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EXAMINATION: LACUNAS IN LABOUR LAWS OF PAKISTAN IN LIGHT OF FOREIGN JURISPRUDENCE

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EXECUTIVE SUMMARY

This brief attempts to lay down a global perspective of some of the important principles of jurisdiction of labour courts and tribunals. Being the beneficial legislations in favour of the working class, the labour laws of most countries seem to set the jurisdiction of labour courts and tribunals in a manner which makes the delivery of justice to the weaker party i.e., workman to be easier. For example, in Canada, the decisions of tribunals, even when they exercise correct jurisdiction, can be overruled in case it decides a legal question incorrectly or unreasonably.[1] The principles of jurisdiction enumerated in this article illustrate that, although, the labour courts in different countries function under specific labour legislations providing them with different jurisdictional powers, some beneficial recommendations can be still be provided for the jurisdictional issues in Pakistan some of which are following:

- Clarity in the choice of legislation applicable if the legislations are *pari materia*
- Consolidation of all matters related to labour legislations under unified labour court
- Clear demarcation of jurisdictions of NIRC and Labour Courts
- Clear mention within IRA 2012 that NIRC and Labour Courts possess all ancillary powers for execution

[1] Public Service Alliance of Canada v Canadian Federal Pilots Assn. (F.C.A.) 2010, 3 F.C.R. 219.

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Introduction

The constitution of a country and various other legislative instruments enacted by its legislative bodies formulate the rights of labour. Labour Courts and Tribunals are established for enforcement of these rights that determine and adjudicate upon industrial disputes, including instances of unfair labour practices, union rights and conditions of work. For such purposes, the Labour Court is deemed to be a Civil Court in many jurisdictions. Any award or decision rendered by a Labour Court or Tribunal is subject to an appeal by the appellate authority provided in the governing statute, which can modify or vary the award or decision. Since labour law is a beneficial legislation, the jurisdiction to hear and adjudicate on labour - related disputes are specifically allocated to Labour Courts and Tribunals in order to ensure timely relief for the working class. For a smooth application of labour law, it is essential that labour disputes be invoked before the right forum to save time and resources. This article provides an analysis of various facets that relate with the jurisdictions of Labour Courts in Pakistan and provide some solutions in light of the analysis of common law jurisdictions like the United Kingdom.

Section I: Jurisdiction based on geographic location of establishments

The jurisdiction of labour courts and tribunals to settle industrial disputes can be attributed to the location of establishments in certain states and provinces based on the provisions within their respective labour legislation. In Pakistan, industrial disputes in industrial establishments situated in Islamabad Capital Territory or more than one province (trans-provincial) are adjudicated upon by a commission called the National Industrial Relations Commission ('NIRC').[2] The Industrial Relations Ordinance, ("IRO") 2002 first established the NIRC for the purposes of adjudicating and determining industrial disputes in the Islamabad Capital Territory and trans-provincial corporations. IRO 2008 also provided for the same system.[3]

However, IRO 2008 was abolished because of 18th Amendment leading to provincialization of labour laws in 2010. The abolition of NIRC made all types of

[2] Under section 53 of the Industrial Relations Act, 2012.
[3] Under section 49 of IRO 2002, reiterated under section 25 of IRO 2008.

industrial disputes a matter of jurisdiction for the labour courts and tribunals of that province. Following the introduction of the Industrial Relations Act ("IRA") 2012, the status of NIRC was restored, and now, NIRC has the jurisdiction to hear industrial disputes that arise in trans-provincial corporations and corporations based in Islamabad Capital Territory.[4] The labour courts or labour appellate tribunals do not have the jurisdiction to hear such matters.[5]

NIRC also has jurisdiction to deal with the matters pending for registration of a union of industry-wise character at national level having membership in more than one province.[6] However, it lacks jurisdiction to register trade unions in establishments that cannot be termed as an 'establishment' or 'industry' given under IRA 2012.[7] It may also proceed in the matters that do not belong to a single province and are in the nature of national industry-wise character subject to the existence of relevant law.[8]

After the 18th Amendment in the Constitution of Pakistan, various issues relating to the jurisdiction was contested in the court especially in relation to the confusion between the jurisdictions of Federal and Provincial powers. In *Telenor v. Presiding Officer, Labour Court* (2014 PLC 238), the petitioner being trans-provincial establishment within the meaning of Industrial Relations Act 2012 contested that the Provincial Wages Authority established under the PWA of 2013 cannot entertain against such establishment. The court reasoned that the applicability of the two legislations i.e. the KPK Payment of Wages Act, 2013 and the second is the KPK Minimum Wages Act, 2013 is important. In accordance with section 1(2) of PWA of 2012, the Act shall extend to the whole of the province of KPK. Similarly, section 1(3) (d) made applicable the provisions of PWA of 2012 also to all factories, industrial and commercial establishments under the control of Federal Government. Thus, the provisions of law have been extended to all the industrial and commercial establishments constituted in the province of KPK. In the PWA of 2012, the trans-provincial establishment, as defined in the IRA 2012, has not been excluded. The KPK Minimum Wages Act, 2013 also has similar provisions in the definition clause and specifically 'Pakistan Railway', is mentioned which is a trans-provincial

[4] Under section 54 of the IRA, 2012.
[5] The Managing Director, Utility Store Corporation and 6 others v Mudassir Shahzad and 230 others, 2018 PLC 63.
[6] M. Amin Qamar v Bank of Punjab, 2013 PLC 290.
[7] National Electric Power Regulatory Authority (NEPRA) v Registrar of Trade Unions, NIRC, 2015 PLC 148.
[8] M. Amin Qamar v Bank of Punjab, 2013 PLC 290.

organization. Thus, the jurisdiction of labour court remained intact in relation to this matter and that the jurisdiction of Payment of Wages Act 1936 and the provincial legislation *pari materia* apply. The court also clarified the jurisdiction of NIRC which includes the subject matters including industrial disputes, individual grievances, disputes related to registration of trade unions and matters of unfair labour practices. An interesting set of facts were observed in *Habib Bank Employees Union v. Habib Bank through President (* 2014 PLC 238 Baluchistan Appellate Tribunal) where the respondent urged that the union is not registered under NIRC and the IRO 2011 applied to the bank as it is a trans-provincial establishment while the Baluchistan IRO 2010 applies only to provincial establishments. The court reasoned that the reading of section 3 of IRA 2012 read with section 34(2), section 54(a) and explanation of section 57 of the same Act, it can be inferred that the jurisdiction of NIRC is confined to the matters affecting the affairs of establishment and employees within whole country or the employer has establishments in more than one province. Similarly, this extends if trade unions or CBU representing such employees having their membership in more than one provinces. However, in this case, it appeared that all the demands pertaining to Province of Baluchistan having no relevancy with other provinces as well as Islamabad capital territory. Furthermore the members of appellant/applicant union are not member of any Federation. No question of unfair labour practice was involved which is the jurisdiction of NIRC. Thus, the case for IRA 2012 to apply should be an industrial dispute affecting all the employer or workers of the establishment in more than one province rather only to the extent of one province. Furthermore the trade union should be a federation and their membership should be trans-provincial to invoke the IRA 2012.

In the UK, the precedent for the jurisdiction of an Employment Tribunal ("ET") arises when a case concerns an establishment in Great Britain and a sufficient connection to the territory is necessary to establish the jurisdiction of Great Britain. The hierarchy of adjudication systems of labour law (tribunals and courts) in the UK where matters of jurisdiction and territorial connection may be decided is from the ET to Employment Appellate Tribunal ("EAT") and finally to the High Court.[9] If the test of operation and location rules that the establishment falls within the territory of Great Britain, the jurisdiction of ET for protective awards will be attracted in such cases. In *Sea Horse*

[9] Sea Horse Maritime Ltd v Nautilus International, [2018] EWCA Civ 2789.

Maritime Ltd v Nautilus International [2018] EWCA Civ 2789, the High Court heard a similar case in which the ET and EAT channels were exhausted. In this case, a number of individuals were employed by Seahorse Maritime Limited Seahorse. They were tasked to *serve on any vessel which was managed by* a third party. The crew was primarily outside of territorial waters of Britain. Employees who were British national would return home at the end of each roster rotation. However, due to an economic downturn some employees needed to be laid off. As a result, number of redundancies within the seahorse workforce resulted. The court in this case established that all such ships constituted as one establishment. It was critical as the duty of an employer to consult with trade union is attracted only when the establishment employs more than 20 employees. Thus section 188 shall not apply and protective damages shall not be given be given if ship i.e. one establishment has less than 20 employees. Moreover, the court ruled that each ship shall be considered as an establishment and a self-operating unit. Moreover, it also established the precedent for ET that a case where the employees are outside Great Britain, a sufficient connection is necessary to establish jurisdiction of Great Britain. Moreover, the court also called a ship as self-operating unit which further give an indication of how an establishment can be defined in future for attracting the jurisdiction of courts.

Section II: Jurisdiction in cases of unfair labour practices

Unfair labour practices on part of both employers and employees goes against the rights and obligations established by labour law. In order to ensure that any industrial disputes are dealt in a timely manner as to not afford a detriment to either party, Labour Courts and Tribunals are vested with the jurisdiction to hear such cases, and an appeal against their decision can be filed in superior courts.

In Pakistan, if a workman is dissatisfied with his dismissal and challenges it in a Labour Court, the Court could go into all facts of the case and pass such orders as may be just and proper in the circumstances.[10] This indicates that Labour Courts in Pakistan have jurisdiction to hear cases of unfair labour practices. The legislature intended for

[10] Under section 25-A (5) of IRO 1969.

it to provide protection against arbitrary, capricious, and camouflaged dismissals by an employer.[11]

In the UK, aggrieved parties can apply for interim relief in the Employment Tribunal ("ET") in relation to matters of dismissal as a result of trade union activities.[12] In case the ET determines that the application for unfair dismissal has more than a 51% probability or a "pretty good" chance of success, the case not only manifests the jurisdiction of ET to grant interim relief on unfair dismissals, but also establishes the test under which this jurisdiction shall be exercised. The ET also has jurisdiction to hear a case if there is any contention related to suffering a detriment or dismissal resulting from requiring time off for other duties, study, training or seeking work, as well as any failure of the employer to pay remuneration while suspended from work for health and safety reasons.[13]

Under section 189 of TULRCA, an employment tribunal can hear an application by an employee for a protective award. This award arises as a result of an employer's failure to consult over a redundancy situation with the representative of trade union concerned. In *Working Links Employment Ltd v Public and Commercial Services Union* UKEAT/0305/12/RN, EAT held that ET can take jurisdiction of a case under section 189 of the TULRCA if the evidence is clear that the union was recognized so that it could be consulted regarding the redundancy of an employee of the nature regarding which the union is registered. This case, thus, not only manifests that ET has the subject matter jurisdiction to hear cases regarding the non-consultation of union regarding the redundancy of employees but also set the parameters of such hearing.

TULRCA also bars any discrimination as evident in section 137 and 139 which allows ET to purview any case which pertained to the discrimination in obtaining employment due to membership or non-membership of a Trade Union. Similarly, section 145, 146-147 and 152-160 allows ET to take jurisdiction of cases pertaining to any detriment or dismissal relating to being, not being or proposing to become a trade union member and any incidental compensation. An important jurisdiction of TULRCA is embedded in section 237-239 which allows a case based on an unfair dismissal in connection to

[11] Section 25 of IRO, 1969; Crescent Jute Products Ltd., Jariwala v Muhammad Yaqub, PLD 1978 SC 207; Imdad Ali v Sindh Labour Appellate Tribunal, PLD 1975 Karachi 288.
[12] Section 161-167 of Trade Union and Labour Relations (Consolidation) Act, 1992.
[13] Section 64, 67-68, 70(1) and 70(4) of the Employment Rights Act, 1996.

a lock out, strike or other industrial action. ERA Section 46, 47, 48, 102-103,105, 108-109 and 111 allows employment tribunal to hear a case if there is any contention related to suffering a detriment or dismissal resulting from requiring time off for other duties, study, training or seeking work. Section 64, 67-68, 70(1) and 70(4) of the ERA relates to the jurisdiction of ET if there is any failure of the employer to pay remuneration while suspended from work for health and safety reasons while pregnant or on maternity leave.

Under section 3(1) of the TULRCA, an organization of workers, whenever formed, may apply to the CO to have its name entered in the list. Section 8(1) of the TULRCA allows a CO to issue certificate of independence which when in force is a conclusive of evidence for all purposes that a trade union is independent and vice-versa. Section 124 and 125 of the TULRCA allows CO to enter or remove a name of employer`s trade union in the list. In *North Essex Partnership NHS Foundation Trust v Bone* UKEAT/0352/12/GE, the EAT observed that TULRCA allowed stay in such conditions where the independence of union is in question. It is a statutory pre-condition for the final decision and application of the section 146 (actions short of dismissal for deterring trade union membership) of 1992 Act. Therefore, if there is any such question, the Employment tribunal should first stay the case and if the independence is not granted there is no reason to further hear the case on the basis of section 146 of TULRCA as the certification officer is given a *qausi-judicial* power to determine independence and Parliament has kept the courts and ACAS separate from these decisions. Thus, in these cases, a clarity was provided in relation to the ambit of powers of CO.

Under section 209 of the TULRCA, it is the general duty of ACAS to promote the improvement in industrial relations. Moreover, ACAS must encourage the improvement in collective bargaining. Under section 210 of the TULRCA, if a trade dispute exists, ACAS can request one or more parties its assistance with a view to bringing about a settlement. The assistance can be through conciliation and may include the appointment of a person other than an officer or servant of ACAS to offer assistance to the parties to the dispute with a view to bringing about a settlement. Under section 211(1) of the TULRCA, ACAS shall designate some of its own officers to perform the conciliation officer for any matter which employment tribunal can also have jurisdiction. Under section 212(1) of the TULRCA, in a trade dispute, ACAS may

at the request of one or more of the parties to the dispute refer all or any of the matters to which the dispute relates for settlement to the arbitration. In this case, one or more persons appointed by ACAS for that purpose (not being officers or employees of ACAS) can execute arbitration.

In the United States, the Congress has provided the National Labour Relations Board ("NLRB") with exclusive jurisdiction to hear and settle labour disputes that affect establishments involved in interstate commerce per the National Labour Relations Act 1935, and the jurisdiction of the State-based Labour Relations Board is barred from such subject matters.[14] However, in the 1950s, this trend changed and it was ruled that this exclusive jurisdiction does not hold in cases where the NLRB refuses to hear and rule upon a matter. In instances of such rejection, the State-based Labour Relations Board will have jurisdiction to hear such disputes.[15]

In India, matters pertaining to unfair labour practices are the domain of the Labour Courts. Wrongful dismissal or discharge of an employee, illegality or otherwise of a strike or lockout and all such matters fall in the jurisdiction of labour courts. [16] The Labour Court can go into the question whether the dismissal of an employee amounts to victimization or unfair labour practice, and based on this matter, can grant or refuse approval of the dismissal of an employee. In cases where the punishment is so disproportionate that no reasonable employer would ever have imposed it in like circumstance, the Tribunal may treat the imposition of such punishment as itself showing victimization or unfair labour practice and refuse permission for the dismissal.[17] Labour Courts also have jurisdiction to question the dismissal of an employee, to adjudicate upon the re-employment of an employee or to interfere with the findings of the domestic inquiry.[18]

[14] Bethlehem Steel Co. v New York State Labour Relations Board, 1947, 330 U.S. 767; Plankinton Packing Co. v Wisconsin Employment Relations Board, (1950) 338 U.S. 953.
[15] Weber v. Anheuser-Busch, Inc., (1955) 348 U.S. 468 (pp. 58); Guss v Utah Labour Relations Board, 353 U.S. 1 (1957) (pp. 59).
[16] Other than those specified in the Third schedule of the Act.
[17] Security Paper Mill v Hari Sankar Namdeo and Another, (1980) IILLJ 61 MP.
[18] Central Inland Water Transport v The Workmen & another, 1974 AIR 1604; Security Paper Mill v Hari Sankar Namdeo and another, (1980) IILLJ 61 MP; Babulal Nagar And others v Shree Synthetics Ltd. & others, 1984 AIR 1164; Ambalal Shivlal v Vin D.M. and others, 1964 (9) FLR 328; Dahyabhai Ranchhoddas Shah v Jayantilal Mohanlal and others, 1973 (27) FLR 143.

Section III: Jurisdiction with reference to persons in state service

Labour law does not apply in the same manner to those employed in government and state service as it does to private employees. Each country has special provisions to invest the power of resolving such disputes in independent tribunals that overlook these matters. In Pakistan, Labour Courts do not have jurisdiction to hear the matters of the persons in the service of Pakistan. The jurisdiction of all courts concerning such persons is excluded and lies only with the tribunals set under section 3 of the Services Tribunal Act.[19] Section 1(3) of IRA, 2012 provides for the same provision.

In the UK, the Trade Union and Labour Relations (Consolidation) Act does not apply to those in service as a member of the naval, military or air forces of the Crown, or those forces which have a certificate of national security (such as the police).[20] The legislature intends that labour rights are limited in relation to national security, defense of the UK and public order.

In the United States, the jurisdiction of the National Labour Relations Board is limited to private sector employees; other than these, it has no authority over labour relations disputes involving governmental, railroad, airline employees or agricultural employees. In matters concerning federal employees, the Civil Service Reform Act, 1978 gives exclusive jurisdiction to the Merit Systems Protection Board (MSPB), an independent quasi-judicial agency, and bars federal district courts from ruling on matters related to the Act including adverse employment actions of the federal departments. The US Court of Appeals for the Federal Circuit has jurisdiction to hear appeals for the decisions of the MSPB.[21]

In India, the IDA does not apply to the persons who are employed in the police service or as an officer or other employee of a prison. The persons who are subject to Air Force Act, 1950, or the Army Act, 1950, or the Navy Act, 1957 also do not come under the definition of workman under the IDA 1947, hence, the Act does not apply to such people as well.[22]

[19] Section 2-A of Services Tribunal Act, 1973; Muhammad Aslam Javed v United Bank Ltd. through Circle Executive, 2006 SCMR 301.
[20] Section 273, 274(1) and 280 of the Act.
[21] Elgin v Department of Treasury, 567 U.S. 1 (2012).
[22] Section 2(s) of IDA 1947.

Section IV: Jurisdiction to pass interlocutory orders and interim relief

In Pakistan, Labour Courts have jurisdiction to pass interim reliefs even if it is not mentioned in the statute under which the court functions. Where an Act confers a jurisdiction to a court or person, it implicitly also grants the power of doing all such acts, or employing such means as are essentially necessary to its execution.[23]

In UK, under section 192 of TULRCA, an application by an employee that an employer has failed to pay a protected award can also be heard in ET. Under sections 168-170 of TULRCA, failure to allow time off for trade union activities or duties can be adjudicated in employment tribunals. Section 161-167 of TULRCA allows an application for interim relief in ET as well. This was manifested in *Mihaj v Sodexho Ltd.* UKEAT/0139/14/LA in which the EAT reasoned that an application for interim relief under section 163(1) of TULRCA to ET must relate to a summary assessment by the ET. The assessment shall aim to determine the possibility that on a final hearing, the claimant will establish the reason that his dismissal was related to his taking part in trade union activities. Secondly, the Employment Tribunal in this assessment should determine whether the application for unfair dismissal has more than a 51% probability of success or whether the claimant has a "pretty good" chance of success. Thus, this case not only manifests the jurisdiction of ET to grant interim relief on unfair dismissals but also establish the test under which this jurisdiction shall be exercised.

Similarly, in *London City Airport Ltd v Chacko* UKEAT/0013/ 13/ LA, the claimant's claim was for unfair dismissal contrary to section 152 (1)(b) of TULRCA which related to the dismissal on the participation in trade union activity and Schedule A1 paragraph 161(2)(a) which related to the dismissal in relation to acting to secure union recognition. An application for interim relief under section 161 of TULRCA 1992 and section 128 of ERA 1996 was filed in the ET. The ET granted an interim relief. The EAT concluded that the statutory test for interim relief is that whether "it appears to the tribunal" and in this case the employment judges "that it is likely” that claimant shall be successful. Thus EAT in this case affirmed the jurisdiction of ET regarding interim relief for unfair dismissal under both TULRCA and ERA and defined the test for its exercise.

[23] Commissioner Khairpur Division, Khairpur Vs Ali Sher Sarki, PLD 1971 SC 242.

Under section 86 and section 87 of TULRCA, an employer can also apply for relief to ET for a failure of the employer to comply with a certificate of exemption or to deduct funds from employees` pay in order to contribute to a trade union political fund.

In Australia, section 23 of the Federal Court of Australia Act, 1976 provides for such comparable powers in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders.[24] This power is provided once the jurisdiction has been conferred by the Fair Work (Registered Organizations) Act, 2009. However, section 23 cannot be invoked when the court derives its jurisdiction under a statute, which provides a code of available remedies and does not authorize the grant of an injunction.[25]

In Canada, whenever any set of facts arising out of a dispute are covered by collective agreement, the interim relief would be provided according to the plan set out in the collective agreement by both the parties.[26] Thus, in cases where the parties have agreed on the jurisdiction to be exclusive to a tribunal, an ordinary court cannot exercise its jurisdiction to award an interim relief. The procedure is given by collective agreement by the aggrieved party takes precedence over the jurisdiction of ordinary courts.[27] The ordinary courts can hear a case of labour dispute should there be no procedure given in a collective agreement.

Recommendations

1) It must be clearly established within the IRA 2012 that the jurisdiction of NIRC shall apply totally without any question if the entity in question is located in Islamabad Capital Territory or if the establishment is located in more than province. It shall not matter if the matter in question relates to one province but the establishment generally is trans – provincial in nature.
2) A provision in IRA 2012 must be provided which clearly elaborates that if a Provincial Act applies on trans – provincial establishments' *pari materia* with

[24] Jackson v Sterling Industries Ltd., (1987) 162 CLR 612.
[25] David's Distribution Pty Ltd. v National Union of workers [1999] FCA 1108.
[26] Section 3 and 27 of the Canada Labour Code, 1985.
[27] Bisaillon v Concordia University, [2006] 1 S.C.R. 666; Gendron v Supply & Services Union of the Public Service Alliance of Canada, [1990] 1 S.C.R. 1298; Galarneau v Canada (Attorney General), [2004] F.C.J. No. 886.

IRA 2012, and if there is a clash of IRA 2012 with that Provincial Act, precedence shall be provided to the Federal legislations.

3) There is also a need of elaboration within IRA 2012 that whether provincial legislature can frame laws on those entities which are subject to IRA 2012.

4) In IRA 2012, a test needs to be devised for those establishments which are not in the territory of Pakistan. In this matter, the English jurisprudence is of significance as it requires a sufficient connection of that matter with the country. For this purpose, it needs to be elaborated whether ships and Pakistani businesses operating overseas would be subject to IRA 2012.

5) Section 30 and 33 of IRA 2012 provide the NIRC with the jurisdiction to adjudicate and determine matters of unfair labour practices after due inquiry. However, labour court also possess the jurisdiction to adjudicate similar matters. There needs to be clarity on matters pertaining to the NIRC and the matters pertaining to the labour courts. For the purposes of simplicity, labour court needs to be provided exclusive jurisdiction on matters relating to unfair dismissals while NIRC must be accorded all matters relating to trade relations.

6) Another proposal, in light of the British jurisprudence, could be consolidation of all matters related to labour and employment to be consolidated within one unified labour court. It shall provide the labour court to resolve all matters arising from a trade relations dispute as well as unfair dismissals under one philosophy and explore the inter – connectedness of the problems. In UK, only Employment Tribunal, adjudicate all matters relating to labour law. The purpose of NIRC could be replaced with a body similar to British ACAS.

7) There needs to be clarity provided about the employees of state – owned enterprises and people who are employed within autonomous government institution in regards to the applicability of IRA 2012. It needs to be clearly mentioned within the IRA 2012 that NIRC as well as in relation to all the matters not coming within NIRC which is the exclusive jurisdiction of labour courts shall be backed with all powers related to the execution of the spirit of the establishment of the court including the power to grant interim relief. The courts have affirmed such rulings in their subsequent judgments holding that the power to grant interim relief is an auxiliary or incidental power as opposed to

inherent power of Social Security Court although the Act forming these court only mentioned a general appellate jurisdiction clause.[28]

[28] Sindh Employees Social Security Institution v Adamjee Cotton Mills, PLD 1975 SC 36.