Challenge to the Industrial Relations Act 2012: Two High Courts Respond

KESC v NIRC 2015 PLC 1
Pakistan Workers Federation v Government of Pakistan 2014 PLC 351

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Introduction

The Industrial Relations Act 2012 ('IRA') was enacted to regulate the formation of trade unions, trade union activities, relations between employers and workmen, the settlement of industrial disputes, and ancillary matters. However, after the 18th Amendment, several constitutional petitions challenged the validity of the IRA since the regulation of labour no longer remained within the legislative competence of the *Majlis-e-Shura* ('Parliament'). In *KESC v NIRC*[1] and *Pakistan Workers' Federation v Government of Pakistan*,[2] the Sindh and Baluchistan High Courts, respectively, upheld the validity of the IRA on the ground that its provisions apply only to trans-provincial concerns which the Parliament is empowered to regulate. They also tackled other pertinent questions regarding the power of provincial legislatures in the regulation and legislation of trans-provincial industries and the extent of provincial autonomy after the 18th Amendment. This case note revisits these landmark cases and underlines the important principles that the courts have adopted to resolve disputes concerning legislative competence of the federal and provincial legislatures following the 18th Amendment. For this purpose, this case note explores the background of the IRA, the prior law, and the judgments of the Sindh High Court ('SHC') and the Baluchistan High Court ('BHC') in the *KESC* and the *Pakistan Workers' Federation* ('*PWF*'). It also includes brief observations on how the law, if applied prospectively, can help resolve labour-related disputes.

Background and Prior Law: The Controversy around the IRA – A Legal Conundrum

The 18th Amendment to the Constitution of Pakistan 1973 ('Constitution') led to substantial changes in the structure of the State, transferring significant

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[1] 2015 PLC 1.
[2] 2014 PLC 351.

powers from the President to the Parliament and from the Federal legislature to the Provincial legislatures. The 18th Amendment abolished the Concurrent Legislative List ('CLL') which enumerated subjects on which both the federation and the provinces were empowered to legislate. Consequently, all items previously listed under the CLL fell into the exclusive domain of the Provincial legislatures by virtue of Article 142 of the Constitution. Entry no. 27 ('Trade unions; industrial and labor disputes') of the CLL, for instance, entitled the federation to legislate on matters related to settlement of industrial disputes and the formation of trade unions. However, after the 18th Amendment, such matters fall within the domain of provincial legislatures. Therefore, when the Federal legislature enacted the IRA, it initiated a debate which culminated in the *KESC*[3] and the *Pakistan Workers' Federation* (PWF)[4] case.

The IRA was enacted to regulate industrial relations with regard to trans-provincial enterprises and those operating in Islamabad territory. Section 2 (xxxii) of the IRA defines 'trans-provincial' as 'any establishment, group of establishments, or industry having its branches in more than one province'.[5] Section 87 provides that the IRA will have an overriding effect where trans-provincial industries are concerned. It was promulgated as an amendment to the problematic Industrial Relations Act 2008, which followed the similar restrictive pattern of the 1969 and 2002 industrial relations statutes. For instance, in the previous industrial relations statutes, the term 'worker' constituted the entire class of supervisors and apprentices, but failed to include those employed as security or fire-service workers at airports, sea ports, oil refineries, and government hospitals. In this context, the IRA was promulgated to rectify the defects of preceding enactments.

Moreover, the IRA established National Industrial Relations Commission ('NIRC') as a parallel legal forum for resolution of disputes in trans-provincial establishments in addition to the Labour Courts established under provincial industrial relations statutes. In the *KESC*[6] case, the court ordered the transfer of cases from the NIRC to Labour Courts, and thus put an end to any confusion pertaining to matters of jurisdiction.

Critics of the 18th Amendment and the IRA have claimed that the former violates the right to association as well as 'the international

[3] (n 1).
[4] (n 2).
[5] Industrial Relations Act 2012, s. 2 – 'trans-provincial means any establishment, group of establishments, or industry having its branches in more than one province'.
[6] (n 1).

obligations undertaken by the Government of Pakistan by ratifying ILO Conventions Nos. 87 and 98'.[7] These obligations relate to the right to freedom and the right to collective bargaining, respectively. This criticism stems from the vulnerabilities of the common worker who is faced with powerful corporations in the courts of law.

Proponents of the IRA, on the other hand, argue that Article 137[8] of the Constitution permits concurrent jurisdiction and authorizes both provincial and federal assemblies to legislate on a subject. The abolishment of the CCL resulted in confusion as to which laws would apply to trans-provincial industries since applicants could approach both the NIRC and the Labour Courts. The central issue discussed in both the *KESC* case and *PWF* case is regarding the legality of the IRA under the Constitution.

Facts, Arguments and Holdings

This section not only explores the arguments made before the SHC and BHC regarding the IRA, but it also discusses and comment on the reasoning adopted by these courts in deciding the respective cases.

KESC v NIRC

After a number of petitions challenging the validity of the IRA were filed in the court, the Division Bench referred the matter to the Chief Justice with a request to constitute a larger bench to deliberate upon the important constitutional issues therein.

KESC argued that its employees could not get legal recourse through the IRA because it enumerated on subjects that were outside the jurisdiction of the Federal legislature and therefore was an invalid law after the 18th amendment. The employees, on the other hand, argued that the Federal legislature did have the authority to legislate on matters such as the formation of trade unions and settlement of industrial disputes relating to establishments that operated at trans-provincial level. They posited that the

[7] Khurshid Ahmed, *Labour Movement in Pakistan: Past and Present* (2nd edn, Institute of Workers Education and Labour Studies 2011) 136-37.

[8] The Constitution of Islamic Republic of Pakistan 1973, art. 137 – 'Subject to the Constitution, the executive authority of the Province shall extend to the matters with respect to which the Provincial Assembly has power to make laws:
Provided that, in any matter with respect to which both [Majlis-e-Shoora (Parliament)]and the Provincial Assembly of a Province have power to make laws, the executive authority of the Province shall be subject to, and limited by, the executive authority expressly conferred by the Constitution or by law made by [Majlis-e-Shoora (Parliament)] upon the Federal Government or authorities thereof.'

Provincial Assemblies were not empowered to legislate on matters that were in operation beyond its territories; therefore, the Federal legislature was competent to promulgate the IRA.

The Sindh High Court addressed two primary issues in its judgment:

1. Whether the IRA was *ultra vires* of the Constitution? and
2. What legal remedies were available to workers employed in corporations established in more than one province?

In its decision, the Sindh High Court applied the doctrine of pith and substance which entails an inquiry into the essence of the law that is under dispute. In determining whether the IRA was *intra vires*, the court focused on the purpose behind the Federal Law and the objective it aimed to achieve. One of the arguments discussed by the court was that if the provincial government were to legislate on matters pertaining to trans-provincial establishments, it would be a violation of Article 141[9] of the Constitution which prevents provincial governments from making laws concerning rights relating to trans-provincial establishments. Hence, the right to form a trade union in trans-provincial establishments, it was argued, could not be secured and regulated by a provincial law. The court subsequently examined Article 137 of the Constitution, which provides concurrent jurisdiction to both the Federal and the provincial assemblies, allowing them to legislate on a subject even after the 18th Amendment. Further, the court opined that formulating a federal law to deal with a situation which could not be addressed through provincial legislation, was not an infringement of provincial autonomy. This meant that since provinces could not make a law for trans-provincial establishments, it was imperative for the Federal legislature to promulgate a law to fill the gap that the provinces did not have the power to fill themselves.

Moreover, the court held that the purpose of the IRA was to allow citizens to exercise their right of association under Article 17[10] of the Constitution while being employed in trans-provincial organizations. The regulation of such an organization and securing rights for workers in a trans-provincial establishment is out of the purview of a provincial government,

[9] Art. 141 – 'Subject to the Constitution, [Majlis-e-Shoora (Parliament)] may make laws (including laws having extra-territorial operation) for the whole or any part of Pakistan, and a Provincial Assembly may make laws for the Province or any part thereof.'

[10] Art. 17 – 'Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan, public order or morality.'

since provincial law is unenforceable beyond the territorial limits of the province. These rights include the right to organize on an inter-provincial level, form trade unions, elect Collective Bargaining Agents ('CBA'), and to have industrial dispute resolution mechanisms at an inter-provincial level.

The court referred to *Air League of PIAC Employees v Federation of Pakistan*[11] where the Supreme Court had upheld the Industrial Relations Act 2008, even after the 18th Amendment. The SHC relied on the court's analysis of Article 144[12] whereby the provincial assemblies could adopt Federal laws even for matters outside the purview of any Entry in the Federal Legislative List. Article 144[13] did not apply to the *KESC* case because the court deemed the provisions of Entry 58 of Part I[14] of the Federal Legislative List as sufficient grounds to vest legislative authority in the Parliament to enact the IRA.

As far as the interpretation of laws is concerned, the court laid down the principle that where two views on the constitutionality of an enactment are possible, the one making the enactment constitutional is to be adopted. The same principle was also upheld in *Lahore Development Authority v Ms. Imrana Tiwana*,[15] where Justice Saqib Nisar summarized the rules which must be applied when deciding the constitutionality of laws. Thus, it was held that it is better for a subject to be regulated by the Federal Government than for it to remain unregulated because the provincial legislatures lack the authority to make a law on that subject.

According to the court, the IRA aims to provide a forum for employers and employees of trans-provincial establishments to resolve their disputes including even the most basic concerns such as the issue of registration of trade unions. However, in the absence of the IRA, if no law exists to regulate trade unions at trans-provincial level, the court will be 'putting an embargo'[16] on the fundamental right of freedom of association as provided by Article 17 of the Constitution. In light of the foregoing reasons, the SHC upheld the constitutionality of the IRA.

PWF v Govt of Pakistan

[11] 2011 SCMR 1254.
[12] (n 1).
[13] Ibid.
[14] Art. 144 – 'Matters which under the Constitution are within the legislative competence of Majlis-e-Shoora (Parliament) or relate to the Federation.'
[15] 2015 SCMR 1739.
[16] (n 1) 15.

Just like the SHC, the BHC[17] was also called upon to determine the constitutionality of the IRA. The court found it to be *intra vires* – albeit for different reasons. The court discussed precedents and case law from other jurisdictions to explain that some significant laws, due to their overarching effects, need to be legislated upon by the Parliament, even when they do not fall within the federal domain.

The BHC upheld the validity of the IRA based on the ground that the power of the state to regulate inter-provincial trade and commerce included the power to regulate trade unions and employment conditions. The court also reviewed American case law in detail. The United States had dealt with a similar question by way of the Commerce Clause: Article 1(8)(3)[18] of the US Constitution, which allows Congress to regulate commerce with other countries as well as between states within the US. Similarly, the case at hand deals with the issue whether the authority to legislate vests with the Federal government or with the provincial government. Furthermore, the BHC referred to Oliver Wendell Holmes' dissent in *Hammer v Dagenhart*,[19] especially since Justice Holmes' dissent was referred to by the majority's decision in a subsequent overruling judgment, *United States v Darby Lumber Co.*[20] In *Hammer,*[21] the question before the court was whether Congress could legislate and subsequently place a prohibition on the inter-state trade of any good made by children under the age of fourteen years – a prohibition imposed by the Keating-Owen Act of 1916. The court distinguished between inter-state commerce and manufacturing, holding thereby that manufacturing does not come within the purview of inter-state commerce; and, therefore, Congress did not have the power to legislate on the respective matter. Holmes, on the contrary, stated that the states 'may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line, they are no longer within their rights'.[22] In this way, a seemingly inter-state subject became a concern for the Federal Government as will be seen in the following case.

The unanimous decision in *United States v Darby Lumber Co*[23] overruled *Hammer* and preferred the dissenting view of Justice Holmes from

[17] (n 2).
[18] The Constitution of the United States of America, art. 1(8)(3) – 'To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.'
[19] 247 US 251 (1918).
[20] 312 US 100 (1941).
[21] (n 19).
[22] Ibid.
[23] (n 20).

the now-overruled case. A Georgian lumbar company was alleged to be in violation of Fair Labour Standards Act of 1938, a federal law enacted to ensure that fair labour standards were regulated and that states did not use substandard labour practices to benefit financially from inter-state commerce. The law was declared valid, allowing Congress to regulate inter-state commerce, since an authority for the Congress could 'neither be enlarged nor diminished by the exercise or non-exercise of state power'.[24] Therefore, Congress was recognized as the legitimate authority which could exercise power over inter-state activities as a means of regulating inter-state commerce.

The court discussed the Commerce clause further with reference to *NLRB v Jones and Laughlin Steel Corp.*[25] In this case, the National Labour Relations Board found that the Steel Corporation had violated the National Labor Relations Act of 1935 by discriminating and firing workers who wished to join a trade union. The Steel Corporation argued that it was involved in the business of manufacturing and not inter-state commerce, thus Congress did not have authority within the Commerce clause to legislate on this issue. Chief Justice Hughes held that Congress might have the command to legislate where industrial activity, having a significant link to interstate commerce, needed protection from 'burdens and obstructions' and where matters need to be regulated between workers and the management. A reference was also made to *McCulloch v Maryland*[26] where Chief Justice John Marshall had held that the authority was not specifically granted to Congress unless it was, 'a right incidental to the power (of carrying into execution the sovereign powers), and conducive to its beneficial exercise'.[27]

The court referred to the persuasive arguments made in relation to the American jurisprudence and applied them on the matter at hand. The court next discussed the view that labour laws in trans-provincial establishments may be incidental or ancillary to the inter-provincial clause. It referred to *Messrs Haider Automobile Ltd. v Pakistan*[28] to explain that items in the legislative list must be read broadly to encompass 'all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended within it'.[29] Ultimately, the BHC also reached the same conclusion that the IRA was validly enacted by the Parliament.

[24] Ibid.
[25] 301 US 1 (1937).
[26] 17 US 316 (1819).
[27] Ibid.
[28] PLD 1969 SC 623.
[29] 2014 PLC 351 (16).

Additionally, the BHC gave a detailed background of the history of the IRA and the Federal and Concurrent Legislative Lists. Senator Raza Rabbani, Chairman of the committee working on the 18th Amendment was heard in the court. In his view, under Article 154,[30] the Parliament had the authority to make laws for inter-provincial matters. He also referred to Article 38(a),[31] which includes the State's task to guarantee 'equitable adjustment of rights between employers and employees'. Moreover, Senator Rabbani argued that the term 'State' could be used for both the Parliament and the Provincial Assembly; and since 'inter-provincial matters and coordination' fell within the ambit of the Parliament, i.e. the State, the IRA was validly enacted. The BHC discussed the arguments presented by Senator Rabbani supporting the validity of the IRA.[32] Particularly for trans-provincial establishments, forcing different trade unions to register in different provinces would cause division in trade union movements which would in turn harm country-wide unions created and strengthened over the years. It would also adversely affect them in their negotiations with separate factory managements. Administratively, factory managements would have to monitor different trade unions under different laws and would need to sign the Charter of Demands separately with each union, as they would be registered separately in each province. Significantly, Senator Rabbani gave the example of the Drug Regulatory Authority as an organization that needed to be formed by the Federal Government for the welfare of the country and to be operated in a unified manner irrespective of other laws or circumstances that could vary in the four provinces. For these reasons, the necessity of federal control of trade unions was demonstrated in order for their effective management as well as ensuring fair labour practices in industries.[33]

Similarly, in the *KESC* case, the SHC discussed similar issues and analysed a scenario in which, by declaring the IRA to be *ultra vires*, the court would leave workers more vulnerable to exploitation and it would amount to denial of their fundamental rights. Without the IRA, employers

[30] (n 9) art. 154 – 'The Council shall formulate and regulate policies in relation to matters in Part II of the Federal Legislative List and shall exercise supervision and control over related institutions.'

[31] (n 9) art. 38(a) – 'The State shall secure the well-being of the people, irrespective of sex, caste, creed or race, by raising their standard of living, by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest and by ensuring equitable adjustment of rights between employers and employees, and landlords and tenants'

[32] (n 2) 7.

[33] (n) 10.

would be able to resist and clamp down trade unions in trans-provincial establishments and make access to justice more difficult by forcing workers to seek redress under various labour laws. Furthermore, workers in each unit would be counted separately, reducing their strength, and thus, hampering the perks they may obtain as a result of the rights provided to them under certain labour laws.

Hence, in trans-provincial establishments, workers are more susceptible to problems than the factory management due to the dangers of not having legislation like the IRA. Both the superior courts agreed that the Parliament had the legislative authority to enact the IRA under the Constitution of Pakistan 1973.

The Impact of IRA: Other Issues Examined by SHC and BHC

The IRA affects all industry-related concerns. One issue addressed by the court in *KESC*[34] related to the legal remedies available to the workers employed in trans-provincial enterprises. It is highly problematic that workers' grievances were left unaddressed till the time this judgment clarified the matter – an issue that only concerned the jurisdiction of the NIRC. The court explained that factories in the same province could resolve their disputes under provincial laws, while trans-provincial industry disputes were to be addressed under the IRA.

In *PWF*,[35] another concern was whether under Baluchistan IRA ('BIRA'), the Provincial Trade Union Registrar could have registered the NADRA Employees Union Baluchistan in respect of a Federal body ('NADRA') whilst a Federal law, i.e. the IRA, also existed. Under section 25 of the BIRA, the government was directed to make an Industrial Relations Commission to aid the implementation of the IRA. In this regard, the court stated that the government needed to either to create the Commission or make amendments to the BIRA.

The court held that the Registrar Trade Unions Baluchistan did not have the authority to register NADRA Employees Union Baluchistan since it was only within the purview of the IRA to register inter-provincial establishments. To further strengthen this claim, Article 143[36] of the

[34] (n 1).
[35] (n 2).
[36] Art. 143 – 'If any provision of an Act of a Provincial Assembly is repugnant to any provision of an Act of Majlis-e-Shoora (Parliament) which Majlis-e-Shoora (Parliament) is competent to enact, then the Act of Majlis-e-Shoora (Parliament), whether passed before or

Constitution was cited, which provides for Federal laws to prevail over provincial laws irrespective of whichever law was enacted first. The registration of the NADRA Employees Union Baluchistan was, therefore, invalid.

Failure of Labour Law

Labour related issues are given little attention in Pakistan. This has been reflected in the lack of implementation of labour laws and the non-compliance of employers across the country. The issue of non-payment or under-payment of wages below the minimum wage, for example, was brought to light by the Lahore Sunder Industrial Estate factory disaster,[37] the brick-kiln workers, and the Labour Qaumi Movement in July 2015.[38]

Moreover, Pakistan failed to ratify any of the ILO conventions relating to occupational health and safety of workers in 2015.[39] In Karachi, the factory fire in Ali Enterprises claimed the lives of 258 workers in 2012. The incident better known as Baldia Factory Fire gained prominence because over 50% produce of the factory was being purchased by an international corporation. The Baldia Factory Fire demonstrated the lack of occupational health and safety measures which directly contributed to the high death toll.[40] These instances highlight the neglected state of labour rights and the accepted exploitation of workers in Pakistan. In light of these circumstances, it can be argued that perhaps the approach adopted by the BHC was better since it did not focus on Pakistani precedents that have not been in favour of workers. A detailed analysis of other jurisdictions might have been the more progressive method to reach the most favourable decision for workers.

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after the Act of the Provincial Assembly, shall prevail and the Act of the Provincial Assembly shall, to the extent of the repugnancy, be void.'

[37] The catastrophe occurred on 4th November 2015 when a shopping bag factory collapsed killing 45 workers. The cause was said to be the weakening of the foundations after an earthquake which was ignored by the owners who continued to construct the building further.

[38] Human Rights Commission of Pakistan, 'Annual Report On Labour: Rights of The Disadvantaged' (Human Rights Commission of Pakistan 2016) 16.

[39] Hussain Ahmad Siddiqui, 'Safety at Workplace' (*Labour Watch Pakistan*, 24 August 2015) <http://labourwatchpakistan.com/safety-workplace/> accessed 18 January 2018.

[40] Zia-ur-Rehman, Declan Walsh and Salman Masood, 'More than 300 Killed in Pakistani Factory Fires' (*The New York Times*,12 September 2012) <http://www.nytimes.com/2012/09/13/world/asia/hundreds-die-in-factory-fires-in-pakistan.html> accessed 10 January 2018.

The IRA is a labour-friendly law which provides a forum to employers and employees to resolve their industrial disputes amicably. By upholding the IRA, the *KESC* and *PWF* cases have safeguarded many rights of workers including restrictions on unfair labour practices and granting powers to the NIRC including the authority to refer cases to the Provincial Labour Courts. This aims to expedite the process of settlement of cases and is immensely beneficial to workers especially since there were as many as 6,862 cases pending before the NIRC in July 2014.[41]

Furthermore, the *KESC* and *PWF* cases also illustrate the inadequacies of the 18th Amendment in effectively defining the domain of the provinces and the federation in many areas. Another instance, highlighting the inadequacies of the 18th Amendment, is the devolution of higher education from the Federal to Provincial legislatures. The Higher Education Commission ('HEC') was previously under the executive authority of the Federal government; however, removal of higher education from the CLL led to the creation of the provincial Higher Education Commissions (PHECs) in Punjab, Sindh, KPK, and Baluchistan. It is interesting to note that the establishment of PHECs did not abolish the Federal HEC, meaning thereby that the intent of the legislation was to devolve only a few functions of higher education to the provinces, not all. These functions have still not been clearly defined and Federal HEC is still performing functions, which fall within the domain of provinces.[42] The deficiencies of the 18th Amendment are emphasised due to a lack of implementation in various government sectors. The boundaries of control between the centre and the provinces remain blurred even after eight years of its passing by the Parliament in 2010.

Conclusion

The regulation of industrial establishments is usually a priority for every government because of their impact on the economic growth of the country and the amount of revenue that they generate for the State. This prioritising often comes at the expense of healthy working conditions and other labour rights of poor workers. Considering that labour complaints are already side-lined by the employers, it is imperative for labour legislation to be in the interest of workers. This can only be achieved when in addition to the

[41] Pakistan Institute of Labour Education & Research, *Status of Labour Rights in Pakistan: 2014* (Pakistan Institute of Labour Education & Research 2015) 17.

[42] 'Implementation of 18th Amendment in Education Sector Demanded' (*The Nation*, 21 March 2015) <http://nation.com.pk/islamabad/21-Mar-2015/implementation-of-18th-amend-in-edu-sector-demanded> accessed 20 July 2017.

Federal legislature, provinces also play their part in enacting laws to protect the interests of labourers. Thus, the passing of the provincial IRAs must be seen as a progressive move, though only time will tell how far it promotes justice at the grass-roots level.

The verdicts in the *KESC* and the *PWF* cases have paved the way for the resolution of industrial disputes under the provincial IRAs without completely dismissing the power of the Parliament to make laws where they are required. With the legality of the IRA established, it is hoped that the workers will be able to obtain some relief, and further case law will reflect the significance of these judgments by upholding decisions of the Labour Courts.

Even though the validity of the IRA is no longer in question, confusion persists in other departments where there is still a lack of clarity regarding control and authority between the federation and the provinces. The federal government has not taken any concrete steps to implement the 18th Amendment. The only step forward is to complete the implementation phase through improved coordination between the federal and provincial governments, and by introducing a comprehensive policy that focuses not just on improving legislation but also on its implementation.