

# GOOD DECISION-MAKING UNDER PAKISTANI LAW

## A GUIDE FOR CIVIL SERVANTS

by

**Research Society of International Law, Pakistan**

in collaboration with

**Konrad-Adenauer-Stiftung, Pakistan**



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# FOREWORD

The basis of good governance is effective decision-making by those entrusted to perform public functions. Yet, all too often we witness the decisions of public functionaries being challenged in the courts through the process of Judicial Review. This leads to delay in the execution of important government initiatives, increases costs to the exchequer, creates uncertainty amongst decision-makers, and unnecessarily burdens the courts. For the past twenty-five years, RSIL has provided legal and capacity-building support to the State of Pakistan in a variety of forms. This Guide is a further such endeavor aimed at providing specific and accessible guidance to Civil Servants throughout the country.

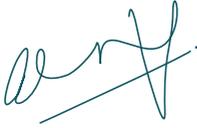


The Civil Service is the backbone of the nation's governance mechanism and providing it with the right tools to perform its functions is a priority for RSIL. Our research team has spent considerable time and resources in extracting the most pertinent rules and legal principles necessary for civil servants in the discharge of their duties. These have then been collated and presented in a manner which remains accessible to all readers especially those without a legal background. The team has aimed to take the often-complex judicial review process and simplify it for readers. Through statutes and case law, major principles are highlighted to allow for civil servants in similar situations to be able to easily identify the situation and assess their own prospects.

It is my earnest desire that this Guide helps public functionaries avert challenges to their decisions through a qualitative improvement in their understanding of the legal processes and principles involved in Judicial Review. In this manner, I hope that the ideal of the Rule of Law is upheld and governance is made more effective. Furthermore, decisions taken in line with the principles highlighted in this Guide will ensure that the

rights of citizens are not unduly encroached upon. This will in turn lead to fewer legal challenges and a reduction of the burden on the Courts of Pakistan. I am confident that this initiative will prove useful to readers.

On a final note, I would like to congratulate my research team on undertaking this important initiative and the quality they have brought to the development of this Guide. I am also thankful to the Konrad Adenauer Stiftung for their support throughout this process.

A handwritten signature in blue ink, appearing to read 'Ahmer Bilal Soofi', with a horizontal line drawn underneath the signature.

**Ahmer Bilal Soofi**

President,  
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December, 2018.

# TABLE OF CONTENTS

<b>PREFACE</b>	<b>08</b>
<b>ABOUT THE KONRAD-ADENAUER-STIFTUNG</b>	<b>10</b>
<b>GLOSSARY OF TERMS</b>	<b>12</b>
<b>SECTION I</b>	<b>17</b>
<b>INTRODUCTION TO ADMINISTRATIVE LAW &amp; JUDICIAL REVIEW</b>	
1. WHAT IS ADMINISTRATIVE LAW?	18
2. WHOSE ACTIONS CAN BE CHALLENGED?	19
3. WHAT ARE ADMINISTRATIVE ACTIONS?	23
4. ON WHAT GROUNDS CAN ADMINISTRATIVE ACTIONS BE CHALLENGED?	26
5. HOW CAN ADMINISTRATIVE ACTIONS BE CHALLENGED?	28
6. WHAT ARE THE POWERS OF COURTS WHEN SCRUTINIZING ADMINISTRATIVE ACTIONS?	32
<b>SECTION II</b>	<b>37</b>
<b>FUNDAMENTAL CONCEPTS GOVERNING EXERCISE OF ADMINISTRATIVE AUTHORITY</b>	
1. REASONABLENESS	38
2. RATIONALITY	39
3. LAWFULNESS	40
4. ARBITRARINESS	41
5. PROCEDURAL FAIRNESS	42
6. DISCRIMINATION	43
7. BIAS/IMPARTIALITY	44
8. INDEPENDENCE	45
9. MALA FIDE	46
10. FUNDAMENTAL RIGHTS	47

<b>SECTION III</b>	<b>55</b>
<b>SUBSTANTIVE PRINCIPLES &amp; ISSUES RELATING TO DUTIES AND POWERS OF PUBLIC FUNCTIONARIES</b>	
1. AUTHORITY AND COMPETENCE	56
2. DELEGATED LEGISLATION	66
3. EXERCISE OF DISCRETION	71
4. INTERDEPARTMENTAL COORDINATION	78
5. DIRECT AND INDIRECT USE OF LEGISLATION	82
<b>SECTION IV</b>	<b>91</b>
<b>COURT PROCEDURE FOR JUDICIAL REVIEW</b>	
1. ILLUSTRATION OF THE JUDICIAL REVIEW PROCEDURE IN PAKISTAN	92
2. STEP-BY-STEP COURT PROCEEDINGS IN JUDICIAL REVIEW	93
3. COMPONENTS OF PLEADINGS	100
<b>SECTION V</b>	<b>107</b>
<b>CHECKLIST FOR RESPONDING TO JUDICIAL REVIEW PROCEEDINGS</b>	

## PREFACE

The State of Pakistan has witnessed a fundamental evolution in the balance of power between the various constitutional actors in the past decade. The judiciary's role in governance and public policy has been particularly significant, with judges of the superior judiciary increasingly asserting their constitutional power of judicial review to scrutinize administrative actions by the executive.

The majority of these cases strike at key issues pertaining to the exercise of administrative authority such as appointments and promotions in Government institutions, challenges to delegated legislation such as Regulations & Notifications issued by Government authorities/departments and decisions regarding planning & procurement of public sector development projects, among various others.

In this context, the Research Society of International Law (RSIL), in collaboration with the Konrad-Adenauer-Stiftung (KAS), has produced this Guide for civil servants on good decision-making under Pakistani law. The Guide is a user-friendly document containing simple and practical guidance for civil servants and is based on an exhaustive review of the latest judicial precedent of the superior courts in Pakistan along with illustrative case studies.

The purpose of this Guide is to inform and improve the quality of administrative decision-making in Pakistan. Our objective is to help reduce the chances of future challenges to administrative decisions by helping public functionaries understand the potential legal risks of their actions. The Guide has also been developed with the intention to provide a meaningful and useful overview of the judicial review process in Pakistan which can be referred back to if, or when, the reader is involved in a judicial review claim. We hope that such an understanding will contribute to readers' being better placed to advise on and make legally sound decisions in the exercise of their official duties.

In this regard, we hope our efforts provide stakeholders the necessary clarity in a process often shrouded in legalese and help improve decision-making by the nation's public servants.

A handwritten signature in black ink, appearing to read 'Jamal Aziz', with a stylized flourish at the end.

**Jamal Aziz**

Executive Director

Research Society of International Law

Advocate High Court

## ABOUT THE KONRAD-ADENAUER-STIFTUNG



Freedom, justice and solidarity are the basic principles underlying the work of the Konrad-Adenauer-Stiftung (KAS). The KAS is a political foundation, closely associated with the CDU party. As co-founder of the CDU and the first Chancellor of the Federal Republic of Germany, Konrad Adenauer (1876-1967) united social, conservative and liberal traditions. His name is synonymous with the democratic reconstruction of Germany, the firm alignment of foreign policy with the trans-Atlantic community of values, the vision of a unified Europe and an orientation towards the social market economy. His intellectual heritage continues to serve both as our aim as well as our obligation today.

In our European and international cooperation efforts we work for people to be able to live self-determined lives in freedom and dignity. We make a contribution underpinned by values to helping Germany meet its growing responsibilities throughout the world. We encourage people to lend a hand in shaping the future along these lines. With more than 70 offices abroad and projects in over 120 countries, we make a unique contribution to the promotion of democracy, the rule of law and a social market economy. To foster peace and freedom we encourage a continuous dialog at the national and international levels as well as the exchange between cultures and religions.

Human beings in their distinctive dignity and with their rights and responsibilities are at the heart of our work. We are guided by the conviction that human beings are the starting point in the effort to bring about social justice and democratic freedom while promoting sustainable economic activity. By bringing people together who embrace their responsibilities in society, we develop active networks in the political and economic spheres as well as in society itself. The guidance we provide on the basis of our political know-how and knowledge helps to shape the globalization process along more socially equitable, ecologically sustainable and economically efficient lines.

We cooperate with governmental institutions, political parties, civil society organizations and handpicked elites, building strong partnerships along the way. In particular we seek to intensify political cooperation in the area of development cooperation at the national and international levels on the foundations of our objectives and values. Together with our partners we make a contribution to the creation of an international order that enables every country to develop in freedom and under its own responsibility.

Our engagement in Pakistan began in 2008. Since then we have undertaken several projects with various local partner organizations on important national, regional and international issues concerning Pakistan. These are, among others, security of Pakistan, nuclear non-proliferation and arms control, prospects of regional integration and cooperation. We have also conducted several trainings and workshops for Members of Parliament and parliamentary staff of Pakistan with the aim to strengthen their capacity as representatives of the people. In addition, the KAS office in Islamabad has facilitated several exchange programs of high-ranking officials from Pakistan and Germany and has also played a spearhead role in the formation of the Pakistan-German Parliamentary Friendship Group. The KAS sponsors conferences, seminars and publications of its partners and carries out its own programmes as well.

# GLOSSARY OF TERMS

## **Aggrieved Party**

An individual who is entitled to commence legal proceedings against another because his or her legal rights have been violated.

## **Certiorari**

A Latin term meaning "to be informed", an order by which a higher court reviews a decision of a lower court.

## **Constitution**

Constitution of the Islamic Republic of Pakistan 1973.

## **Coram non judge**

A Latin term meaning "in the presence of a person not a judge," is a phrase that describes a proceeding brought before a court that lacks the jurisdiction to hear such a matter.

## **CPC**

Code of Civil Procedure, 1908.

## **De facto**

This phrase is used to characterize an officer, a government, a past action, or a state of affairs existing in fact, although perhaps not intended, legal, or accepted.

## **Doctrine**

A particular legal principle, position, or policy taught, advocated, or adhered to.

## **Habeas Corpus**

Is a Latin term literally meaning "that you have the body", habeas corpus refers to a recourse in law through which a person can report an unlawful detention or imprisonment to a court and request that the

court order the custodian of the person, usually a prison official, to bring the prisoner to court, to determine whether the detention is lawful.

### **Jurisdiction**

This term refers to the original power to make legal decisions and judgments.

### **LHC**

Lahore High Court.

### **Mandamus**

A Latin term literally meaning “we command”, an order of a superior court that commands an individual or subordinate authority to perform, or refrain from performing, a particular act, the performance or omission of which is required by law as an obligation.

### **Mala fide**

A Latin term meaning “in bad faith”, with intent to deceive.

### **Petitioner**

A party that presents a formal, written application to a court, officer, or legislative bodies that requests action on a certain matter.

### **PLD**

Pakistan Law Digest.

### **Quo warranto**

A Latin term literally meaning “by what warrant?” is a special form of legal action used to resolve a dispute over whether a specific person has the legal right to hold the public office that he or she occupies.

### **Quasi judicial**

Having a partly judicial character by possession of the right to hold hearings on and conduct investigations into disputed claims and alleged infractions of rules and regulations and to make decisions in the

general manner of courts. Judicial in character but not within the judicial power or function especially as constitutionally defined.

### **Respondent**

The party against whom a case is brought in Court by a Petitioner/Applicant i.e. a petition, appeal or application for a court order, is instituted and who is required to defend or answer in order to protect his or her interests.

### **Sine qua non**

A Latin term meaning “without which not”, a description of a requisite or condition that is compulsory.

### **S.**

“Section” – in the context of a numbered section of an Act.

### **SC**

Supreme Court.

### **SCMR**

Supreme Court Monthly Review.

### **Tribunal**

Institutions with authority to judge, adjudicate on, or determine claims or disputes.

### **Ultra Vires**

This term literally means “beyond the powers” in Latin. For example, if a decision maker acts outside his power for a purpose that the power was not created to achieve, that action (often in the form of a decision) will be *ultra vires*.

### **Writ**

A writ is a legal order or command, or an official mandate requiring the performance of a specific act.

# **SECTION I**

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INTRODUCTION TO ADMINISTRATIVE  
LAW & JUDICIAL REVIEW



# INTRODUCTION TO ADMINISTRATIVE LAW & JUDICIAL REVIEW

This section introduces basic and pertinent concepts of administrative law and judicial review. This guide is limited to review by the Judicial pillar of the State, i.e. judicial review, of administrative actions taken by the Executive pillar of the State and the various departments, bodies and entities operating under it. The ambit of judicial review also extends to other areas such as the exercise of power by the Legislature, however, this falls outside the scope of this guide.

As a public functionary, it is important for you to have a sound understanding of administrative law and its operation in Pakistan. The introductory section has been organized into a series of easy to understand questions which will enable readers to navigate the information in a logical manner. The queries which would naturally arise when embarking upon a study of judicial review of administrative action have been identified as follows:

1. What is Administrative Law?
2. Whose actions can be challenged?
3. What are administrative actions?
4. On what grounds can administrative actions be challenged?
5. How can administrative actions be challenged?
6. Powers of the Courts when scrutinizing administrative actions?

## 1. WHAT IS ADMINISTRATIVE LAW?

Administrative law can be described as a set of legal principles or rules recognized by the courts as an area of law, which relates to and regulates the administration of the Government. In other words, it is the branch of law that governs governmental departments and public bodies in the exercise of their public functions. The terms “public law” and “administrative law” are often used synonymously.

Administrative law and its practical procedures play an important part in securing good administration, by providing a powerful method of ensuring that the improper exercise of power can be checked.

It is an important function of administrative law to ensure that the government's powers are exercised according to law, on proper legal principles, according to the rules of reason and justice, and not on the mere caprice or whim of the administrative officers. Further, it must also be ensured that the individual has adequate remedies when his rights are infringed upon by the administration. Therefore, the objectives of administrative law are to ensure legal control of administrative power and to provide protection to individuals against abuse of such power which may at times be cloaked as 'public good' and 'public interest'.

### Scope of Administrative Law

Administrative law deals with the following general areas:

- Structure, powers and functions of the organs of administration.
- Limits of such administrative powers and functions.
- Procedures followed by the administration in exercising its powers and functions.
- Measures by which administrative powers are controlled and scrutinized.
- Legal remedies available to any persons when their rights are infringed by administrative organs.

### **Sources of Administrative Law**

There is no one specific enactment on administrative law, in fact it is derived from a number of primary legal sources as well as secondary sources, among others, including:

- Constitution of the Islamic Republic of Pakistan, 1973;
- Judicial Precedent i.e. case law which lays down legal principles;
- The Rules of Business, 1973;
- General Clauses Act, 1956;
- Public Procurement Laws;
- Special Laws and Enactments;
- Legislation pertaining to Statutory Bodies;
- Rules made under the Acts; and
- Notifications, by-laws, circulars etc.

## **2. WHOSE ACTIONS CAN BE CHALLENGED?**

Public bodies and public functionaries performing their public functions are the focus of administrative law. The scrutiny of such administrative actions makes up for a major part of judicial review.

- ***“Public Bodies” and “Public Functionaries”***

The term “public bodies” describes a range of bodies exercising public, often statutory functions. Examples include: Federal Government and Provincial Government including Ministries, Divisions, Departments, Secretariat etc., Statutory Bodies, Governmental Corporations, Non-Statutory Corporations and Agencies, Tribunals etc. Whereas the term “public functionaries” refers to the officials, civil servants, and personnel performing the administrative actions within and on behalf of public bodies/entities.

- ***“Public Functions”***

Generally, all bodies (including private bodies) are said to be performing public functions when they act, and have the authority to act, for the collective benefit of the general public (and are thus governed by administrative law).

## The Public – Private Distinction

It is not always easy to see where private law ends and public law begins. The Court will examine each case to see how far public law functions are involved.

- In certain circumstances activities of private bodies may also be governed by principles of administrative or public law. This is likely to occur where private bodies carry out public functions.
  - In the case of *M/s. Huffaz Seamless Pipe Industries v. Sui Northern Gas Pipelines*<sup>1</sup> it was observed that the companies registered under the Companies Ordinance, 1984 which are funded by Federal/Provincial Government and which provided the amenities of life to citizens are in substance agencies of State, and actions of such institutions are administrative actions which are subject to judicial review.
  
- However, there may be instances where organizations or entities which are obviously public bodies, like government departments, engage in activities which are governed by private law. Even in such instances certain aspects, such as the decision to undertake such an activity in the first place, would still be governed by public law.
  - For example, if a government department enters in a contract for the provision of IT equipment, the contract with a supplier will be governed by the terms and law of the contract.
  - But the decision of the department to put the contract out to tender, or some aspect of the tendering procedure, may well be governed by public law.
  - In the case of *Airport Support Services v. Airport Manager, Quaid-e-Azam International Airport, Karachi*<sup>2</sup> the Supreme Court declined to interfere in the contractual disputes between private parties and public functionaries as the contract lacked the elements of public interest.

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<sup>1</sup> 1998 CLC 1890 Lah.

<sup>2</sup> 1998 SCMR 2268

## Public Functionary under the Constitution of Pakistan

For the purpose of invoking the High Court to exercise its powers of judicial review, the requirements of Article 199 of the Constitution, which is discussed in great detail later in this section, must be met. Relief pursuant to judicial review under Article 199 is used for the enforcement of fundamental rights of the public connected with public functionaries or to compel the statutory bodies to discharge their duties or to act within their bounds or to refrain from an act beyond their domain.

In order to determine the most useful definition of a public functionary or public body it is necessary to allude to the relevant terminology used in Article 199. The relevant terms are “person performing, --- functions in connection with the affairs of the Federation, a Province or a local authority”.

- *In Zahid Hussain v. The Chairman Selection Committee/Chairman Baluchistan Public Service Commission*<sup>3</sup> the respondent not being a person performing function in connection with the affair of Federation or Province and also not being governed under statutory rules, could not rely on the relief under Article 199.
- The Supreme Court of Pakistan held in the case titled *Salahuddin v. Frontier Sugar Mills*<sup>4</sup> that “if the person whose acts, actions or proceedings are challenged before the High Court does not fall within any of the specified categories (any person performing functions in connection with the affairs of Federation, a Province or local authority), then he would clearly not be amenable to this extraordinary jurisdiction.”
- **“Person”**  
The expression “person”, as defined in the Constitution<sup>5</sup>, includes any body politic or corporate, any authority of or under the control of the Federal Government or of a Provincial Government or any

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3 2017 CLC 426

4 PLD 1975 SC 244

5 Article 199(5) and Article 260 of the Constitution Pakistan, 1973

Court or Tribunal established under a law relating to the Armed Forces of Pakistan. The definitions offered by the Constitution are not meant to be exhaustive and are subject to interpretation by the Courts on a case to case basis.

- **“Functions”**

The expression “functions” has been held by the Supreme Court<sup>6</sup> as having a wide connotation. It connotes the formal and proper activity of a person or institution, or the specific duties of a person especially in a profession or official capacity, or duty peculiar to any office; it includes both duties and obligations.

- **“Affairs of the Federation, a Province or a local authority”**

For the instant discussion the word 'affairs' means any matter or business which is the concern of the Federation, a Province or a local authority. The three tiers of authorities i.e. Federation, Province and local authority, must be understood in terms of the Constitution for the former two and customary usage for the latter.

- **Functions Test**

In the case of *Salahuddin v. Frontier Sugar Mills*<sup>7</sup>, the Supreme Court laid down the test “to determine whether the functions of a body can be considered to be functions of a person for the purpose of the Constitution”. The Supreme Court held as follows:

“The primary test must always be whether the functions entrusted to the organization or person concerned are indeed functions of the State involving some exercise of sovereign or public power; whether the control of the organization vests in a substantial manner in the hands of the Government and whether the bulk of the funds is provided by the State. If these conditions are fulfilled, then the person, including a body politic or body corporate, may indeed be regarded as a person performing functions in connection with the affairs of the Federation or Province, otherwise not.”

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6 PLD 1997 SC 84

7 PLD 1975 SC 244

### 3. WHAT ARE ADMINISTRATIVE ACTIONS?

The expression 'administrative action' or 'act' is a wide term covering a variety of functions of public bodies such as issuing directions, instructions, rendering decisions, making rules, etc. All administrative actions regardless of their nature can be scrutinized and challenged through the process of judicial review.

Administrative action can be statutory or non – statutory. The majority of these actions are statutory because the Constitution or a statute gives them legal affect. Even though these actions are discretionary, the administrative authority is to act in a fair, impartial and reasonable manner.

#### **Classification of administrative actions**

Most of the various functions and duties performed by public functionaries (in the domain of the Executive) can be divided into three general categories:

- i) Executive Actions (Rule Application)  
Rule application can be seen as the core function of the executive or administrative entities. They apply primary legislation or subordinate legislation, in order to implement the mandate of the law in letter and spirit. Public bodies perform a number of functions, usually in the ordinary course of business, in pursuance of this role.
- ii) Quasi-Legislative Actions (Rule Making)  
This refers to the power expressly delegated by the Legislature or the Parliament to various public bodies or authorities to make subordinate or delegated legislation. Given the complexity of modern governments not all areas can be legislated upon by Parliament, therefore, the Parliament often creates the over-arching legal framework through a Statute, but within that Statute delegates limited law (rule) making powers to various bodies to allow them to deal with the wide variety of situations that may arise.

### iii) Quasi-Judicial Actions (Decision Making)

Public bodies are also tasked with playing a somewhat judicial function in that they have to decide between parties on specific matters. Regulatory bodies, administrative tribunals, ombudspersons etc. all have such 'decision making' powers and often have to follow procedures similar to Courts.

- In performance of the quasi-judicial function or decision making, the concerned public functionaries must remain conscious of the dictates of natural justice and equity. These include at least the following:
  - Giving all parties a fair and equitable opportunity to present their case/positions.
  - Considering all relevant facts on the record as well as giving due consideration to the applicable law(s).
  - Giving a well-reasoned and detailed speaking order which reflects the aforesaid requirements.

### **Examples of administrative actions**

The following are some examples of a wide variety of administrative actions which can fall into any one or more of the aforesaid categories:

- Issuing directions to subordinate officers, not having the force of law – (Rule Application)
- Making a reference to a tribunal, for adjudication under the law of industrial relations – (Rule Application leading to Decision Making by the tribunal)
- Preventive detention, internment, externment, and deportation (Rule Application and where a status determination process ensues, such as in Asylum Applications, then a Decision Making role is also played)
- Granting or withholding sanction to file a suit under Section 55(2) of the Muslim Wakf Act 1954 (Rule Application and Decision Making)
- Granting or withholding sanction by the Advocate – General under section 92 of Civil Procedure Code (Rule Application and Decision Making)
- Fact – finding action (Rule Application, Decision Making)

- Requisitions, acquisitions, and allotments (Rule Application)
- Decisions by Administrative Tribunals (Decision Making)
- Framing Rules under an Act of Parliament for its operationalization (Rule Making)
- Making Appointments to Public Bodies (Rule Application).

### **Distinction between Directions and Rules**

Administrative actions may take the form of delegated legislation i.e. Rules or directions/instructions e.g. letters, circulars, orders, memorandum, press notes etc. Confusion arises because words such as codes, rules and regulations which are rightly used for delegated legislation, are also generally used for directions. Thus, the term by which a piece is called government “legislation” does not always show its true character. Both differ in essence and concept, as can be seen hereunder:

- Rules or delegated legislation can only be issued if the authority in question has the statutory power to do so, while directions are usually issued under the general power of Government.
- Another difference lies in the fact that delegated legislations are usually binding in the face of law, whereas directions are not. However, just because directions are not legally enforceable does not mean that administrative authorities can disregard them as they may face a disciplinary action for breach of direction. However, the general rule is that a direction is not enforceable against an individual or an administration.
- While directions can fill the gaps in a rule, they cannot amend them, as a rule can only be amended by another rule. Also, a direction that is inconsistent with a rule cannot be issued. Directives cannot undermine the exercise of statutory powers.
- Even where a direction is drafted in terms that makes it seem mandatory, its breach does not constitute a court action.
- Administrative directions can be treated as rules if they have certain characteristics of statutory rules, such as being expressed with precision or possess generality so to be applicable to a large number of cases.

- Instruments given in relevant letters issued by a Provincial governor to public service commission, are statutory and considered to be binding.
- Sometimes the government issues “rules” where an Act gives them rule-making power, but the court may hold it to be a direction due to a lacuna in the law. Interpretative rules issued by administration for clarity in statutory provisions do not have final effect, as only the statute is held to be binding and not the interpretation. These “rules” are actually directions.
- **Rule or Direction? - Factors for determination**

The following propositions can be used to identify whether a government pronouncement is a direction or a rule:

- 1) When it mentions the statutory provision under which it has been issued. It is to be treated as a rule if the statutory provision states it is a rule.
- 2) Where government issues a norm using its rule-making power and all formalities have been fulfilled.
- 3) Difficulties in identification arise where a government instrument is silent in regard to source of power under which it is issued. In such a case it may be asked
  - (i) Does the instrument impose obligation on individual?
  - (ii) Is it informational or procedural?
  - (iii) Does it impose obligation on administration?
  - (iv) Does it confer rights on individuals?

#### **4. ON WHAT GROUNDS CAN ADMINISTRATIVE ACTIONS BE CHALLENGED?**

When considering whether a public functionary is able to exercise power in a particular way, the starting point will always be to look at the power itself, for example, a provision in an Act of Parliament:

- The power may expressly limit the way in which discretion should be

exercised (for example, by placing a cap on the amount that may be payable under a statutory compensation scheme), which would warrant a straightforward review or challenge thereof.

- Alternatively, a power may appear to be without express limitations, in such instance its lawful exercise will be subject to a range of implied factors, including but not limited to:
  - a) principles established by the Court - derived from public law cases e.g.
    - the need to exercise the power reasonably;
    - the need to exercise the power for the purpose for which it was provided;
    - the need to take relevant factors into account when reaching a decision, and not to take into account irrelevant factors;
  - b) other express limits contained in other statutes;
  - c) power to be exercised within the domain of the parent statute;
  - d) power exercised following a set of rules;
  - e) where law requires something to be done in a particular manner it is done in that manner; and
  - f) an obligation to exercise the power in accordance with jurisdiction of Article 199.

### **Tests of lawfulness/grounds of challenge**

Administrative law has developed a series of tests for measuring the lawfulness of an exercise of public law powers, in addition to the foregoing factors these may also serve as grounds for challenge or review. These so called tests or touchstones include:

- i. Legality – acting within the scope of any powers and for a proper purpose. To act lawfully, the department must have the legal power to do what it intends to do. If it does not, it will be acting *ultra vires*, or outside its powers. It will be acting illegally. Where the power does exist, it will usually be found in primary legislation (an Act of Parliament) or subordinate or secondary legislation (a statutory instrument etc.);
- ii. Procedural fairness – e.g. to give the individual an opportunity to be heard;

- iii. Reasonableness or Rationality – following a proper reasoning process and so coming to a reasonable conclusion;
- iv. Compatibility with the Convention rights and EC law.

## 5. HOW CAN ADMINISTRATIVE ACTIONS BE CHALLENGED?

Administrative Actions are challenged through the legal process of Judicial Review exercised ordinarily by the High Courts and in certain circumstances by the Supreme Court of Pakistan. In Pakistan, the superior courts derive their authority to judicially review administrative actions, from the 1973 Constitution.

The Courts have also held that judicial review extends to, amongst other things, the scrutiny of and/or challenge to all administrative actions of public functionaries on various counts. These include inter alia the following actions or omissions or contraventions:

- Constitutionality of statutory provisions, e.g. a declaration of incompatibility with the Constitution;
- Constitutionality or competence of subordinate legislation;
- Exercise of discretionary powers;
- Procedures used when making decisions, e.g. a challenge to whether a consultation process has been adequate;
- Inaction, e.g. a challenge to a failure to issue guidance or failure to act in accordance with the law;
- Delay in performing functions, reference: writ of mandamus; and
- Coram non-judice i.e. lack of jurisdiction.

### **Jurisdiction of the Supreme Court of Pakistan**

The Constitution provides for the exercise of the power of judicial review directly by the Supreme Court under Article 184(3) of the Constitution of Pakistan, in terms of the provisions set out in Article 199 of the Constitution. However, such direct exercise of jurisdiction is only available where the case involves a question of public importance with reference to the enforcement of Fundamental Rights as provided in the Constitution itself.

## Constitutional Jurisdiction of the High Courts

Article 199 of the Constitution provides the basic framework for Judicial Review. It grants the High Courts 'writ' or constitutional jurisdiction which can be invoked to challenge administrative actions or acts/omissions of public importance or for enforcement of fundamental rights.

A writ petition shall not be maintainable if an adequate alternative remedy is available or where a defect of jurisdiction is apparent on the face of the proceedings. However, in certain instances writs may still be issued despite the existence of an alternate remedy.

## Types of Writs

In Pakistan there are five types of writs commonly invoked, these are described hereunder:

### a) Habeas Corpus

Habeas Corpus, an important safeguard of personal liberty, was derived from the English Common Law, i.e. a right available to anyone arrested or detained. It allows for an inquiry into the lawfulness of the interference with a person's liberty.

- *William H. Rehnquist* explains that a writ is directed to the official who has the custody of the detained, and requires that official to explain to the Court issuing the writ, the basis for the detention. The Court would then determine whether the detainee should be released or otherwise.<sup>8</sup>

### b) Mandamus

Writ of mandamus is a judicial remedy issued in the form of an order or direction from the Supreme Court or a High Court to any constitutional, statutory or non-statutory agency or body to do some specified act which the agency or body is obliged to do under the law and which is in the nature of a public duty or a statutory duty. Simply put, a writ of mandamus is a command issuing from the High Court, directing a person to do any particular act therein specified,

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<sup>8</sup> William H. Rehnquist in his book, "All The Laws But One" at p.23

which relates to his office and is in the nature of a public duty.

c) Quo Warranto

The term means “by what authority or warrant.” It is a prerogative writ requiring the person to whom it is directed to show what authority they have for exercising some right or power they claim to hold.

d) Certiorari

Writ of certiorari has the effect of declaring that something done by a public functionary is without lawful authority and of no legal effect. It is used when an act has been done and that decision needs to be set aside. It is used to control excess of jurisdiction committed by bodies that are entrusted with power to determine the rights of individuals in a judicial manner.

e) Prohibition

Writ of prohibition prohibits a person from doing something in excess of his authority. The rationale of prohibition is that prevention is better than cure and it, therefore, comes into play at an earlier stage than certiorari. Simply put, certiorari is applied to an unlawful decision which has already been taken, whereas prohibition seeks to prevent an unlawful decision from being taken.

### **Who can challenge administrative actions?**

In order to be entitled to apply for judicial review of a decision, a person must have a “sufficient interest” in the decision or the consequence of the action i.e. standing or '*locus standi*'. A person is not entitled to challenge a decision which does not affect him personally, simply because he disagrees with it. Furthermore, in certain instances it is necessary that an aggrieved person initiates a challenge.

In this context, “person” includes legal persons, such as groups or organizations protecting or campaigning for a particular public interest. Judicial review can also be sought under 'public interest litigation.' This

is seen where a case is brought not for personal interest, but for a benefit to the public and its welfare. This relieves the locus standi requirement. The Supreme Court, recently, commenting on the scope of 'public interest litigation' took the view that it enlarges the scope of the meaning of aggrieved person under Article 199 of the Constitution to include a public spirited person who brings to the notice of the Court a matter of public importance that requires enforcement of Fundamental Rights.<sup>9</sup>

### **Limitations on the exercise of writ jurisdiction**

Certain principles have the tendency to limit or restrict the exercise of writ jurisdiction. Nevertheless, the jurisdiction of High Courts shall not be barred from reviewing acts, actions or proceedings that suffer from want of jurisdiction, are *coram non judice* or are based on *mala fide*.<sup>10</sup>

The limitations or restriction upon exercise of writ jurisdiction are briefly discussed hereunder:

- The territorial jurisdiction of the High Courts is of importance;
- Where the petitioner challenging an administrative action does not have standing or lacks *locus standi*;
- Where an adequate alternative remedy is available to the petitioner and has not been availed.
- Where there is delay in bringing about proceedings and the matter is hit by the principle of *laches*;
- Where the Court deems a writ non-maintainable on account of discretion, acquiescence or equity etc.;
- Where the jurisdiction of the Court is ousted by the Constitution itself, however, it will be for the Court itself to interpret the ousting provisions.<sup>11</sup>
- While a judiciary has the power to declare an appointment as void if irregularity ensues, it cannot appoint a person on behalf of the Government. Those decisions are to be left in the hands of the administrative powers.
- Policy decisions are immune from the ambit of judicial review to a

9 2018 SMCR 365

10 PLD 1996 SC 801; PLD 1988 SC 26; PLD 1983 SC 457; PLD 1975 SC 566

11 PLD 1974 SC 151

certain extent.

- Courts in Pakistan do not have the power to examine the appropriateness of policies. It has been made clear that the best judge for policy-making would be the body authorized to do so.
- As per a formalist view Courts only interfere in policy decisions when there is obvious arbitrariness, favoritism and neglect of the law of the land or it is against the fundamental rights enshrined in the Constitution or any other provision of law.
- There is a tendency by all Courts to avoid any kind of involvement in the policy-making domain of the Executive to ensure that there is no overlap in the powers allocated to the three branches of the State.

## 6. WHAT ARE THE POWERS OF COURTS WHEN SCRUTINIZING ADMINISTRATIVE ACTIONS?

The Court has wide discretionary powers when adjudicating a matter pursuant to Article 199 of the Constitution of Pakistan.

### Remedies

Following a successful challenge to an administrative action, i.e. in furtherance of judicial review the Court may grant the following remedies:

- a quashing order, which sets aside or cancels an action or decision (or subordinate legislation) found to be unlawful;
- a prohibiting order, forbidding the public authority from performing an act found to be unlawful;
- a mandatory order, which requires the public authority to perform a particular action;
- a declaration, for example declaring what the law is or that a particular decision is unlawful; and
- damages (in limited circumstances) the Court can award financial compensation.

All of the Court's remedies are "discretionary" in nature, which means

that the petitioner does not have an absolute right to any particular remedy.

In deciding whether to grant a remedy, the Court may consider factors such as:

- whether the matter consists of factual controversy;
- whether the claimant has suffered substantial hardship;
- any inordinate delay by the petitioner in bringing the case;
- any impact the remedy may have on third parties;
- whether a remedy would have any practical effect;
- whether the matter has become academic;
- the merits of the case; and
- whether the remedy would promote good administration.

### **Interim relief**

The power of the Court to grant interim relief is based on the principle that where the court has power to pass a final order, it will generally have the power to make an interim order also, unless such a power is excluded either expressly or by necessary implications.<sup>12</sup>

When an application for judicial review is filed, the claimant must confirm what remedies they seek, including any request for interim relief. Interim relief orders normally take the form of an injunction or a status quo order. An injunction can also be mandatory, e.g. directing the defendant to ensure that the claimant is given suitable accommodation within a particular time frame.

The principles that govern the grant of temporary injunctions under the Code of Civil Procedure, 1908 also apply to the grant of interim injunctions in applications under Article 199.<sup>13</sup> Those principles are well settled i.e. (i) the applicant must have a prima facie case; (ii) the balance of convenience must be in favour of the grant of temporary injunction; and; (iii) the petitioner would suffer irreparable loss if the interim injunction is not granted.<sup>14</sup>

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<sup>12</sup> PLD 1973 Kar. 383, 398.

<sup>13</sup> 1968 SCMR 88.

<sup>14</sup> PLD 1970 SC 139.



# **SECTION II**

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FUNDAMENTAL CONCEPTS GOVERNING  
EXERCISE OF ADMINISTRATIVE AUTHORITY



## FUNDAMENTAL CONCEPTS GOVERNING EXERCISE OF ADMINISTRATIVE AUTHORITY

In this section we will explore some fundamental concepts governing the exercise of administrative authority. These concepts are of utmost importance and underpin all instances of good decision-making and fair exercise of authority. It is at all times necessary to employ several if not all of these concepts in the decision making as well as day to day workings undertaken in a public office.

The description of each topic in this section is based upon an analysis of the interpretation and application of that topic by the Supreme Court of Pakistan in various cases. This section also includes of case summaries, highlighting some of these concepts. These concepts are further explained by way of a summarized case example. Please note that most of these issues overlap in either their purpose or their application, hence their mention may reoccur in different sections.

As a public functionary, you must demonstrate a thorough understanding of the following core principles of administrative law which permeate through every administrative action:

1. Reasonableness
2. Rationality
3. Lawfulness
4. Arbitrariness
5. Procedural Fairness
6. Discrimination
7. Bias/Impartiality
8. Independence
9. Mala Fide
10. Fundamental Rights

## 1. REASONABLENESS

- Every action taken by the Government must be in the public interest and its action would be liable to be invalidated on the touchstone of reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional and invalid.<sup>15</sup>
- It is certainly not easy to define “reasonableness” with precision. It is neither possible nor advisable to prescribe any abstract standard of universal application of reasonableness. It needs to be kept in mind that “reasonable” implies intelligent care and deliberation, that is, the choice of course that reason dictates. For an action to be qualified as reasonable it must also be just, right and fair and should neither be arbitrary nor fanciful or oppressive.<sup>16</sup>
- For an action to be qualified as reasonable it must be just, right, and fair.
- In deciding whether a decision or action is reasonable certain factors, identified by the Court, are to be taken into consideration. These include the nature of the right infringed/affected, duration and extent of the restriction, and the manner as well as the purpose for which the restrictions are imposed.
- As regards reasonableness, the Courts also take into account the English Law *Wednesbury* Reasonableness test. Which provides that a decision will not be reasonable, if it is so unreasonable that no reasonable person acting reasonably could have made it.<sup>17</sup>
- it is been held that any classification or distinction must be reasonable. There must be rational nexus between the basis of classification and the object intended to be achieved thereby. Any classification must be based on intelligible differentia, meaning comprehensible difference between one class/group of persons from another group in a particular set of circumstances. There is a general presumption of constitutionality of the principle regarding reasonable classification, but no such presumption can be carried if there is nothing on the face of law and the surrounding

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15 2012 SCMR 773

16 PLD 2016 SC 692

17 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948 1 KB 223].

circumstances on the basis of which such reasonableness of classification can be deemed.<sup>18</sup>

## 2. RATIONALITY

- For a decision to be reasonable it must also be rational. Irrationality means unreasonableness. It is one of the three core grounds upon which an administrative action is subject to control by judicial review, along with illegality and procedural impropriety.<sup>19</sup>
- Freedom, individual autonomy and rationality characterize liberal democracies.<sup>20</sup>
- Blackstone defines rational as behaviour that is guided by reasoning and not any sort of emotions. Thus, in order to make a rational decision one must think in a logical and systematic way to draw a logical conclusion. It also states that rational decision making is done through a systematic approach in which data and analysis are used to reach a decision.<sup>21</sup>
- The concept of reasonableness and rationality, which is an essential element of equality or non-arbitrariness, is protected by Article 25 of the Constitution, and it must characterize every state action whether it is under the authority of law or in exercise of executive power. Article 25 of the Constitution speaks of equality before law and equal protection of law.<sup>22</sup>
- The exercise of discretionary powers without framing rules to regulate its exercise has always been taken to be enhancement of power and where authorities fail to rationalize and regulate their discretion by rules or precedents, the courts have to intervene where exercise of such discretionary power appears to be arbitrary and capricious.<sup>23</sup>

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18 2007 SCMR 410

19 2014 SCMR 676

20 PLD 2014 SC 699

21 Blackstone's Law Dictionary.

22 2005 PLC (C.S) 183

23 2015 PLC (C.S) 117

### 3. LAWFULNESS

- Those exercising administrative authority must obey the law and must be authorised by the law for the decisions they make. This is the same as the principle of legality; it is the authority to act.
- Discretionary statutory power can only be exercised on a ground to achieve an object or purpose that is lawfully within the contemplation of the statute.<sup>24</sup>
- Acting beyond jurisdiction is *mala fide* and without lawful authority and is liable to be struck down. An exception has been made to the general rule of resorting to alternate, adequate and efficacious remedy. This exception relates to an action and/or order of a public functionary, which on the face of it appears to be illegal, unlawful and void. Bar for invoking the writ jurisdiction of High Court would not be applicable where the impugned order was challenged on the basis of lack of jurisdiction.<sup>25</sup>
- Where a statutory functionary acted *malafidely* or in a partial, unjust and oppressive manner, which on the face of it, is patently illegal or without lawful authority or suffered from such legal infirmity which is patent on the very face of the impugned order/action, the High Court, may in spite of the existence of an alternate remedy, exercise its jurisdiction under Article 199 of the Constitution and may grant relief to an aggrieved party. The Court has held, more than once, that a writ of certiorari for instance, could be granted, despite availability of an alternate remedy, where, for example, the impugned order was *ex facie* without lawful authority or where it was a case of lack or absence of or even excess of jurisdiction.<sup>26</sup>
- Public functionaries are supposed to adhere to the principle of transparency in the performance of their duties and are not bound to carry out any order which is not in accordance with the law, they are only obliged to carry out lawful orders of their superiors and if they were being pressurized to implement an illegal order, they should put on record their dissenting role.<sup>27</sup>

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24 2018 SCMR 1544

25 PLD2001 Karachi 344

26 PLD2002 SC 452

27 PLD2010 SC 759

- Where the exercise of power by a competent authority over another depends upon the fulfillment of a condition, such condition must be lawful. As soon as it is to be found that the condition was either unlawful or was continued in an unlawful manner, this would directly adversely affect the said power. The lawful exercise of power is dependent upon the existence of a condition which is lawful. The question as to whether or not there is some such existing condition is, according to the Supreme Court's view, justiciable.<sup>28</sup>

#### 4. ARBITRARINESS

- Arbitrariness is the opposite of the rule of law.
- Arbitrariness is the antithesis of the rule of law. The legislature, when it confers a wide-ranging power, must be deemed to have assumed that the power will be, firstly, exercised in good faith, secondly, for the advancement of the objects of the legislation and thirdly, in a reasonable manner.<sup>29</sup>
- For an action to be qualified as reasonable it must be just, right, and fair; and should neither be arbitrary nor fanciful or oppressive.
- It is now well laid down that the object of good governance cannot be achieved by exercising discretionary powers unreasonably or arbitrarily and without application of mind but the objective can be achieved by following the rules of justness, fairness, and openness in consonance with the command of the Constitution enshrined in different Articles including Articles 4 and 25. The obligation to act fairly on the part of the administrative authority has been evolved to ensure the rule of law and to prevent failure of justice.<sup>30</sup>
- The judicial consensus seems to be that the functionaries of any organization or establishment cannot be allowed to exercise discretion at their whims, sweet-will or in an arbitrary manner; rather they are bound to act fairly, evenly and justly.<sup>31</sup>
- In the exercise of its authority a Statutory body has to act in a fair, non-arbitrary and non-discriminatory manner. It must not act under

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28 2017 PLC (C.S) 373

29 2015 SCMR 630

30 2015 SCMR 1257

31 2005 SCMR 25

the dictation of the Government. It must act fairly and free from governmental influence.<sup>32</sup>

## 5. PROCEDURAL FAIRNESS

- Due process is now available to every person as a fundamental right and underscores procedural fairness and propriety in determining his civil and criminal rights.
- The foundation of good governance is based on reasons, accessibility, accountability, transparency, participation, consensus, inclusiveness, efficiency, ethics and responsiveness. These said factors are also required to fulfil conditions of procedural fairness.
- Every public functionary is supposed to function in good faith, honestly and within the precincts of its power so that persons concerned should be treated in accordance with law as guaranteed by Article 4 of the Constitution. It would include principles of natural justice, procedural fairness and procedural propriety.<sup>33</sup>
- The concept of procedural fairness, that is well-rooted in our jurisprudence, requires that a decision-maker comes to a decision in a procedurally “fair” manner.
- Provision of an open transparent objective criteria based on tangible record which could be lawfully taken into consideration, and to meet the essential requirements of the adequate disclosure and fairness would remove from the process, any blemish and abrasion of unbridled and arbitrary exercise of discretion. A process being flawed for want of a well thought out structured objective criteria, and lacking due process, may give way to arbitrariness and ambiguity and a whimsical approach.<sup>34</sup>
- All persons purporting to act under law are presumed to be aware of it. Hence, where an action taken is so unreasonable, improbable or blatantly illegal that it ceases to be an action countenanced or contemplated by the law under which it is purportedly taken malice will be implied and act would be deemed to suffer from malice in law or constructive malice. Strict proof of bad faith or collateral propose

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32 2015 SCMR 1739

33 2015 SCMR 1257

34 2017 SCMR 969

- in such cases may not be required.<sup>35</sup>
- With regard to insuring procedural fairness, the decision-maker may have to disclose reasons he intends to rely on to make the decision, material facts and reason for the decision.
  - A series of defective decisions that are followed by a final procedurally fair decision will not lead to lawful outcomes.<sup>36</sup>

## 6. DISCRIMINATION

- Discrimination refers to the treatment or consideration of, or making a distinction in favour of or against, a person or thing based on the group, class, or category to which that person or thing belongs rather than on individual merit.
- Article 27(1) of the Constitution protects the citizens from discrimination based on race, religion, caste, sex, residence and place of birth in matter of appointment to service of Pakistan. However, it does not open the doors of other forms of discrimination or nepotism under the garb of some rules that are patently unconstitutional and against the very scheme of the civil services. Were it so, a number of constitutional provisions such as Articles 4, 8, 9, 14, 18, and 25 (of the Constitution) would lose their significance and the entire edifice of social justice and equality before law would become vulnerable to various exceptions created under the perverse interpretation of the said Article 27(1).<sup>37</sup>
- When an authority is conferred with the power of exercising discretion in any matter, such power is to be exercised in a judicious; transparent and impartial manner, keeping in view the fundamental principle of non-discrimination qua reasonable classification, and not in an arbitrary or capricious manner and without any sound criteria for doing so.<sup>38</sup>
- Where the administrative authority acts in a discriminatory manner and action fails the test of reasonableness, transparency and/or is otherwise unjust and unfair or suffer from mala fide, the Courts not

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35 2017 SCMR 1249

36 PLD 2014 SC 47

37 2017 SCMR 206

38 2015 SCMR 642

only are vested with the jurisdiction to set aside such action but any failure in such an eventuality to exercise the power of Judicial Review, when invoked, would make the Court a party to such unreasonable, unfair, mala fide and illegal action.<sup>39</sup>

- Public functionaries, deriving authority from or under law, are obligated to act justly, fairly, equitably, reasonably, without any element of discrimination and squarely within the parameters of law, as applicable in a given situation.
- Every public functionary is supposed to function in good faith, honestly and within the precincts of its power so that persons concerned should be treated in accordance with law as guaranteed by Article 4 of the Constitution. It would include principles of natural justice, procedural fairness and procedural propriety. The action which is mala fide or colourable is not regarded as action in accordance with law. While discharging official functions, efforts should be made to ensure that no one is prevented from earning his livelihood because of unfair discriminatory act on their part.<sup>40</sup>

## 7. BIAS/IMPARTIALITY

- Bias or partiality is an unfair act or policy stemming from prejudice. Nepotism, favouritism and 'sifarish', are all hallmarks of bias.
- Bias against certain traits, such as race, religion, sex, and handicaps, is prohibited in certain areas, such as employment and public services. It includes acts of extending favour and conferring benefit of promotion, which is not only against fundamental rights, but also a glaring example of nepotism and undue favour.
- For there to be no bias, everyone has to be appointed or hired by following the same criteria. There has to be complete transparency in the selection process, where everyone competes or undertakes competitive process of selection.
- The real test to adjudge bias is objective. Whether in the given circumstances a reasonable and prudent man, after examining and analysing the facts narrated, would feel that there was "Bias" in the

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39 PLD 2014 SC 47

40 2015 SCMR 1257

- mind of the decision maker or not?<sup>41</sup>
- Bias, malice and mala fides vitiate all proceedings. The Courts while interfering with the discretion exercised by any authority have to be cautious, and have to ascertain from facts and circumstances, the existence of or likelihood of bias. Where in cases it is difficult to prove bias the Court determines its existence on “probabilities to be inferred from the circumstances”.<sup>42</sup>
  - Bias is determined by deciding whether a reasonable man could in circumstances reasonably suspect the bona fides and be left with the impression that there is a real likelihood of bias.<sup>43</sup>

## 8. INDEPENDENCE

- A decision is required to be taken independently, free from external influence, it cannot be taken at the dictation of another.
- In administrative law, the authority is vested with a certain amount of discretion and the said discretion has to be exercised by applying independent mind uninfluenced by irrelevant or extraneous considerations.<sup>44</sup>
- The Pakistani Courts<sup>45</sup> have relied upon *Brean v. Amalgamated Engineering Union (1971) 2 QB 175* Lord Denning MR. observed as follows:

"The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this; the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith, nevertheless the decision will be set aside. That is established by *Padfield v. Minister of Agriculture, Fisheries and Food* which, is a landmark in modern administrative law."

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41 PLD 2009 SC 284

42 1996 SCMR 263

43 1996 SCMR 63

44 2013 SCMR 817

45 ibid

- In exercise of its authority even Statutory Bodies must not act under the dictation of the Government. It must act fairly and free from governmental influence.<sup>46</sup>

## 9. MALA FIDE

- Mala fide is a Latin term which means 'in bad faith,' with intent to be dishonest or to mislead someone. It is the intent, without justification or excuse, to commit a wrongful act. It may be used interchangeably with "malice".
- The term "malice" when used in law, has well defined connotations. Black's law dictionary clarifies that whereas in ordinary parlance malice refers to mere "[i]ll will or wickedness of heart", in legal contexts, it requires "[t]he intent, without justification or excuse, to commit a wrongful act".<sup>47</sup>
- Colourable exercise of power for collateral purpose or improper object can also be held to be mala fide. The action can also be held to be fanciful and arbitrary in its manner. The action which is mala fide or colourable is not regarded as action in accordance with law.<sup>48</sup>
- In order to avoid a decision or action from falling in the category of 'mala fide' such decision or action must be made strictly in accordance with applicable rules, regulations and by-laws, without any discrimination and in a transparent manner.
- Mala fide acts cannot qualify for validation under the law as they are neither acts duly done nor acts purported to be done either in the exercise of or in the purported exercise of powers derived from such Orders, Regulations, Enactments, Notifications, Rules, Orders or by-Laws. Mala fide acts stand on the same footing as acts done without jurisdiction.<sup>49</sup>
- Where an action is taken or order passed not with the intention of fulfilling its mandate or to achieve its purpose but is inspired by a collateral purpose or instigated by a personal motive to wrongfully

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46 2015 SCMR 1739

47 2013 SCMR 1159

48 2015 SCMR 1257

49 PLD 1974 SC 151

hurt somebody or benefit oneself or another, it is said to suffer from malice of facts.

## 10. FUNDAMENTAL RIGHTS

- Fundamental right is a basic or foundation right derived from natural law.
- The Fundamental Rights enshrined in the Constitution are always considered paramount and cannot be curtailed, usurped or infringed by any legislative device or executive measurement; however, it is subject to any reasonable restriction that may be imposed by law in the public interest.<sup>50</sup>
- It is a right that is deemed by the Supreme Court to receive the highest level of Constitutional protection against government interference.
- It recognises inherent and inalienable dignity of all human beings as the foundation of freedom, justice and peace.
- Right to life and right to dignity are considered to be the most important of these rights, as they allow physical, social, economic and cultural environment, to health and education and to information and communication.
- Fundamental Rights can neither be treated lightly nor interpreted in a casual manner. Therefore, while implementing a directive principle of policy, the State or the said authority must not make any law which takes away or abridges Fundamental Rights, unless it is in the interest of the public at large.

### *Example No.1*

**2012 SCMR 455 – Dr. Akhtar Hassan Khan & Others versus Federation of Pakistan & Others.**

*Decided by the Supreme Court of Pakistan*

In this case, the privatization of Habib Bank Limited (HBL) was challenged under Article 184(3). The decision to privatize HBL was

taken in 1995, but a decisive step to culminate the sale took place in the year 2000. Expressions of Interest were issued and after the entire process Agha Khan Foundation for Economic Development was declared the highest bidder. The argument brought forward by the petitioner is that the process of privatization was not transparent and hence, unreasonable.

The Court held that it is not for them to determine whether a particular policy of a particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary from case to case. The Court held that it would ordinarily refrain from interfering in policy making domain of executive authority or in the award of contracts unless these acts smack of arbitrariness, favoritism and a total disregard of the mandate of law. It was noted that while exercising the powers of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the “decision making process.” By way of Judicial Review, the Court cannot examine the details of the terms of the contracts which entered into by the public bodies or the State. The Courts have inherent limitations on the scope of any such enquiry. But at the same time the courts can certainly examine whether “decision making process” was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution. Furthermore, it was observed that the Court must exercise its discretionary powers of Judicial Review with circumspection and only in furtherance of public interest and not merely making out of a legal point. It should always keep the larger public interest in mind to interfere or not to interfere. Only when the public interest overwhelms any other consideration, the Court should interfere.

*Example No.2***2015 PLC (C.S) 183 – Muhammad Idrees versus Federation of Pakistan.***Decided by the Supreme Court of Pakistan*

In this case, the petitioners were assistants serving in the Cantonment Board of Multan, who invoked the jurisdiction of Court through constitutional petition for implementation of office memorandum issued by Government of Pakistan, Finance Division. The petitioners voiced their grievance that the finance division through office memorandum approved for up-gradation of clerical and auditors post, and the respondent had discriminated against the petitioners by not upgrading their post and hence, depriving them of their fundamental rights under Article 4 & 9 of the Constitution of Pakistan.

It was held by the Court, that in the present case the petitioners were discriminated against the respondents without any reasonable differentia by not being given an up-gradation in their post. It was further held that it is a settled principle of law that statutory bodies and functionaries are strictly required to function in accordance with law. Any act done so should be guided by reasoning and following settled rules. The petitioners being cantonment servants cannot be deprived of benefits accrued to them regarding up-gradation of their post.

*Example No.3***2017 SCMR 969 – Federation of Pakistan versus Dr. Muhammad Arif.***Decided by the Supreme Court of Pakistan*

The case involved the criteria for the award of 15 marks at the disposal of Central Selection Board (CSB), with overriding effect of 5 marks and thereby placing the civil servants in category A, B and C as against the dictum laid down by this court. It was averred that the process carried

out by CSB on the basis of above formula, and resulting into deferment/supersession of the respondents was illegal, without jurisdiction and violative of the law laid down by this Court.

The Court held that it is evident that instead of providing any evaluation structure, it was not only left open for the board to choose either the service dossier of the officer concerned as source material for the evaluation of the various essential and crucial attributes of the officer, or just to rely upon the personal knowledge of its members for the said purpose. Whereas in relation to the candidate's personality profile it was left exclusively to be evaluated on the members knowledge, without any reference to any record. The entire impugned process was held as flawed for want of a well thought out structured objective criteria and lacking in due process, giving way to arbitrariness, ambiguity and a whimsical approach, by placing reliance on undefined personal opinion and that too without qualifying it with the necessity of being based on any tangible/material, resulted in adverse recommendation. Thus, the process not only violated the requirement of adequate disclosure but also offended the principle of fairness, due process and procedural propriety.

#### *Example No.4*

#### **PLD 2013 Supreme Court 195 - Syed Mahmood Akhtar Naqvi & Others Versus Federation of Pakistan & Others. (Anita Turab Case)**

#### *Decided by the Supreme Court of Pakistan*

The background to this matter is that Suo Motu case was initiated on the basis of broadcasts on different TV channels. In these broadcasts, Syeda Wahida Shah, a candidate of the Pakistan People's Party was shown slapping a member of the polling staff. The Suo Motu case was concluded. Ms. Anita Turab, who was a civil servant in BS.19, presently working in the ministry of interior, filed an application in the aforesaid Suo Motu case. The application was ordered to be registered under article 184(3) of the Constitution. The petitioner set out in her petition,

seeking that the standing of the civil service be restored as service of the state and not the service of any transient government. To achieve this object, her submission was that unlawful political interference in the independent and legitimate functioning of civil servants be stopped.

The Court held that tenure, appointment, promotion and transfer are of utmost importance in the civil service. If these are made on merit in accordance with defined rules, instructions etc., the same will rightly be considered and treated as part of the terms and conditions of service of a civil servant. If, however, rules and instructions are deviated from and as a result merit is discouraged on account of favoritism, *safarish* or considerations other than merit, it should be evident the civil service will not remain independent or efficient. Appointment, removal, promotion, tenure, and transfer must be made in accordance with the law and the rules. Civil servants owe their first and foremost allegiance to the law and the constitution. They are not bound to obey orders from superior which are illegal or are not in accordance with accepted practices and rule-based norms.



# **SECTION III**

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SUBSTANTIVE PRINCIPLES & ISSUES  
RELATING TO DUTIES AND POWERS OF  
PUBLIC FUNCTIONARIES



## **SUBSTANTIVE PRINCIPLES & ISSUES RELATING TO DUTIES AND POWERS OF PUBLIC FUNCTIONARIES**

In this section we will explore some of the substantive principles and issues pertaining to the exercise of power by public functionaries, including civil servants. These principles, albeit of general applicability, remain specifically relevant to most functions and actions undertaken by public functionaries. The following also stand out as the most common issues highlighted during Judicial Review:

1. Authority and Competence;
2. Delegated Legislation;
3. Exercise of Discretion;
4. interdepartmental Coordination; and
5. Direct and Indirect use of Legislation.

## 1. AUTHORITY AND COMPETENCE

Authority and competence of a Civil Servant or Public Functionary can be scrutinised on two fronts hence this section has been divided accordingly. (a) Firstly, the authority or eligibility to hold public office i.e. Quo Warranto, and (b) secondly the due power/authorization to take certain actions including delegated authority or delegation of power. Both have been discussed in seriatim hereunder:

### (a) QUO WARRANTO

#### Brief overview

Denotes scrutiny of right to hold public office.	Not extended to performance/misconduct issues.
Appointment procedure must be transparent.	Appointment must be based on merit and fairness.
As per applicable laws and rules/regulations.	Without undue influences e.g. nepotism, favouritism.
Must not depend upon unfettered discretion.	Appointment only to be made in manner provided.
Objective procedure must be followed.	

#### KEY ISSUES

- The term “Quo Warranto” is Latin for “by what warrant (or authority)?”. The term is usually used in relation to writs or legal actions scrutinising a person's right to hold the respective public office.
- The Constitution confers the power on the High Court, and accordingly on the Supreme Court, to issue a writ of Quo Warranto when deemed necessary, the same may be issued only against a person holding a public office. Accordingly, the public functionary would be required to establish their right, authority and/or eligibility to hold that particular public office.

- While scrutinising for Quo Warranto, the Court can only proceed with regard to the public functionary's right to hold that particular public office. In such instance the Court may not delve into any complaints of non-performance or misconduct during the course of performance of duty in that position.<sup>51</sup>
- Transparency of procedure and meritorious appointment after giving equal opportunity to interested eligible members of the public, has been held akin to a fundamental right by the Supreme Court of Pakistan. It has held that appointments to various posts by the Federal Government, Provincial Government, Statutory Bodies and other Public Authorities, either initial or ad hoc, without inviting applicants from public through the Press, is a violation of Article 18 of the Constitution, read with Article 2A of the same which makes it clear that every citizen equally placed or situated is to be treated alike.<sup>52</sup>
- One obvious element which the Courts consider is whether the appointment of the said public functionary has been done on account of undue influences such as nepotism, favouritism, or 'sifarish' i.e. undue intercession. In order to be lawful, the appointment must have been made without any such considerations or other external influences.
- It has been held by the Superior Courts that good governance in a system can only be achieved if appointments to such positions are made on the basis of a clear 'merit' criterion, fair process, and in accordance with the applicable laws and rules/regulations, as opposed to being influenced by favouritism and nepotism. It is a settled principle of law that appointments to a public office, whether under the control of the Provincial or Federal Government, made in an arbitrary and capricious manner cannot be allowed to hold field. Therefore, it is important that all appointments in public institutions

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51 PLD 1964 Lahore 129

52 1996 SCMR 1349

are based on a fair process and within the parameters of the applicable rules and regulations.<sup>53</sup>

- This principle was taken into account by the Court when deciding the legal bases of appointment of many employees of Employees Old-Age Benefits Institutions (EOBI) and it was held that even though allowing these petitions (challenging the appointments) would cause hardship to many of the appointees, but such ill-gotten gains could not be defended/protected.
- In particular where the relevant statute or a constitution of a public body/organization expressly provides for an entity or authority empowered to make appointments and regularization of its employees, then such power can only be exercised in the manner provided. In order to be viable and lawful the appointment and regularization has to be made by such specified entity or body and none other.
  - This was seen in regard to Secretary Sindh Adbi Board, where the court held that under clause 2 of the Constitution of the Board, it was required that appointment of an officer or servant shall be made by a Board which comprises of eight members nominated by the Government, two Ex-Officio Members, two Members nominated by University of Sindh and three members nominated by outgoing Board. Hence, the appointment by the Minister of Education/ Chairman of Board could not make an appointment.<sup>54</sup>
- The appointment is not dependent upon the unfettered whim and discretion of the government of the day or the political executive. In order to ensure this, where a statute lays down the procedure of appointment of a certain post, the appointment must be made in accordance with the set rules. It has been held that autonomous

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53 2014 SCMR949

54 2014 SCMR652

institutions in particular can only function 'efficiently and effectively' if their autonomy is respected, and this cannot be achieved unless appointments of key positions are made in a transparent manner by ensuring the implementation of checks provided in the applicable laws.<sup>55</sup>

- The validity of an appointment is dependent upon whether an objective procedure has been followed or not. The selection procedure must have a reasonable nexus with the object of the whole exercise and a reasonable selection procedure must be followed with rigour, objectivity and transparency.<sup>56</sup>
  - The Court has held that where codal formalities of appointments are not followed it will generate frustration among all persons who have excellent merits.<sup>57</sup>

#### *IMPORTANT CASE EXAMPLE*

### **2013 SCMR 1159 – Muhammad Ashraf Tiwana & Others versus Pakistan & Others**

*Decided by the Supreme Court of Pakistan*

Principles of good governance were reflected in Sections 5 & 6 of the Securities and Exchange Commission of Pakistan Act, 1997, which laid down stringent criteria for the candidate that the Federal Government may appoint as Commissioner/Chairman of the Securities and Exchange Commission of Pakistan (SECP). It was deemed that although the Federal Government had the authority to appoint the Chairman and Commissioners of the SECP, but the Government did not have absolute and unbridled powers in such behalf.

In this case, the petitioner, Mr. Muhammad Ashraf Tiwana, was a former

<sup>55</sup> PLD 2012 SC 132

<sup>56</sup> Ibid 4.

<sup>57</sup> PLD 2004 SC 313

employee of Securities and Exchange Commission of Pakistan. He filed a petition under Article 184(3) of the Constitution alleging that the appointment of Chairman SECP was not done in a fair and reasonable manner.

To adhere to the requirements of S.5(1) of the Act of 1997, there had to be a process which ensured that the widest possible pool of qualified candidates was available to the Federal Government and from such pool, through a transparent selection process, appointments could be made.

The appointment of the Chairman SECP was set aside as no attempt appeared to have been made by the Federal Government to ensure compliance of said Sections 5 & 6 of the 1997 Act. Hence, it was seen that they had not complied with the statutory requirements laid down.

The Court held, inter alia, the following:

It has by now become well settled that Courts will look into the process of appointments to public office. It is the process which can be judicially reviewed to ensure that the requirements of law have been met.

- These are universal principles of good governance and are reflected in sections 5 and 6 of the Act which lay down stringent criteria for the kind of person the Federal Government may appoint as Commissioner/Chairman SECP, which must be met.

- We have come a long way from the days of the whimsicality of Kings and Caesars. The element of subjectivity and discretion of the Government has been severely limited by the legal requirement that an appointee must be a person having integrity, expertise, eminence etc. This requirement imposes a duty on the Federal Government to put in place a process which ensures that the requirements of the law are met.

- It was found that the process of appointment was arbitrary and unsuited as CV's were seen to either be forwarded by enthusiast or politically active divisions.

- It is settled law that a statutory delegate cannot sub-delegate his powers. Hence, as the statute had vested the power of appointment in the Federal Government and not the SECP or its Chairman, the Federal

Government could not delegate this duty to SECP or its Chairman.  
 - It was also held that appointments to senior positions in public bodies must be done in a transparent, inclusive and demonstrably fair manner; so that the objectives for which public offices are established can be efficiently achieved.

## (b) Exercise of Authority & Delegation of Power

### Brief overview

Where law confers a jurisdiction it also confers the power to do acts necessary for its exercise.	Order or action in derogation or excess of the powers granted can be challenged.
Mala fide acts akin to acts without jurisdiction.	Decisions without jurisdiction are held to be invalid.
Judicial review is to act as “a check against excess of power in derogation of private right”.	Delegated power cannot be transferred completely or for an indefinite time period.
Delegated power cannot be beyond that which is vested in the delegating authority.	Courts judge an act or decision on various touchstones provided in the law and on principles of natural justice.

### KEY ISSUES

- As a general rule it is well-settled that where law confers a jurisdiction it impliedly also confers the power to do all such acts and employ all such means which are required and necessary for the exercise of such jurisdiction. This principle of implied power is based on the Latin maxim “*Cui jurisdiction data est ea quoque concessa esse videntur sine quibus jurisdiction explicari non potuit*”, meaning, to whomever jurisdiction is given, those things are also supposed to be granted, without which such jurisdiction cannot be exercised.<sup>58</sup>

- Performing functions in connection with the affairs of the Federation and Province, means functions in relation to the government and the state, involving the exercise of public power in one form or another. Hence, these functions will be performed by persons or bodies directly appointed, controlled and financed by the State.<sup>59</sup>
- Any order passed or action taken which is in derogation or in excess of the powers granted under the law can be assailed as ultra vires.<sup>60</sup>
- Decision which are made without jurisdiction are held to be invalid. Furthermore, acts done with mala fide are also invalid. This is because mala fide acts stand on the same footing as acts done without jurisdiction.<sup>61</sup> Sometimes the decision-making authority of a functionary, body or organization may also be brought into question.
- The function of judicial review is to act as “a check against excess of power in derogation of private right”, yet judicial review cannot supervise all administrative adjudications, for it exists to check, not to supplant them. Accordingly, if on a point of law, the administration has adopted a construction, which is a possible one, the Court will support the action. On a point of procedure, the essential duty is to secure fairness, for Court procedure is not the only fair procedure, but minimum standards are necessary.<sup>62</sup>
- In cases of delegation of power, it is also held that such power cannot be transferred completely and for an indefinite time period.<sup>63</sup>
- Delegated power cannot be beyond the scope and confines of the power or authority vested in the delegating authority.
- In scrutinising exercise of authority, the Courts judge an act or decision on various touchstones provided in the law and on principles of natural justice. Some of the considerations, inter alia, are as follows:
  - Whether there has been “Colourable exercise of power”, which in effect means that the authority exercises power, that is

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59 Ibid 9.

60 2013 SCMR 642

61 PLD 1974 SC 151

62 PLD 1964 SC 673

63 2010 SCMR 312

conferred on it for one purpose, to achieve something else which it is not authorised to do under the law in question.

- While looking at the administrative action, Courts also look at whether the act was unreasonable such that the authority was acting on irrelevant or extraneous grounds or for an improper purpose.
- Whether before issuing an administrative order if the competent authority considered the matter before it in detail and formed an opinion thereon. A competent authority should not come to a decision mechanically, without applying its mind to the facts and circumstances.
- Whether the decision was made independently or under the dictation of a superior authority. Although the authority intends to act itself, in effect, it does not as it does not take the concerned action under their own judgment, contrary to the obvious aim of the statute granting authority.
- Whether the procedural requirements laid down in a statute or other legal instrument to reach a decision have been followed. It is for the Court to decide whether a procedural requirement is mandatory or directory.
- Whether the act or decision infringe any fundamental rights or are in derogation of any legal provision or principles of equity, fairness and natural justice.

### IMPORTANT CASE EXAMPLE

#### **2015 SCMR 1739 – Lahore Development Authority through D.G. & Others versus Ms. Imrana Tiwana & Others.**

*Decided by the Supreme Court of Pakistan*

The instant case was Civil Appeal against the Judgment passed by a Full Bench of the Lahore High Court. The Petitioners before the High Court had assailed the signal free corridor project on various grounds. The Lahore Development Authority (LDA), a statutory authority planned to introducing two underpasses, 7 U-turns and 5 overhead pedestrian bridges on an existing 7.1 KMs of the existing Jail Road and Main Boulevard. It started from Qurtaba Chowk (roundabout) and will end at Liberty Market main chowk, commonly known as “a signal free, high speed expressway”. The High Court stopped the project on various grounds, including, that Lahore Development Authority cannot assume jurisdiction or interfere in the political, administrative and financial powers devolved on to the local government through Punjab Local Government Act under Article 140A of the Constitution.

Functions of a local government could not be read/interpreted so as to trump the executive authority of the Provincial Government. Articles 137 and 140A had to be read in harmony. Both provisions provided a scheme for a representative government and participatory democracy in the country and a scheme to establish Local Government and articulate a framework within which the Provincial Government must function. The authority conferred on the Province and the responsibilities devolved on the Local Government form part of a common scheme. These are not to be used as trumps as one cannot cancel the other.

The province is under an obligation under article 140A of the Constitution to establish, by law, a Local Government System and to devolve political, administrative and financial responsibility on the Local Government. Yet, in doing so it is not stripped bare of its

executive and legislative authority under Article 137 and 142 of the Constitution. The Provincial and Local Governments are to act in a manner, which complements one another.

The Court held, inter alia, the following:

- Article 140A of the Constitution of Islamic republic of Pakistan casts a mandatory obligation on the provinces to establish Local Governments possessing meaningful authority and responsibility in the political arena, administrative and financial matters. It is the duty of a province through the provincial government and the provincial assembly to purposefully empower local governments in the province so as to comply with their mandatory obligation under article 140A of the Constitution.
- That even after the insertion of Article 140A the Provincial Government would continue to have the authority to enact and amend statutes, make general or special laws with regard to Local governments and extend municipal boundaries.
- However, where the Provincial Government uses its power of amendment to overstep its legislative or executive authority to make the Local Government powerless such exercise would fall out of Article 140A of the Constitution.
- The creation of a Local Government System does not deprive the Provincial Authority power over its citizens and deny it all roles in progress and prosperity.
- Provincial Government, in exercise of its power, can aid the Local Government. It can also take initiative of growth and development, but these should be in the public interest.
- In this case, as elections to Local Government had not taken place in the Province, there could be no conflict between Local and Provincial Authorities. Since, development work was of the Local Government, and since it did not exist in the present case, the projects should not be brought to a standstill and, thus, the Provincial Government could carry on these tasks.

## 2. DELEGATED LEGISLATION

### Brief overview

Most of the specialist or detailed law-making is undertaken by the Executive.	Rule-making power bestowed upon functionaries or agencies has the force of law.
Inconsistency between delegated legislation and the parent statute, the latter shall prevail.	Subordinate legislative provisions cannot be retrospective.
Matters of fundamental nature or general policy or great importance, cannot be delegated.	Delegated legislation must be reasonable.
Powers can be assigned within reasonable limits and scope in order to allow rules and regulations to be made by anyone empowered to do so, within the frame-work of the main legislation.	Power entrusted for one purpose must be used for that purpose alone.

### KEY ISSUES

- In this day and age, a comparatively small part of all legislation is made directly by the legislature as most of the specialist or detailed law-making is undertaken by the Executive, known as “delegated legislation”. Usually, the Legislature makes a law that covers the general principles and policies relating to a problem, and then confers the rule-making power on the Executive or some other Administrative Agency. Delegation of legislative power is done due to the complexities of administrative laws today which make it increasingly difficult for the Legislature to make laws on every particular subject, therefore, it entrusts this authority to the Government.
- The Legislature can delegate authority to subordinate or outside authorities for carrying the laws enacted by it into operation. In view of the long history of legislative practice, the rule-making power

bestowed upon functionaries or agencies subordinate to the legislature has the force of law. The power of delegation is inherent and ancillary to the primary legislation, with prescribes limits given by the Constitution.<sup>64</sup>

- The delegate authorities are entitled to carry out the mandate of the legislature, mostly by framing rules or regulations, which translate and apply to the substantive principles of law set out in the parent legislation.<sup>65</sup>
  - This is also seen under section 10 of the Rural Area Act 1986, under which the Government may name schemes and issue instructions consistent with the Act.<sup>66</sup>
- Delegated legislation i.e. rules etc. have to be in line with the parent statute and the Constitution. The subordinate legislation cannot go beyond the parameters of the parent statute.<sup>67</sup>
- Statutory bodies are authorized under their parent Act to make rules and regulations that are not inconsistent with that Act. The delegated authority to legislate is only with respect to such matters which fall within their lawful domain to carry out the purposes of the primary legislation.<sup>68</sup>
- Where there is inconsistency between the delegated or secondary legislation and the Parent statute, the latter shall prevail. However, this is contingent upon the fact that such conflict is incapable of being resolved.<sup>69</sup>
- Another principle of paramount importance when making a subordinate legislation in exercise of delegated authority is that it cannot run contrary to Constitutional provisions.<sup>70</sup>
  - In regard to considering the power of the Federal Government to amend the Income Tax Ordinance 2002, the Supreme court

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64 2013 SCMR 1337

65 2015 SCMR 630

66 2015 SCMR 630

67 PLD 2008 SC 468; 2016 SCMR 842 & PLD 1995 SC 66

68 2013 SCMR 642

69 2001 PTD 2383

70 PLD 2011 SC 619

has held that just because they have such power does not give them the right to just amend any provisions as section 240 makes it clear that such an amendment must not be “inconsistent” with the Ordinance and held that in passing a conditional legislation, the legislature performs the duty as imposed by the Constitution upon it.<sup>71</sup>

- However, as seen in the case of *Executive District Officer v Ijaz Hussain*, where the Recruitment Policy framed by the Government of Punjab was held to be a part of delegated legislation, the Court held that a subordinate legislation could not be struck down on vague consideration of being “unreasonable” or likely to be misused. The provision does not become unconstitutional, violative of fundamental rights or unreasonable simply because it can be abused.<sup>72</sup>
- In taking into consideration an exercise of delegated legislation the Court has held that the power of subordinate legislation which is exercised by the executive has very limited power and such power does not include power to give retrospective effect.<sup>73</sup> Subordinate legislative provisions cannot be retrospective in operation, unlike primary legislation passed by the Legislature.<sup>74</sup> The Court has upheld this principle as far back as 1983, where in a judgement the Supreme Court stated that subordinate legislations cannot operate retrospectively.<sup>75</sup>
- The legislature must retain in its hands the essential legislative functions and what can be delegated is the rest of subordinate legislation, necessary for implementing the purposes and objectives of the Act.<sup>76</sup>
- Delegated legislation can be struck down where power is entrusted for one purpose and deliberately used for another, leading to misconstruction of the enabling Act.

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71 2006 SCMR 109

72 2011 SCMR 1864

73 PLD 1964 SC 293

74 PLD 2006 SC 472

75 1983 SCMR 785

76 2005 SCMR 186

- However, matters of fundamental nature or of general policy or of great importance, cannot be delegated. Nevertheless, powers can be assigned within reasonable limits and scope in order to allow rules and regulations to be made by anyone empowered to do so, within the frame-work of the main legislation.<sup>77</sup> For delegated legislation to be valid it must be reasonable. Delegated legislation may be held to be bad on grounds of arbitrariness and excessive delegation.

### IMPORTANT CASE EXAMPLE

#### **PLD 2016 SC 808 – Mustafa Impex, Karachi versus Government of Pakistan through Secretary Finance, Islamabad**

#### *Decided by the Supreme Court of Pakistan*

In this case, the appellant were importers of cellular phones and textile goods. They used to enjoy certain exemptions, which vide notifications was either withdrawn or tax rates were modified.

It was noted in the following case that it is mandatory to bring any proposal for the levy, abolition, remission, alteration or regulation of any tax to the Cabinet. It is no doubt true that the Prime Minister has the discretionary power in the matter, but the exercise is circumscribed by the following conditions that call for a conscious application of mind by the Prime Minister to the existing circumstances justifying the need for departure through passing of a reasoned and formal order prior to the action taken; and more critically a determination of whether constitutional provisions justify such a departure.

It was further highlighted that Article 90 describes the Prime Minister as Chief Executive and contemplates the Cabinet acting through him. Clause (2) of Article 90 adds that he may act either directly or through Federal Ministers, however, this is his discretionary choice. Therefore,

the conclusion is drawn that the Chief Executive is to execute and implement policy decisions taken by Cabinet i.e. the Federal Government.

The Court held, inter alia, the following:

- The executive is not to take policy decisions by himself. His function is to execute or implement decisions.
- There has to be an independent conferment of delegated power.
- It needs to be clarified that there is a significant conceptual distinction between the exercise of power through a designate person and the delegation of power to him.
- A mere formal consent of the Cabinet without following the provisions in the Rules may render the decision open to question.
- All legislature is binding and should be followed, whether primary or subordinate. Federal Government does not have the discretion to not follow delegated legislation.
- Delegated Legislations are binding and if someone does argue that they are only directory and not mandatory, then the burden of proof is on that person to establish that there are powerful and sound reasons that they should not be considered mandatory and binding.
- It is settled now that designated functions can only be conferred on officers or authorities subordinate to the federal government.
- However, there is no transfer of legislative power of any nature in delegated legislation, all it permits is the discharge of certain functions by designated officials. The transfer of legislative power would be a clear violation of the law.

### 3. EXERCISE OF DISCRETION

#### Brief overview

Discretionary power to be exercised in interest of public and as per policy.	Discretion to be applied in non-discriminatory and uniform and structured manner.
Should be applied within the lawful contemplation of the statute that grants it.	Exercise of discretion to be rational, in good faith, and in a reasonable manner.
Exercise of discretion must be in a judicious, transparent and impartial manner.	Must keep in view the fundamental principle of non-discrimination qua reasonable classification.
Exercise discretion at their whims, sweet-will or in an arbitrary manner.	Good governance as per Constitution, cannot be achieved by exercising discretionary powers unreasonably or arbitrarily.

#### KEY ISSUES

- Due to the complexity of administrative powers, legislations are designed in such broad terms that allows the executive or administration to use their discretion to act in a way they think fit. If the government is only provided with administrative functions, without any discretionary powers, then their roles would become extremely rigid and unworkable.
- Such power, however, has to be exercised in the interest of the public and in accordance with policy. Many principles of discretion have been identified by law.
- One important principle is that discretion must be exercised in terms of consistent policies for sound reasons. Thus, it must be exercised in accordance with the general principles relating to good governance.<sup>78</sup>
- With regard to allowing exemptions under the Government's discretion, the Court has held that while these exemptions should be

applied in a non-discriminatory manner, they should also be applied on a uniform basis.<sup>79</sup> Thus, allowing the development of a consistent policy with regard to the grant of exemptions.

- As regards appointment, it has been held that where the Government has to appoint persons to regulatory bodies, such as the Lahore Development Authority, they should do so in a fair manner that is in the public interest and even where legislative bodies confer discretion on these regulators such discretion should be structured.<sup>80</sup>
- Where the authorities fail to regulate their discretion by the framing of rules, or policy statements or precedents, the Courts are more likely to intervene to maintain the necessary balance for exercise of statutory power.<sup>81</sup>
- A way of structuring discretionary power is by applying it within the lawful contemplation of the statute that grants it.<sup>82</sup>
  - As seen in regard to the discretion vested in the Chairman NAB under section 25(b) of the NAB Ordinance, it was held that it is structured, as the law states that the Chairman is required to exercise his discretion after taking into account the facts and circumstances of the case.<sup>83</sup>
  - As regards appointment of a person, it has been held that this shall be done by following the requirements of the law, as was seen in regard to the appointment of the SECP chairman, where it was held that exercise of discretion in regard to appointment of the Chairman was to be done in good faith for the furtherance of the objectives of the statute.<sup>84</sup>
- The use of any discretionary power has to be rational and have nexus with the objective of the underlying legislation, which is done by

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79 Ibid 1.

80 2015 SCMR 1739

81 2015 SCMR 630

82 2018 SCMR 1544

83 PLD 2017 SC 194

84 2013 SCMR 1159

exercising such power in good faith, for the advancement of the objects of the legislation and in a reasonable manner.

- In order to draw a balance between discretion and rule-based decision making, fairness and evenhanded treatment is of utmost importance.<sup>85</sup> Fairness in regard to exercise of discretion is also assured if the exercise is done in an impartial and transparent manner, keeping in view the fundamental principles of non-discrimination qua reasonable classification.
- When an authority is conferred with the power of exercise of discretion in any matter, such power is to be exercised in a judicious, transparent and impartial manner, keeping in view the fundamental principle of non-discrimination qua reasonable classification, and not in an arbitrary or capricious manner and without any sound criteria for doing so.<sup>86</sup>
  - For example, in the case of *Muhammad Yasin v Federation of Pakistan through Secretary, Establishment, Division Islamabad* the Court had to look at whether the appointment of Chairman OGRA was illegal. While, looking into the selection it was held that running of important regulatory bodies can only be done if their autonomy is respected, and this is done when appointment of key positions is done in a transparent manner by ensuring the implementation of checks which are laid down in the Ordinance. In this case, the requirements of merit laid down in the legislature were not followed and the process of appointment was held to be done in a non-transparent and partial manner, promoting nepotism. Therefore, it is to be noted that even where appointments are to be made in the exercise of discretionary powers, it has been well settled that such powers are to be employed in a reasonable manner by appointing on merit and in a transparent manner.<sup>87</sup>

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85 PLD 2013 SC 195

86 2010 SCMR 1659

87 PLD 2012 SC 132

- For discretion to be reasonable, it must also be exercised in an independent and impartial manner.
  - This was seen in the case of *Khalid Hussain Hamdani*, where the respondent was charged with giving excess amount to the contractor and so an inquiry was called. However, the Competent Authority, that was to issue the penalty, did not take into account the findings of the inquiry officer but instead choose the penalty suggested by the Chief Engineer. It was, thus, held that authorities under administrative law are conferred with a degree of discretion, and such discretion must be exercised by applying independent mind uninfluenced by irrelevant or extraneous considerations.<sup>88</sup>
  - Another example is that in regard to training for P.I.A.C pilot for Boeing-777, it was held that such choice had been made in an extraneous manner. It was held by Court that even where P.I.A.C has the power to choose the pilot of its choice for the training of Boeing-777, such choice cannot be made in a whimsical and arbitrary manner. In his Treatise 'Discretionary Powers' which is Legal Study of Official Discretion D.J. Galligan has acknowledged that "the general principles that discretionary decisions should be made according to rational reasons means, (a) that there be findings of primary facts based on good evidence and (b) that decisions about the facts be made for reasons which serve the purposes of the statute in an intelligible and reasonable manner". According to the celebrated author, the actions which do not meet these threshold requirements are arbitrary, and may be considered a misuse of powers.<sup>89</sup>
- It can be said that executives are not allowed to exercise discretion at their whims, sweet-will or in an arbitrary manner, but rather they should exercise it by acting in a fair, even and just manner.

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88 2013 SCMR 817

89 2005 SCMR 25

- Justly means conforming to or consonant with, what is legal or lawful. The word refers to righteous, fair and impartial acts in accordance with justice and facts, which are well-grounded.
  - Fairly means reasonably, honestly and impartially with sustainable correctness.
  - Lastly, honestly means full of honour and fair dealing. It is a thing deemed to be done in good faith.
- All public power is held to be a sacred trust that must be exercised justly, fairly and honestly in accordance with law and where discretionary power is vested in a public authority it should be exercised to achieve the goal of fair, just and honest discharge of such trust.<sup>90</sup>
  - The object of good governance required by our Constitution, cannot be achieved by exercising discretionary powers unreasonably or arbitrarily and without application of mind, but should be exercised justly, fairly and reasonably.<sup>91</sup>
  - The authorities should structure and regularise their discretionary powers. The seven instruments that are most useful in the structuring of discretionary power are open plans, open policy statement, open rules, open findings, open reasons, open precedents, and fair informal procedure.<sup>92</sup>
  - Discretion is to be exercised in accordance with policy and expediency.
  - There are three ways in which exercise of discretion can be made objective:
    - Law conferring discretion lays down the standards to be adopted by the authority exercising it;
    - Where Legislature has not laid down such standards, the Administration can itself lay down standards; and
    - On some level, administrative norms and practices can also be used to bring uniformity in exercise of discretionary power.

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90 PLD 2012 SC 681

91 2015 SCMR 1257

92 2005 SCMR 25

### IMPORTANT CASE EXAMPLE

#### **Human Rights Case No.3654/2018 (In the matter regarding appointment of Managing Director, Pakistan Television Corporation)**

*Decided by the Supreme Court of Pakistan*

It came to the notice of the Court that blatant irregularities/illegalities existed involving Mr. Qasmi's appointment as Director and the Chairman of PTV and the fixation of his terms and conditions (including a handsome salary package along with perks/benefits/allowances). It was apparent from the face of the record that there was nepotism and misuse of authority regarding Mr. Qasmi's appointment as Director/MD PTV. There, it was well within the power of the Court to determine the validity of such an appointment and fixation of salary etc.

The question which arose was whether PTV, a public sector company, is a person performing functions in connection with the affairs of the Federation. The test laid down in *Salahuddin versus Froniter Sugar Mills & Distillery (PLD 1975 SC 244)* was considered.

The Court held, inter alia, the following:

- PTV, being the national broadcaster, fulfilled the conditions laid down in the case of Salahuddin as it was substantially under the control of the Federal Government, and hence a public functionary.
- As PTV, was performing the State functions, thus validity of Mr. Qasmi's appointment could be examined.
- While the federal Government was empowered under Section 183(b) of the Ordinance read with Article 83 of AOA to appoint a Director to the Board of PTV, it had to do so by following the procedure prescribed in Clause(iii) of SI. No. 141 of the Esta Code, keeping in mind the criteria laid down in Rule 3(1) and (7) as such process ensured transparency, merit and fairness.
- Rules of 2013 provide that a person, amongst other things, should be

a reputed businessman or a recognized professional with relevant sectorial experience, have financial integrity, no convictions or civil liabilities, be known to have competence, have good reputation and character, have traits of efficiency and honesty, and does not suffer from any disqualification to act as a director. These criteria ensure that highly competent and capable people are appointed to the Boards of Public Sector companies.

- The discretionary power of appointing a Director under section 183(b) of the Ordinance was used in a simple “cherry picking” way to appoint Mr. Qasmi.

- There was a need for a transparent procedure of appointment, which entails publishing an advertisement to scan the talent pool, filtering and then assessing the best candidates for the post in accordance with the criteria laid down in Rules of 2013.

- Failure of the Federal Government to exercise its discretionary powers in a reasonable manner meant that it had exercised its power arbitrarily and at its own whims and caprice.

- The remuneration of Directors, Chief Executives and a full-time working Director is to be determined by the Company in its General Meeting, whereas the remuneration of the Directors who are deputed to work on a whole time basis is determined by the Board.

## 4. INTERDEPARTMENTAL COORDINATION

### Brief overview

Increased level of complexity has enhanced need for interdepartmental coordination.	Coordination present when awareness of each other's activities and efforts not to duplicate or interfere.
One department's actions must not cancel the others.	Requires a mixture of coordination strategies, mutual adjustment, standardization of work processes.
Key principle of interdepartmental coordination is decentralization.	Decentralization also ensures that there are no spillovers.

### KEY ISSUES

- The increased level of complexity in the Government has enhanced the call for interdepartmental coordination, requiring the government programs to work together. In order to do so, there is a need for cross policy fields to collaborate more closely.
- Coordination is present when organisations are aware of each other's activities and make efforts not to duplicate or interfere. The Court have established certain principles that may be followed to achieve this.
- The first principle in regard to achieving interdepartmental coordination is that one department's actions must not cancel the others. They have to work in harmony and complement one another. This requires a mixture of coordination strategies, mutual adjustment, standardization of work processes to be implemented.
  - As seen in reference to coordination between the Provincial and the Local Government, where it is made clear that if the Provincial Legislature confers full panoply of political, administrative and financial responsibility on Local Government, its own constitutional, legislative and executive

authority would be taken over by that of the Local Government, leading to impractical results. Therefore, both Governments are to function in harmony.

- This approach was also seen in regard to discussion of Lahore Development Authority (LDA) and the Local Government, as it was held that the LDA is to always act in support of and complement the Local Government. Thus, where the Local Government is unable to act due to lack of resources, the LDA can step in and work with the Government. Similarly, Provincial Governments in exercise of its legislative and executive authority can aid and support the Local Government.<sup>93</sup>
- Harmony can also be established between departments by hiring experts in their respective fields.<sup>94</sup>
  - This was also seen in regard to setting up of a cement industry called the West Pakistan Industrial Development Corporation, which required an Environmental Impact Assessment (EIA) to be filed with the Punjab Environmental Protection Agency. However, when the recommendations were sent to the Director General, Environmental Protection Agency for approval the said recommendations were kept pending and no order was passed within the statutory period that was provided. In regard to discussing the interdepartmental coordination between the two agencies, the Court held that the statutory timeline plays a balancing act between the interest of the proponent, who is in the process of setting up the project and has undertaken financial and other business obligations, and that of the agency, which under law is designed to safeguard the public interest by protecting the environment. Thus, the two are to work in harmony to provide efficient running of the business.<sup>95</sup>

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93 2015 SCMR 1739

94 2018 SCMR 211

95 2018 CLD Lahore 153

- Another principle of interdepartmental coordination is decentralization, that allows there to be better delegation of power. Decentralization is a process of transferring responsibility, authority and accountability for specific management functions to lower levels of the organization. Modes of decentralization include de-concentration, delegation and devolution.
- For heads of public departments decentralization relates to management and coherence between department units and executive agencies. It also includes better relations between different policy fields. This leads to working from a perspective of the government, rather than just for interest of the said department.
- Decentralization allows interdepartmental coordination by encouraging local governments to handle their own affairs, and where they are unable to do so provincial government can intervene.
- Decentralization also ensures that there are no spillovers as economies of scale functions is assigned to higher tiers of government.<sup>96</sup>
- Decentralization was also seen in the case of *Afghan Leghari* where the Climate Change Commission was constituted to ensure that the concerned Ministries, as well as, concerned Departments take charge of the matter so that the Province, as well as the Country moves towards climate resilient development. According to the report submitted by the Commission almost 66.11% of the priority items of the Framework have been completed due to effort made by the Commission. The Chairman submitted that the Commission has achieved its goals and now the matters should be left to the respective Governments to take forward.<sup>97</sup>

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96 PLD 2015 Lahore 522

97 2018 CLD Lahore 424

*IMPORTANT CASE EXAMPLE*

2018 SCMR 211 – NASPAK (Pvt.) Limited & Others versus Kamil Mumtaz & Others (the Lahore Orange Line Case)

*Decided by the Supreme Court of Pakistan*

The Government of Punjab wished to reduce the cost of OLMT Project. It commissioned NESPAK, one of the best companies in the country in the area of infrastructure development, having vast local as well as international experience, to re-examine the feasibility study prepared by MVA Asia.

The main dispute raised before the Lahore High Court related to the impact of the proposed Project on various heritage sites and special premises, and the NOCs/permission letters granted by the concerned departments to undertake the Project. It was noted that any development scheme within a distance of 200 feet of an immovable antiquity, a protected site or special premises (under the applicable law) requires sanction by the competent authority.

The Court held, inter alia, the following:

- In order to convert the statutory “No” as contained in section 22 of the 1975 Act and section 11 of the 1985 Ordinance into a “Yes”, the authorities concerned ought to have undertaken a scrutiny of the highest order, and the proposal ought to have undergone minute and thorough screening and due diligence, after collecting accurate relevant scientific data.
- The statutory intent of protecting and preserving heritage and avoiding any harm thereto is strong and overwhelming, thus potential harm to the heritage cannot be taken lightly even where such harm is outweighed by the advantages of the proposed development.
- Serious efforts need to be made by concerned authorities and departments to protect the heritage sites and where necessary experts in the field should be appointed.
- All requisite permissions/ approvals, licenses and NOCs must be

obtained from the concerned departments/agencies before actual work on the Project has commenced so that all those who are to raise objections have adequate time and sufficient information to approach the competent authority.

- Pakistan is a signatory to “the Convention for protection, conservation, presentation and transmission to the future generations of the cultural and natural heritage” adopted by General Conference of United Nations Educational, Scientific and Cultural Organization (UNESCO), thus it has to comply with international standards in regard to “identification, protection, conservation, presentation and transmission to future generations of cultural and natural heritage.”

## 5. DIRECT AND INDIRECT USE OF LEGISLATION

### Brief overview

When law requires thing be done in a particular manner then, it must be done in that manner.	Must be done in that manner as prescribed by law or not at all.
Law does not allow for something to be done indirectly, if it is not allowed to be done directly.	Where the law expressly mentions one thing, others are impliedly excluded.

### KEY ISSUES

- One of the rules of administrative law is 'when law requires a thing be done in a particular manner then, it must be done in that manner.' This derives from the Latin maxim 'expressio unis est exclusio alterius,' which is used as a tool of statutory interpretation.
  - The principle was seen in application in the case of *Muhammad Hanif Abbasi v Imran Khan Niazi* [PLD 2018 Supreme Court 189]. In this case the petition was filed under Article 184(3) of the Constitution of Islamic Republic of Pakistan 1973, to disqualify Respondent No.1, Mr. Imran Khan Niazi, from the National

Assembly and direct Respondent No.4, the Election Commission of Pakistan, to hold a fresh election on his seat NA-56 when it became vacant. The petition also requested an inquiry into the donations and funds acquired by Respondent No.1 and Respondent No. 2, his party Pakistan Tehreek-e-Insaf, through illegitimate sources. The Court referred to the principle where law requires something to be done in a particular manner, it must be done in that manner to hold that before a Court of law can determine whether a certificate issued by the head of a party under Article 13(3) of PPO is false or not, the question as to party receiving foreign contributions under Article 6(3) has to be decided by the competent forum. Once the competent forum, in this case the Election Commission of Pakistan, has found against the party only then could the Court consider an action under Article 13(3).

- It has also been held that where the law requires something to be done in a particular manner it should be done in that manner alone and such dictate of law cannot be termed a mere technicality.<sup>98</sup>
  - Thus, where the law under the 1997 Ordinance required a banking company to give a judgment debtor an option by writing to redeem his property before its sale or auction, then sale made without such notice was to be invalid.<sup>99</sup>
- A thing required to be done by law has to be done in a certain manner must be done in that manner as prescribed by law or not at all.<sup>100</sup> It has been held that where an Act clearly states and requires notification of an order, the notification has to be done in the official Gazette and non-issuance/non-publication will deem the notification ineffective.<sup>101</sup>
- Another important principle is that the law does not allow for

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98 PLD 2016 SC 995

99 Ibid

100 1992 SCMR 46

101 2008 SCMR 1148

something to be done indirectly, if it is not allowed to be done directly.<sup>102</sup>

- This was recently seen in the case of *Zulfiqar Ahmed Bhutta v Federation of Pakistan*, where the Supreme Court held a person who is disqualified to be the king cannot operate a freehand as being the kingmaker, as that would give him the power of being a puppet master and pulling all the strings in the exercise of political power because it is a cardinal principle of law and justice that what cannot be done directly cannot be done indirectly.<sup>103</sup>
- The principle is also used in regard to bringing a case, such as where a petitioner is debarred from filing a claim under a particular section or act, he cannot re-agitate the issue in order to move the claim under another section or Act.<sup>104</sup>
- An important principle is that where the law expressly mentions one thing, others are impliedly excluded. Thus, *expressio unis est exclusio alterius* is the maxim used for the interpretation of such a statute.
  - This was seen to be applied by the Supreme Court in regard to interpreting section 65 of the Ordinance that laid down some powers of the Social Security Court, and the Supreme Court held that when a statute mentions one or more things of a particular class and is silent as to others, it is taken to be excluding the rest classes that are similar to those expressly mentioned.<sup>105</sup>
- In other words, where a legislature or piece of law specifies or states some things or category of people, things not mentioned or people who do not fit in that category are impliedly excluded. Although, it is accepted that this principle can have a dangerous effect and thus should be used with extra care and caution.<sup>106</sup> It is also used in regard

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102 PLD2018 SC 189

103 PLD2018 370.

104 PLD2011 SCMR 551

105 PLD 1975 SC 32

106 PLD2013 SC 829.

to exemptions, thus where a statute states only one particular exemption then it is a good ground to hold that it is excluding all others.<sup>107</sup>

- It has, however, also been held that the rule is not absolute in its application, as during interpretation the structure that is closest to justice and reason should be taken.<sup>108</sup>
- However, it must be borne in mind that where in a statute there is clear mention of several things is not due to excess caution but legitimate to the provisions of the statute, the list may be held to be exhaustive and exclusive of what is not mentioned in it.<sup>109</sup>

### *IMPORTANT CASE EXAMPLE*

#### **PLD 2018 SC 189 – Muhammad Hanif Abbasi versus Imran Khan Niazi**

#### *Decided by the Supreme Court of Pakistan*

A petition was filed under Article 184(3) of the Constitution, whereby it was contended to disqualify Imran Khan from National Assembly for non-disclosure of property in nomination papers and direct the Election Commission to hold fresh elections on his seat NA-56. An inquiry was also to be brought against the donations and funds of Imran Khan's party Pakistan Tehreek-e-Insaf.

If the Federal Government is satisfied that a political party is a foreign-aided part or has been formed or is operating in a manner prejudicial to the sovereignty or integrity of Pakistan it shall make such declaration by notification in the official Gazette. If the Supreme Court upheld this declaration, then the party is dissolved.

The Court held, inter alia, the following:

- Before a court of law can determine whether a certificate

107 1973 SCMR 525

108 PLD 1975 SC 32

109 PLD 1965 SC 453

issued by head of a party under article 13(3) of PPO is false or not, it must be decided under article 6(3) of PPO whether the party is receiving foreign contributions by a competent forum.

- Where law requires something to be done in a particular manner it must be done in that manner.
- Another important canon of law is that what cannot be done directly, can also not be done indirectly.
- It is the Election Commission of Pakistan that has jurisdiction to determine whether a political party has received contributions or donations from prohibited sources under Article 6(3) of PPO read with Rule 6.
- Federal Government is the competent forum to determine whether a political party is a foreign-aided political party in terms of Article 2(c) of PPO.
- Election Commission Pakistan has the power to collect facts, information and data that enables it to properly and effectively perform such duty to oversee accounts and sources of funds of different political parties.
- The principle of past and closed transactions is not attracted to audited statements of accounts because neither the PPO nor the Rules contain provisions imposing a time bar on action being taken by ECP under Article 6(3) or Rule 6.

### *IMPORTANT CASE EXAMPLE*

#### **PLD 2013 SC 195 – Syed Mahmood Akhtar Naqvi & Others versus Federation of Pakistan & Others.**

*Decided by the Supreme Court of Pakistan*

The grievances of Ms. Anita Turab were that firstly, she sought that the standing of the civil service be restored as service of the State and not the service of any transient government. To achieve this her submission was that unlawful political interference in the independent and legitimate functioning of civil servants be stopped.

Secondly, she prayed for corrective institutional measures to revert the civil service to rule-based management practices in accordance with the letter and spirit of applicable laws, rules and precedents of the Supreme Court.

The Court held, *inter alia*, the following:

- Appointments, removals and promotions must be made in accordance with the law and the rules made thereunder, where no such law or rule exists and the matter has been left to discretion, such discretion must be exercised in a structured, transparent and reasonable manner and in the public interest.
- When the ordinary tenure for a posting has been specified in the law or rules made thereunder, such tenure must be respected and cannot be varied, except for compelling reasons, which should be recorded in writing and are judicially reviewable.
- Civil servants owe their first and foremost allegiance to the law and the Constitution. They are not bound to obey orders from superiors which are illegal or are not in accordance with accepted practices and rule-based norms; instead, in such situations, they must record their opinion and, if necessary, dissent.
- Officers should not be posted as OSD except for compelling reasons, which must be recorded in writing and are judicially reviewable. If at all an officer is to be posted as OSD, such posting should be for minimum period possible and if there is a disciplinary inquiry going on against him, such inquiry must be completed at the earliest.



# **SECTION IV**

COURT PROCEDURE FOR JUDICIAL REVIEW



## COURT PROCEDURE FOR JUDICIAL REVIEW

Judicial review proceedings can be a daunting experience for public functionaries, especially those without a legal background or experience with legal proceedings in Pakistan.

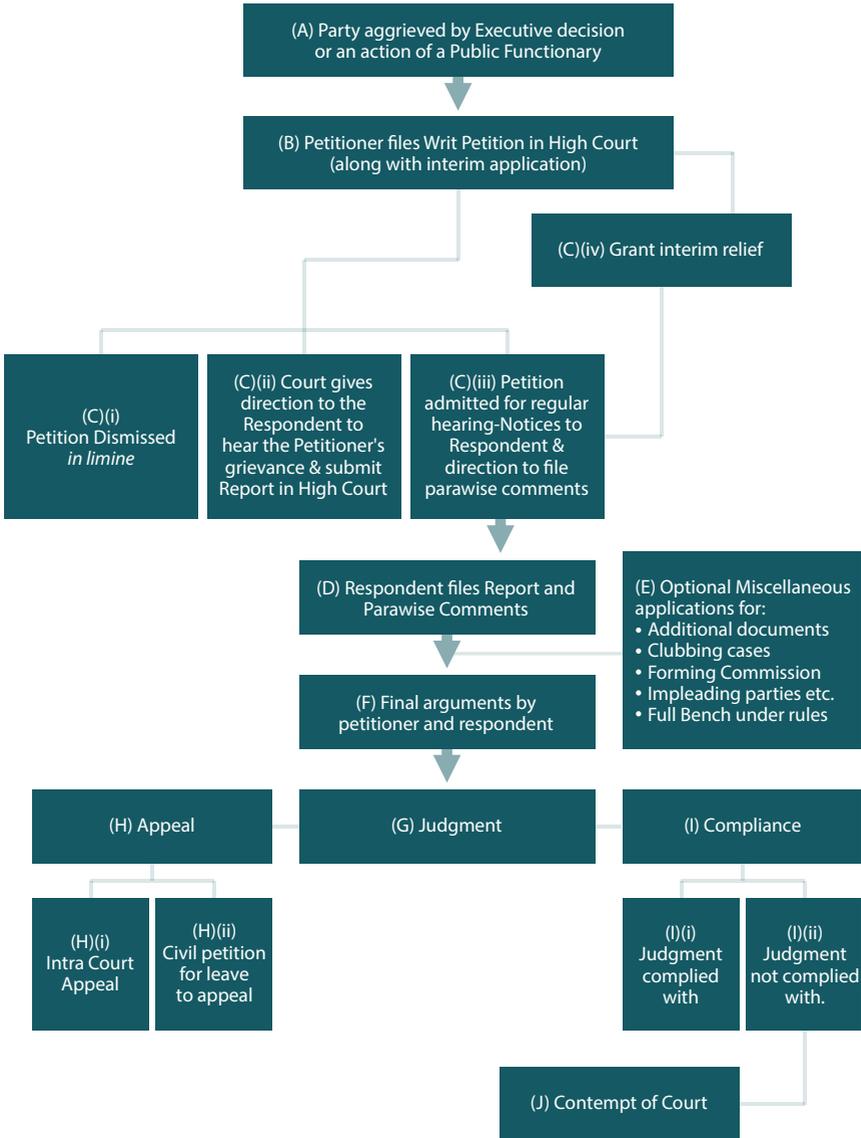
This section sets what happens in a typical judicial review case in Pakistan and what you might expect as a civil servant or public functionary involved in a ministerial or departmental decision under challenge. However, it is not exhaustive and does not cover every possible development. The objective is to help you understand the key litigation procedure, offer practical advice and help you to be better placed in answering the questions that will require a response by your department.

This section begins with an illustration of the step-by-step procedure for judicial review in Pakistan. Each stage of judicial review contains an alphabetical reference which corresponds to a tabular explanation in the following sub-section.

This section also explains the structure and key components of the two main documents at the heart of the Court proceedings i.e. the Writ Petition and the Para-wise Comments/Reply. Familiarization with the structure and key components of these documents will help you to better understand the nature and scope of the challenge in each case and improve your ability to draft replies, increasing the chances of a favourable outcome for your department.

1. Illustration of Judicial Review Procedure in Pakistan
2. Step-by-Step Court Proceedings in Judicial Review
3. Components of Pleadings: Structure of Writ Petitions and Para-Wise Comments/Reply

## ILLUSTRATION OF THE JUDICIAL REVIEW PROCEDURE IN PAKISTAN



## STEP-BY-STEP COURT PROCEEDINGS IN JUDICIAL REVIEW

(Corresponding explanation of the flowchart/illustration)

This section contains the description of each step that may arise during Judicial Review proceeding initiated by any person pursuant to Article 199 of the Constitution of Pakistan, 1973. This is the most common form of judicial review proceedings faced by public functionaries and public bodies during the course of their duty.

The table below contains a description of each stage as referenced in the illustration/flowchart above. This table is organized in the following manner:

- Column (1) provides the reference alphabet/no. as stated in each section of the illustration/flowchart above.
- Column (2) provides a concise description/explanation of each step during the proceedings.
- Column (3) provides the applicable legal provision or case law reference for the steps, where appropriate.

Stage No. (1)	Description/Explanation (2)	Legal Provision (3)
(A)	<p>An act or omission by a public functionary may give rise to a potential claim by an 'aggrieved party' whose interests or rights have been infringed or affected.</p> <p>Cases of Quo Warranto or Habeas Corpus entitle 'any person' to initiate proceedings.</p>	
(B)	<p>The aggrieved party, acting as the Petitioner, approaches the High Court to redress its grievance. However, in cases of public interest litigation, the requirement of "aggrieved person" is dispensed with.</p>	<p>Article 199 of the Constitution</p>

	<p>Any person can approach the High Court for issuance of writ of Habeas Corpus or Quo-Warranto</p> <p>In certain circumstances the Petitioner may also file an application for interim relief along with the Writ Petition.</p>	<p>Section 151 read with Order XXXIX Rule 1 &amp; 2 CPC</p>
(C)(i)	<p>The Court may dismiss the Petition at the very outset i.e. in limine for a number of reasons. Grounds for dismissal in limine include: the matter being outside the subject matter and territorial jurisdiction of the High Court; the claim of the Petitioner being without merit; the Petition having been filed after an undue delay (hit by laches); the Petition giving rise to factual controversies/disputed questions of fact; adequate alternate remedy may be available, etc.</p>	<p>Article 212 of the Constitution</p> <p>Section 120 of CPC</p>
(C)(ii)	<p>After hearing the Petitioner's claim, the Court may dispose of the matter by directing the Respondent to grant the Petitioner an opportunity of hearing and decide the Petitioner's grievance within a stipulated period of time. The Court may further direct the Respondent to submit a compliance report of such Order before the Deputy Registrar (Judicial) of Court.</p>	<p>Article 10 A of the Constitution</p>
(C)(iii)	<p>If the Court considers that the Petitioner has a legitimate claim, it shall admit the Writ Petition for regular hearing and issue notice to the Respondent(s) to appear before the Court and file Para-wise Comments.</p> <p>If the Respondent in the Petition is a Federal body, where appropriate, the Court may issue</p>	<p>Order V of the CPC</p>

	<p>notice through a representative of the Attorney General's office i.e. Deputy Attorney General, Additional Attorney General or Assistant Attorney General or Standing Counsel etc.</p> <p>If the Respondent in the Petition is a Provincial body, where appropriate, the Court may issue notice through a representative of the Advocate General's office i.e. Assistant Advocate General or Additional Advocate General.</p> <p>In case the Petition involves any substantial question as to the interpretation of the Constitution and challenge to the vires of provisions of law, the Court may, if it deems applicable, issue notice to the Attorney General of Pakistan and Advocate General in case of Federal legislation and Provincial legislation respectively.</p>	<p>Oder XXVII-A CPC</p>
<p>(C)(iv)</p>	<p>If an application for interim relief has been filed along with the Petition, the Court may allow such application on the first date of hearing or at any time thereafter. The following interim relief may be granted: pass an order directing the Respondent to maintain status quo; or prohibit the Respondent from acting in a certain manner or in furtherance of the executive decision/act complained of. Such interim relief may be granted till the pendency of the Petition, or till the next date of hearing. The Court will issue notice of the application for interim relief to the Respondent if the application is allowed.</p>	<p>Order XXXIX Rule 1 &amp; 2 CPC</p>

	<p>In granting the interim relief the Court will consider:</p> <ul style="list-style-type: none"> <li>a) whether the Applicant's claim has prima facie merit;</li> <li>b) whether the balance of inconvenience tilts towards the Applicant if the interim relief is not granted; and</li> <li>c) whether the Applicant/Petitioner will suffer irreparable loss if the interim relief is not granted (monetary loss is not deemed irreparable loss).</li> </ul>	
(D)	<p>After receiving notice from the Court, the Respondent must appear in Court and file a Report/Para-wise comments i.e. its written reply to the Petition, usually through the Counsel.</p> <p>Supreme Court has held that Federal Ministries and Departments shall be represented in Court only through the Attorney General's Office and its officers. Private Counsels shall not be engaged except with prior permission.</p> <p>Supreme Court has held that Provincial Ministries and Departments shall be represented in Court through the Advocate General's Office and its officers. Private Counsels shall not be engaged except with prior permission.</p> <p>However, Independent and Statutory Bodies, Corporations and Authorities shall engage private Counsel in terms of applicable rules.</p>	PLD 2017 SC 121
(E)	<p>At this stage either party may file additional applications in the interest of justice and fairness and in order to facilitate the</p>	S. 151 CPC

	<p>adjudication of the Petition.</p> <p>These applications can include:</p> <ul style="list-style-type: none"> <li>• Application to file additional documents</li> <li>• Application to club similar cases</li> <li>• Application to form an independent commission</li> <li>• Application to implead parties to the Petition</li> <li>• Application for constituting Full Bench under Rules and Procedure of the concerned High Court</li> </ul>	<p>Order 1 Rule 10 CPC</p> <p>Rule 4 – 7 of Chapter 3, Volume V, LHC Rules &amp; Orders</p>
(F)	<p>The Court will hear oral arguments from all parties. First the Petitioner's Counsel or Petitioner-in-person shall present its case followed by the Respondent(s) or their Counsels.</p> <p>After the final arguments have been made, the Court may announce its decision in open court and subsequently issue a written judgment. Alternatively, the Court may reserve the judgment in order to reach a decision after further deliberation, where after the case may be fixed once more for announcement of judgment/order.</p> <p>The High Court must strive to pass the final judgment within six months of the final arguments, or else the Petition shall have to be fixed for a re-hearing.</p>	<p>2015 SCMR 1550</p>
(G)	<p>The Court will announce its decision and issue a written judgment. The Court may dismiss the Petition or allow it and grant the relief prayed for. As discussed above, the decision shall be announced (in brief) in open Court.</p>	

	The Parties may obtain a certified copy of the judgment from the Copy Branch of the respective High Court.	
(H)	Any dissatisfied party affected by the Judgment may challenge it before the appropriate higher forum.	
(H)(i)	<p>In appropriate circumstances, a party dissatisfied by the judgment of the Court may file an Intra Court Appeal (ICA). An ICA against the impugned judgment shall be filed before a bench of two or more judges of the High Court.</p> <p>The party seeking to file an ICA must do so within 20 days from the passing of the impugned judgment. It can even be filed without obtaining or appending a certified copy of the impugned judgment.</p> <p>Note: An ICA can only be filed against a decree or a final order of a single judge of the High Court and that too if it was passed in the exercise of the High Court's 'original civil jurisdiction'.</p> <p>An ICA will not be available or competent if the aggrieved party had available to it a remedy of either review, appeal or revision in the said matter before approaching the High Court. It does not matter whether said remedy was availed by the Petitioner or not.</p>	<p>S.3 Law Reforms Ordinance, 1972.</p> <p>Article 151 Limitation Act, 1980.</p> <p>S.3(2) Law Reforms Ordinance, 1972.</p>
(H)(ii)	In cases where an ICA is not available or competent, the Party seeking to challenge the judgment of the High Court may file a Civil Petition for Leave to Appeal (CPLA) in the Supreme Court. Once cleared by the office, a	Article 185 of the Constitution

	<p>CPLA is fixed before a Bench of the Supreme Court, and the Court decides whether or not to grant leave/permission to file an appeal.</p> <p>The party filing the CPLA must do so within sixty days from the date of impugned judgment, or final order of the High Court.</p> <p>The CPLA shall contain all the grounds of appeal as well.</p>	Part II Order XII Supreme Court Rules, 1980
(I)	If neither Party challenges the Judgment then the same shall attain finality and must be enforced/complied with.	
(I)(i)	<p>If the Judgment imposes an obligation upon or is against the Respondent (public body/functionary), then the same must be complied with and the verdict must be implemented.</p> <p>In case of compliance, the court proceedings shall conclude.</p>	
(I)(ii)	If the Respondent does not comply with the judgment of the High Court and continues to act in a manner whereby the decision of the Court is disregarded or flouted, a claim for contempt of Court shall arise.	
(J)	Proceedings for contempt of Court may be initiated by the Judgment-debtor, i.e. the Petitioner in most instances where the decision of the Court is disregarded or flouted.	S.3 Contempt of Court Ordinance, 2003.

## COMPONENTS OF PLEADINGS

Judicial review proceedings can contain a plethora of documents which can be challenging to understand and sort through for someone without a legal background. In order to understand the nature, scope and content of judicial review challenge, it is important to familiarize yourself with the structure of a Writ Petition and the Reply sought by the Court. A sound understanding of the format and content of these important documents will help you make better decisions when dealing with a judicial review challenge and draft improved responses, thereby increasing the chances of a favourable outcome for your department.

### Structure of a Writ Petition

A Writ Petition contains a title and a body, each of which disclose different types of information. The title section of a Writ Petition provides the following information:

- i. The Name of the High Court in which the Petition is filed is stated at the very top of the first page. [e.g. In The Hon'ble Lahore High Court, Lahore]
- ii. Serial number of the Writ Petition which also includes the year in which it was instituted [e.g W.P. 123 of 2018].
- iii. The Petitioner's name and address.
- iv. The Respondents' names and addresses in sequence. At least one of the respondents must be a public body/functionary, usually a Government ministry or department.
- v. Title of the Petition which states the law under which the Petition is filed.

The main body of the Petition usually provides the following:

- vi. Preliminary submissions containing a brief overview of the claim. (optional)
- vii. Briefly sets out the relevant facts leading up to the grievance or the offending act/decision/omission.
- viii. The legal grounds based on which the aggrieving act/decision/omission has been challenged.
- ix. A prayer i.e. the actual relief which has been sought by the Petitioner from the Court.

### **Structure of the Reply – Report/Para-wise Comments**

By way of response and in order to get both versions on the record, the Court may seek either a report or Para-wise comments from the Respondent. In certain circumstances, the Court may even seek both.

A reply, in any form, would contain the following information:

- i. The name of the High Court before which the case is pending.
- ii. The case number assigned to the Petition.
- iii. The names of the parties without the addresses. Where there are multiple parties on each side, then only the name of the first party may be provided followed by “& others” or “etc.”.
- iv. Reproduction of the title of the Petition.
- v. Title of the reply i.e. whether it is a Report or Para-wise comments.

A **Report** would simply contain the Respondent's update and/or stance of the events pertaining to the case.

Para-wise Comments would provide the following:

- i. Preliminary objections i.e. overall legal objections as to why the Writ Petition should be dismissed by the Court, for example the High Court does not have jurisdiction over the matter, or the Petitioner failed to exhaust all other forums for relief against the impugned order.
- ii. Para-wise reply to the facts: A comprehensive response to every individual fact asserted in the Petition.
- iii. Para-wise response to the grounds: A comprehensive legal and factual response to rebut every legal ground raised by the Petitioner.
- iv. A prayer that the relief sought by the Petitioner should not be granted and the Petition may be dismissed.

# SAMPLE STRUCTURE OF WRIT PETITION

**IN THE HONOURABLE ISLAMABAD HIGH COURT**

(Constitutional Jurisdiction)

Writ Petition No.\_\_\_\_\_ of 2018

*[Petitioner's name & address]*

**...Petitioner**

**Versus**

*[Respondent's name & address]*

**...Respondent**

**WRIT PETITION UNDER ARTICLE 199 OF THE  
CONSTITUTION OF PAKISTAN, 1973**

**FACTS**

*[This section will briefly set out the relevant facts leading up to the grievance or the offending act/decision/omission]*

**GROUND**

*[The legal grounds based on which the aggrieving act/decision/omission has been challenged will be contained here]*

**PRAYER**

*[The actual relief which has been sought by the Petitioner from the Court will be found here]*

## SAMPLE STRUCTURE OF PARA-WISE REPLY

### **IN THE HONOURABLE ISLAMABAD HIGH COURT**

(Constitutional Jurisdiction)

Writ Petition No.\_\_\_\_ of 2018

*[Petitioner's name & address]*

**...Petitioner**

**Versus**

*[Respondent's name & address]*

**...Respondent**

### **PARAWISE COMMENTS ON BEHALF OF THE RESPONDENT**

#### **PRELIMINARY OBJECTIONS**

*[Insert overall legal objections as to why the Writ Petition should be dismissed by the Court, for example the High Court does not have jurisdiction over the matter, or the Petitioner failed to exhaust all other forums for relief against the impugned order].*

#### **PARAWISE REPLY TO THE FACTS**

*[Insert Para-wise Reply to the Facts which should be a comprehensive response to every individual fact asserted in the Petition].*

#### **PARA-WISE REPLY TO THE GROUNDS**

*[Insert Para-wise Reply to the Grounds which should be a comprehensive legal and factual response to rebut every legal ground raised by the Petitioner]*

#### **PRAYER**

*[Insert Prayer that the relief sought by the Petitioner should not be granted and the Petition may be dismissed]*

# **SECTION V**

CHECKLIST FOR RESPONDING TO JUDICIAL  
REVIEW PROCEEDINGS



## CHECKLIST FOR RESPONDING TO JUDICIAL REVIEW

### PROCEEDINGS

This section provides a guide or checklist for any public functionary faced with judicial review proceedings, especially those pursuant to Article 199 of the Constitution. It contains an outline of the practical steps a public functionary should take when a notice is received from the Court in a particular case.

This checklist is only indicative guide and is not meant to be exhaustive. The objective is to provide a public functionary with a starting point in responding to a judicial review claim and is not intended to replace legal advice rendered by a Counsel based on the peculiar facts of the case.

## CHECKLIST FOR RESPONDING TO JUDICIAL REVIEW PROCEEDINGS:

Once a Petition has been filed and fixed for the first hearing, the Court may issue notices to the Respondent Governmental Department or public body. Any action including those indicated in this checklist need only be pursued once such notice is received from the High Court. In certain instances, representatives of public bodies may discover that a petition has been filed or is about to be filed, however, the same may get withdrawn prior to fixation or may get dismissed in *limine* and the Respondent may never even get notified. In such cases no action whatsoever is required.

The following steps may be useful once a Court issued notice is received:

### Step 1 | Preparation: Getting ready for litigation.

1. Obtain a copy of the writ petition along with annexures.

2. Identify which action/decision/omission the Petitioner claims to be aggrieved of.
3. Identify the authority/legal basis for the said act/decision/omission.
4. Gather all relevant facts and documents leading up to the act/decision or relevant to the omission.
5. Check whether the Petitioner had filed a representation before approaching the High Court. If yes, was the Petitioner given an opportunity of hearing?
6. Assess whether the Petitioner's claim has merit. If yes, consider what corrective measures could be taken instead of contesting the matter before the Court.
7. If you consider the act/decision/omission to be lawful and not infringing upon the Petitioner's legal rights, prepare an exhaustive account of the facts and circumstances that are relevant to it, identify the relevant laws/legal provisions and authorities, note the legal basis for the act/decision and the reason(s) for which said act/decision was taken.
8. Approach the concerned officer from the Attorney General's Office or Advocate General's Office, as the case may be, with a copy of the Court's Notice, the Writ Petition and all the aforesaid information/brief/relevant documents etc.
9. In cases involving Statutory/Autonomous body or Authority, engage appropriate Counsel to represent in Court.
10. Provide draft para-wise comments, especially answering to the facts narrated by the Petitioner, well before the date of hearing along with copies of legible record.
11. Conduct a meeting with the Counsel before the date of hearing for deliberation(s) on the preparation of the reply and case in general.
12. Ensure that the para-wise comments i.e. the departments reply to the Petition, are based on true facts and cogent legal grounds.
13. Provide documentary evidence for every fact asserted or claim made in the para-wise comments.
14. Do not conceal or distort facts before the Court.

15. Finalize the reply and get it signed by the Competent Authority or authorized representative of the Respondent.
16. Ensure that reply be filed in the Office of the High Court, along with required copies, before the date of hearing.
17. Take receiving from Office and retain a copy of the same, also provide a copy to the relevant Counsel.

### **Step 2 | Day in Court: Appearing in the High Court**

18. Ensure that the Counsel is prepared and present in Court on the date of hearing and a copy of the para-wise comments is available for contesting the Petition.
19. Be ready and willing to provide any additional information required by the Court.
20. Ensure all steps required by you during the proceedings are taken promptly without wasting the Court's time.
21. Allow your Counsel to present/argue the case, do not address the Judge or interrupt the Court unless specifically asked to speak.
22. Avoid going beyond the scope of the written reply when making any verbal statements in Court, do not give any acceptance of a Court's verbally suggested resolution nor a conceding statement unless specific permission has been obtained from the parent department/competent authority.
23. Ensure that a department representative attends the Court hearing along with any Legal Counsel engaged.
24. Departmental representative attending each date of hearing must provide written updates of the proceedings to the concerned department after each date.

### **Step 3 | Next steps: Accepting the Court's judgment or filing an Appeal**

25. If the Court accepts the Petition, consider whether it will be in the department's best interest to adhere to the judgment or challenge it in appeal. Also consider the likelihood of success in

appellate proceedings

26. If you choose to appeal the judgment, do not take any steps/decisions which may go against or appear to go against the Courts judgment, during the pendency of the appeal. Doing so will make you liable to criminal charges under the Contempt of Court Ordinance 2003.
27. If no appellate proceedings are initiated, then ensure compliance with the judgment otherwise there is a risk that the criminal proceedings under Contempt of Court Ordinance, 2003 may be initiated.



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