is to be deemed not to have attained his Majority; the 'Guardian" to mean a person having the care of the person of a minor or his property, or of both his person and property and the 'Ward' to mean a minor for whose person or property or both there is guardian. As evident from its preamble, the FCA 1964 has been enacted for the establishment of Family Courts for expeditious settlement and disposal of disputes relating to marriage and family affairs and for matters connected therewith. Subject to the Muslim Family Laws Ordinance and the Conciliation Courts Ordinance, 1961, exclusive jurisdiction has been conferred upon the Family Courts to entertain, hear and adjudicate upon matters specified in Part I of the Schedule to the FCA 1964. These subject matters include custody of children and the visitation rights of the parents to meet them as specified in Entry No.5 of Part I of the said Schedule whereas the matters of Guardianship are also stipulated in Entry No.6 thereof. Section 25 of the FCA 1964 deems the Family Court to be a District Court for the purposes of Guardians and Wards Act, 1890. Barring a few exceptions specified in sub- sections (4) and (5) of section 1 of the FCA 1964, jurisdiction of the Family Court over matters of custody is exclusive and no other Court including the Guardian Judge has any jurisdiction to deal with such matters.

iv) It is noteworthy that the legislature is normally not presumed to have intended to keep two contradictory enactments on the statute book with the intention of repealing the one with the other, without expressing an intention to do so. Such an intention cannot be imputed to the legislature without strong reasons and unless that is inevitable. Before adopting the last-mentioned course, it is necessary for the courts to exhaust all possible and reasonable constructions which offer an escape from repeal by implication.

v) The preamble of the MHO 2001 reveals that the said Ordinance was promulgated to consolidate and amend the law for persons with mental disorder with respect to their care, treatment, the management of their property and other related matters. Chapter No.3 of the said Ordinance relates to assessment and treatment and Chapter No.4 relate to leave and discharge, both of which relate to psychiatry, whereas Chapter No.5 thereof relates to judicial proceedings. The main crux of the MHO 2001 essentially relates to psychiatric facility and management of property of the mentally disabled persons and appointment of guardian under the MHO 2001 is in that context. The dispute inter se parents of a minor for his or her custody and/or guardianship is manifestly not a subject matter of the MHO 2001, which falls within the exclusive domain of Family Court even when the minor suffers from any disability. Therefore, the provisions of MHO 2001 do not contradict and repeal the provisions of section 5 read with items No. 5 & 6 of the Schedule to the FCA 1964 to take away jurisdiction of the Family Court in disputes amongst parents regarding guardianship and/or custody of minors who are suffering from any mental disability.

Conclusion: i) Yes, a writ petition is maintainable against the order of an application for the grant of interim custody.

ii) A father is considered to be a natural guardian of a minor even in situations when the guardian does not have domain over the corpus of the child.

iii) The dispute inter-se parents of a minor for his or her custody and/or guardianship is manifestly not a subject matter of the Mental Health Ordinance, 2001, which falls within the exclusive domain of Family Court even when the minor suffers from any disability.

iv) The courts should escape from adopting the procedure of constructions of repeal by implication of one enactment by the other.

v) No, the provisions of MHO 2001 do not contradict and repeal the provisions of section 5 read with items No. 5 & 6 of the Schedule to the FCA 1964 to take away jurisdiction of the Family Court in disputes amongst parents regarding guardianship and/or custody of minors who are suffering from any mental disability.

LATEST LEGISLATION/AMENDMENTS

1. Vide Notification No. F. 23(31)/2022-Legis. Dated 30.12.2022, section 17 of the Registration Act, 1908 has been amended.

2. Vide Notification No. SOG/EPD/2-1/2017 (P-I), dated 20.12.2022, substitution in rule 4 and 5 of the Punjab Environmental Tribunal Rules, 2012 have been made.
3. Vide Notification No. F. 23(120)/2021-Legis. Dated 30.12.2022, section 195 of the Code of Criminal Procedure, 1898 has been amended vide Code of Criminal Procedure (Amendment) Act, 2022.
4. Amendments in Columns 1 to 10, Schedule-II of the Punjab Specialized Healthcare and Medical Education Department (Medical and Dental Teaching Posts) Service Rules, 1979 has been made through Notification No. SOR-III(S&GAD)1-4/2005(P) dated 20.12.2022.
5. Vide Notification No. SO(MP) 11-5/2019(P-IV) dated 20.01.2023, new clauses (hh), (hhh), (hhhh) have been inserted in the Pakistan Prisons Rules, 1978 in sub-rule (ii) of rule 215.
6. Vide Notification No. SO(MP) 17-1/2021(P-IV) dated 20.01.2023, in sub-rule (i) in the Table-IV of rule 215, serial no. (viii) and in sub-rule (ii) of rule 215, clause (hhhhh) have been inserted in the Pakistan Prisons Rules, 1978.

SELECTED ARTICLES

1. MANUPATRA

https://articles.manupatra.com/article-details/AN-ANALYSIS-OF-LEGALITY-OF-REMIX-CULTURE-COMPLIANCE-OR-VIOLATION-OF-COPYRIGHT-LAWS

An Analysis of Legality of Remix Culture: Compliance or Violation of Copyright Laws? By Swati Pragyan Sahoo

"Remixes are described as works of media that have been transformed from their original form through the adding, removing, and changing pieces of the item. Section 14 of the Indian Copyright Act grants all rights, including further development, translation, reproduction, publication, communication to the public, etc., exclusively to the original author of the work. Section 14(e) of the Copyright Act grants certain protections to the owner of a sound recording. At one stance, the remix culture seems like a violation while on the other side, it can be observed that they comply with the copyright laws and are considered a work of further development. While remixes are a separate genre of music which have started demanding protection amongst other works, they do also bring in ambiguity pertaining to the copyright laws. The paper aims to analyse the copyright laws pertaining to the remix culture taking account of the provisions of the Copyright Act and other domestic and foreign legislations. Taking account of Section 2 (a) (iv) of the Copyright Act which defines 'adaption in relation to musical work' as "any arrangement or transcription of the work". This implies that remixes are any re-arrangement or altercation of the musical pieces of any original work. Remixes are a modified version of any previously published or realised sound/audio recording. S.14 (e) of the Copyright Act provides the owners with the right of protecting their work via the right to sell or hire, any copy of the sound recording

or right to communicate with public. The parties who want to remix the music require to get permission from the original author to make changes to the work. The original author has the full control over the work and he has a right to decide how the work can be reproduced. The owner of the copyright may also transfer the rights to the work's copyright to any third party. According to section 30 of the Act, the owner of the copyright may, through a legal licence agreement, transfer any interest in the rights over his work to another. It can be an expected scenario that the original creator is dissatisfied with the new remix work done on his original work but there is little that can be done to protect the original work. Such actions are unfair, and it creates a loophole. Furthermore, the protections afforded to the Copyright owner by law for the past 60 years have been weakened by Section 52 (1) (j).

2. **MANUPATRA**
https://articles.manupatra.com/article-details/Right-to-Privacy-with-special-reference-to-Right-to-be-Forgotten

Right to Privacy with special reference to Right to be Forgotten
by Abhyuday

According to the concept of right to privacy, privacy means that there are certain documents of human which is personal to a particular person and cannot be shared with anybody else. Illicit opening of such documents would mean infringing the privacy of the person and should be protected at any cost. In India the concept of privacy emerged in the forefront with the judgment of Puttaswamy vs. Union of India. In this case the Supreme Court held that right to privacy is essential fundamental right. The governmental committees in reports stated for an establishment of a legislation on the aspect of privacy and data protection. Data protection bill was drafted in the year 2018. The objective of this bill had a totally new concept i.e. right to be forgotten. As per the current status this bill has yet not been passed by the Parliament. The bill has been withdrawn due to numerous amendments proposed in this bill.

3. **MANUPATRA**
https://articles.manupatra.com/article-details/Rights-Of-The-Under-Trial-Prisoner-An-Analysis-To-Contemporary-Issue-and-It-Way-Ahead

Rights of The Under-Trial Prisoner: An Analysis to Contemporary Issue and It Way Ahead by Kamlesh Singh

The penitentiary system in India is characterised by overcrowded cells flooded with untried inmates, the majority of whom come from disadvantaged and underprivileged communities. Thousands of them remain imprisoned despite significant rulings by the Supreme Court and other high courts of state at various Instances. Many of the prisoner are there in prison Just for petty and minor offences and are unable to avail of bail due to a lack of suitable sureties or an inability to pay cash bail. The 2015 judgment of the Supreme Court by the two-judge bench of Justices Madan Lokur and U U Lalit to immediately release undertrial prisoners who have completed half the period of the maximum possible sentence on a Personal Recognizance (PR) Bond, is a reiteration of the earlier

judgment of the apex court in September 2014 which passed the same directions. The National Legal Services Authorities (NALSA) have been instructed by the Court to work with state authorities and the home ministry to ensure that state undertrial review panels be set up in every district within a month. These must take into account the release of inmates who are awaiting trial and qualify for benefits under Section 436A of the Criminal Procedure Code (CrPC).

4. **MANUPATRA**

https://articles.manupatra.com/article-details/Comparative-Analysis-of-Mediation-Laws-in-India-and-other-countries

Comparative Analysis of Mediation Laws in India and other countries by Abhyuday

Disputes are a part of everyone's life. Disputes are inevitable and are sure to arise in any personal or commercial association. Every dispute has three aspects, namely: people, process, and problem. There is nothing wrong with having a dispute but what is important, is how the parties handle that dispute. There could be two modes of addressing a dispute: adversarial like litigation and arbitration and non-adversarial like mediation and conciliation.1 Mediation as an alternative to self-help or formal adversarial procedures is not entirely new. In an effort to capture the essence of mediation and highlight distinctions between it and other forms, various research defines mediation in a restricted way. However, other researchers provide a very accurate definition in which they state that they prefer to approach mediation behaviourally. One such definition is, "it is a process of conflict management where disputants seek the assistance of or accept an offer of help from, an individual, group, state or organization to settle their conflict or resolve their differences without resorting to physical force or invoking the authority of the law."

5. **SPRINGER LINK**

https://link.springer.com/article/10.1007/s11572-023-09661-z

Moral Entanglement in Group Decision-Making: Explaining an Odd Rule in Corporate Criminal Liability by Sylvia Rich

Acting as part of a corporation may allow an individual more easily to rationalize participating in a harmful act, but there are countervailing forces in corporate action that increase moral oversight and accountability. Making use of group agency to explain membership as a special feature of some corporate agents, I argue that when someone becomes a member of an organized group like a company, their own moral responsibility becomes entangled with the decisions of other members of the company, whether or not they intend this effect. This moral entanglement in corporate decision-making explains why individuals have a moral obligation to act in their role as a corporate officer when they would not have an obligation to act in a personal capacity even if they had identical knowledge. The entanglement affects the individual's own moral status and the moral status of the company itself. Moral entanglement of corporate decision-makers provides a principled explanation for a rule that is present in corporate criminal law that corporate officers with knowledge that another employee is

about to commit a crime must actively intervene, and cannot rely on their status as bystanders.