

Constitution of Pakistan, QSO & GCA

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CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN, 1973

Constitution of Pakistan

Preamble:

The Preamble to our Constitution is important to refer and its opening para read as under –

“Whereas sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by him is a sacred trust;”

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Article 4: Right of individuals to be dealt with in accordance with law, etc.

- (1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.
- (2) In particular :-
 - (a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;
 - (b) no person shall be prevented from or be hindered in doing that which is not prohibited by law; and
 - (c) no person shall be compelled to do that which the law does not require him to do.

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Article 8: Laws inconsistent with or in derogation of fundamental rights to be void

- (1) Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void
- (2) The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void

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Article 10A: Right to fair trial

For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process

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Article 12: Protection against retrospective punishment

- (1) No law shall authorize the punishment of a person:
 - (a) for an act or omission that was not punishable by law at the time of the act or omission; or
 - (b) for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed

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Article 13: Protection against double punishment and self incrimination

- (1) No person:
 - (a) shall be prosecuted for the same offence more than once; or
 - (b) shall, when accused of an offence be compelled to be a witness against himself

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Article 18: Freedom of trade, business or profession

Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business:

Provided that nothing in this Article shall prevent:

- (a) the regulation of any trade or profession by a licensing system; or
- (b) the regulation of trade, commerce or industry in the interest of free competition therein; or
- (c) the carrying on, by the Federal Government or a Provincial Government, or by a corporation controlled by any such Government, of any trade, business, industry or service, to the exclusion, complete or partial, of other persons

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Article 19A: Right to information

Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law

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Article 25: Equality of citizens

- (1) All citizens are equal before law and are entitled to equal protection of law.
- (2) There shall be no discrimination on the basis of sex
- (3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children

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Articles 70 and 73: Introduction and passing of bills including Money Bills

The authority to levy a tax is derived from the Constitution which allocates the power to levy various taxes between the Centre and the provinces. Article 70 read with Article 73 (Procedure with respect to Money Bill) prescribe the procedure of enacting a law more specifically a law that imposes a fiscal charge on the subject

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Article 70(4) and Fourth Schedule:

Article 70(4) distributes legislative powers including taxation, between National and Provincial assemblies. The Fourth Schedule to the Constitution enumerates these subject matters with the use of Legislative Lists and Part I of the Fourth Schedule lists down the powers of the Federal govt. to levy/ impose taxes at the Federal level

Entries 47 and 48 of Part I of the Legislative List respectively empower the Federation to levy –

- (a) Taxes on income other than agricultural income;
- (b) Taxes on corporations

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- (c) Taxes on the sales and purchases of goods imported, exported, produced, manufactured or consumed, except sales tax on services
- (d) Taxes on the capital value of the assets, not including taxes on immovable property

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Article 77: Tax to be levied by law only

An important restriction on the power to levy tax is Article 77 of the Constitution which states –

“No tax shall be levied for the purposes of the Federation except by or under the authority of Act of Parliament.”

Therefore each tax levied or collected has to be backed by an accompanying law, passed either by the Parliament or the Province

Article 75 mandates that every Bill (if passed by the respective House) shall be presented to the President for his assent and shall only be implemented upon the President's assent

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Article 89: Power of President to promulgate Ordinances

Article 89 authorizes the President to promulgate laws under special circumstances. It reads as under –

- “(1) The President may, except when the Senate or National Assembly is in session, if satisfied that circumstances exist which render it necessary to take immediate action, make and promulgate an Ordinance, as the circumstances may require.
- (2) An Ordinance promulgated under this Article shall have the same force and effect as an Act of Parliament and shall be subject to like restrictions as the power of Parliament to make law.”

An Ordinance shall stand repealed after the expiry of 120 days of its promulgation

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Article 142: Subject-matter of Federal and Provincial laws

Subject to the Constitution-

- (a) Majlis-e-Shoora (Parliament) shall have exclusive power to make laws with respect to any matter in the Federal Legislative List;
- (b)
- (c) Subject to paragraph (b), a Provincial Assembly shall, and Majlis-e-Shoora (Parliament) shall not, have power to make laws with respect to any matter not enumerated in the Federal Legislative List

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Article 184(3): Original jurisdiction of Supreme Court

Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved have the power to make an order of the nature mentioned in the said Article

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Article 189: Decisions of Supreme Court binding on other Courts

Any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other courts in Pakistan

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Article 199: Jurisdiction of High Court

- (1) Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law,-
 - (a) on the application of any aggrieved party, make an order –
 - (i) directing a person performing, within the territorial jurisdiction of the Court, functions in connection with the affairs of the Federation, a Province or a local authority, to refrain from doing anything he is not permitted by law to do, or to do anything he is required by law to do; or

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- (ii) declaring that any act done or proceeding taken within the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of the Federation, a Province or a local authority has been done or taken without lawful authority and is of no legal effect; or
- (b)
- (c) on the application of any aggrieved person, make an order giving such directions to any person or authority, including any Government exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II

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Article 201: Decision of High Court binding on subordinate Courts

Subject to Article 189, any decision of a High Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all courts subordinate to it

QANOON-E-SHAHADAT ORDINANCE, 1984

QANUN-E-SHAHADAT ORDER 1984

- ▶ The Qanun-e-Shahadat Ordinance (“QSO”) replaced the Evidence Act, 1872. The purpose of enactment of QSO is said to consolidate the law of evidence so as to bring it in confirmatory with the injunctions of Islam as laid down in the Holy Quran and Sunnah
- ▶ The decision of almost every case [civil or criminal] depends upon evidence and therefore application of the principles of QSO is necessary. The QSO applies to all judicial proceedings in or before any Court, a Tribunal or other authority exercising judicial or quasi judicial powers or jurisdiction. It however, does not apply to proceedings before an Arbitrator

QANUN-E-SHAHADAT ORDER 1984.....Cont'd.

- ▶ The QSO prescribes procedure and methods with regard to recording of evidence of parties for the purpose of proving facts and documents A
- ▶ Article 163 of the QSO deals with acceptance or denial of the claim on oath. When the Plaintiff takes oath in support of his claim, the Court shall, on the application of the Plaintiff call upon the defendant to deny the claim on oath

BURDEN OF PROOF

Section 136 of Income Tax Ordinance, 2001

In any appeal –

1. by a taxpayer under this Part, the burden shall be on the taxpayer to prove, on the balance of probabilities –
 - (a) in the case of an assessment order, the extent to which the order does not correctly reflect the taxpayer's tax liability for the tax year; or
 - (b) in the case of any other decision, that the decision is erroneous

QANUN-E-SHAHADAT ORDER 1984....Cont'd.

Section 176 of the Income Tax Ordinance, 2001

Notice to be obtain information or evidence

- (1) The Commissioner may, by notice in writing, require any person, whether or not liable for tax under this Ordinance -
 - (a)
 - (b) To attend at the time and place designated in the notice for the purpose of being examined on oath by the Commissioner or an authorised officer concerning the tax affairs of that person or any other person and, for that purpose, the Commissioner or authorised officer may require the person examined to produce any accounts, documents, or computer-stored information in the control of the person; or

QANUN-E-SHAHADAT ORDER 1984....Cont'd.

- (4) For the purpose of this section, the Commissioner shall have the same powers as are vested in a Court under the Code of Civil Procedure, 1908 (Act V of 1908), in respect of the following matters, namely –
- (a) enforcing the attendance of any person and examining the person on oath or affirmation;
 - (b) compelling the production of any accounts, records, computer-stored information, or computer;
 - (c) receiving evidence on affidavit; or
 - (d) issuing commissions for the examination of witnesses

Proceedings under the Ordinance to be judicial proceedings

Section 224 of Income Tax Ordinance, 2001

- ▶ Any proceedings before the Commissioner, Commissioner (Appeals) or Appellate Tribunal shall be treated as judicial proceedings within the meaning of sections 193 and 228 of the Pakistan Penal Code, 1860, and for the purposes of section 196 of the Pakistan Penal Code, 1860

QANUN-E-SHAHADAT ORDER 1984.....Cont'd.

- ▶ Article 164 deals with the evidence that has become available because of modern device or techniques. Telegraphic messages can be produced in evidence
- ▶ Video recording, audio cassette, video film can also be produced in evidence. The production of these materials is subject to prove that the same is genuine and not tempered

JUDICIAL PROCEEDINGS

- ▶ Judicial proceedings means discharge of duties exercisable by a Judge in a Court. To perform judicial proceedings, it is necessary to bear a judicial mind to determine what is fair and just in respect of the matter under consideration. It includes any proceedings in the course of which evidence is or may be legally required
- ▶ A proceeding in order to be judicial must relate in some way to the administration of justice or to the ascertainment of any right or liability. It was held by the Lahore High Court in Mrs. Rani v. Commissioner of Wealth Tax Lahore [1993 PTD 206] that proceedings before the tax authorities are judicial in nature

QUASI JUDICIAL

- ▶ The authorities exercising their powers are quasi judicial if not exercising judicial powers
- ▶ The concept of 'quasi judicial' implies that the act is not wholly judicial. It describes only a duty cast on the executive body or authority to conform to forms of judicial procedure in performing some acts in exercise of their executive power.

APPLICATION OF ORDER

- ▶ This QSO applies to all judicial proceedings in or before any court which includes all persons legally authorized to take evidence but will not apply to the proceedings before the arbitrator. The reason being that arbitrators are not expected to work as slaves of technicalities when they are giving award.
- ▶ Arbitrators are free to decide relevancy of question and decide the matter based on other material

ORAL EVIDENCE

- ▶ Articles 70 and 71 deal with oral evidence. Article 70 provides that all facts except the contents of documents may be proved by oral evidence
- ▶ Oral evidence means and includes statements which the Court permits or requires to be made before it by a witness, in relation to the matters of fact under inquiry

DOCUMENTARY EVIDENCE

- ▶ Chapter 5 deals with documentary evidence. Article 72 provides that the contents of the documents may be proved either by primary or by secondary evidence. Article 73 provides that primary evidence means the document itself produced for the inspection of the Court
- ▶ Under Article 74 secondary means and includes certified copies given under the provisions of QSO, copies made from the original by mechanical process, copies made from or compared with the original, counter parts of documents as against the parties who did not execute them and oral accounts of the contents of a document given by some person who has himself seen it

DOCUMENTARY EVIDENCECont'd.

- ▶ A document its mere tender gets no evidentiary value unless its contents are proved according to law

PRIMARY EVIDENCE

- ▶ Primary evidence is the best available evidence and should be produced before the Court. It is that kind of proof which in the eyes of law, affords the greatest certainty of facts in question
- ▶ The primary evidence of the contents of the document is the document itself. Where original documents were lost, the forum adjudicating upon the claim of parties take notice of copies of original documents subject to the fact that the copies are made from the originals

SECONDARY EVIDENCE

- ▶ Where existence of original document is not available, secondary evidence can be produced. Secondary evidence can only be produced when original was either lost or was not in the custody of the party wishing to produce the same
- ▶ The procedure is provided under Articles 74 and 76. Article 74 provides what is secondary evidence and Article 76 lists cases in which secondary evidence relating to documents may be given. Where original document was not produced and permission from the Court for leading secondary evidence was not obtained, copy of said document is not admissible in evidence

CONFLICT BETWEEN ORAL AND DOCUMENTARY EVIDENCE

- ▶ In case of conflict, oral evidence would have no value in the face of documentary evidence, because man may lie in order to support their causes but documents cannot. Negative oral evidence loses its value in the presence of documentary evidence

THE GENERAL CLAUSES ACT, 1897

The General Clauses Act, 1897

- ▶ The General Clauses Act, 1897 (“GCA”) has been enacted to consolidate and extend the General Clauses Acts of 1868 and 1887. The definitions given in the GCA shall apply to all Central Acts and regulations made after the commencement of the GCA
- ▶ The object of the GCA is to provide uniformity of expression by giving definitions of a series of terms in common use. It functions as one of the statutory aids of interpretation

The General Clauses Act, 1897Cont'd.

- ▶ The purpose of GCA is to place in one single statute, different provisions as regards interpretation of words and legal principles which would otherwise have to be specified separately in many different acts and regulations
- ▶ Every Province has its own General Clauses Act, which applies to the Provincial legislation

The General Clauses Act, 1897Cont'd.

What the GCA covers:

- Provisions defining certain words
- Repeal and its effect
- Revival of repealed enactments and references and construction of references to repealed enactments
- Commencement and termination of time
- Computation of time
- Measurement of distances
- Gender and Number

The General Clauses Act, 1897Cont'd.

What the GCA covers:

- Meaning of service by post
- Citation of enactments
- Saving for previous enactments
- Rules and bye laws
- Application of Act to Ordinances

The General Clauses Act, 1897Cont'd.

Caution:

- ▶ The provisions of the GCA are to be applied unless:
 - there is anything repugnant (in conflict with/ repulsive) in the subject or context (PLD 1976 SC 483)
 - the contrary is expressed in the related law or regulations
 - different intention appears in the law or regulations

The General Clauses Act, 1897Cont'd.

SECTION 5. Coming into operation of enactments

- ▶ Where any law is not expressed to come into operation on any particular day, then it shall come into operation on the day on which it receives the assent
- ▶ Unless the contrary is expressed, a law or Regulation shall be construed as coming into operation immediately on the expiration of the day preceding its commencement

The General Clauses Act, 1897Cont'd.

Effect of repeal –

- ▶ Where this Act, or any law or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not –
 - Revive anything not in force or existing at the time at which the repeal takes effect, or affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder, or
 - Affect any right, privilege, obligation or liability acquired, accrued or incurrent under any enactment so repealed, or

The General Clauses Act, 1897Cont'd.

- Affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed, or
- Affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid

The General Clauses Act, 1897Cont'd.

SECTION 9. Commencement and termination of time

- ▶ In any law or regulation, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word “from”, and, for the purpose of including the last in a series of days or any other period of time, to use the word “to”

The General Clauses Act, 1897Cont'd.

SECTION 10. Computation of time

- ▶ Where any act or proceeding is directed or allowed to be done or taken in any Court/ office on a certain day or within a prescribed period, then, if the Court/ office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court/ office is open
- ▶ The above does not apply to any act or proceeding to which the Limitation Act, 1908 is applicable

The General Clauses Act, 1897Cont'd.

SECTION 11. Measurement of distances

- ▶ In the measurement of any distance, for the purposes of any law or Regulation made after the commencement of this Act, that distance shall, unless a different intention appears, be measured in a straight line on a horizontal plane

The General Clauses Act, 1897Cont'd.

SECTION 13. Gender and number

- ▶ In all law and Regulations, unless there is anything repugnant in the subject or context:
 - words importing the masculine gender shall be taken to include Females; and
 - words in the singular shall include the plural, and vice versa

The General Clauses Act, 1897Cont'd.

SECTION 20A. Rules and Order, etc., to be published

- ▶ All rules, orders, regulations and circulars having the effect of law made or issued under any enactment shall be published in the official Gazette

The General Clauses Act, 1897Cont'd.

SECTION 23. Provisions applicable to making of rules or byelaws

- ▶ Where, by any law or Regulation, power to make rules or byelaws is expressed to be given subject to the condition of the rules or byelaws being made after previous publication, then the following provisions shall apply, namely:
 - the authority having power to make the rules or bye laws shall, before making them, publish a draft of the proposed rules or byelaws for the information of persons likely to be affected;

The General Clauses Act, 1897Cont'd.

- there shall be published with the draft a notice specifying a date on or after which the draft will be taken into consideration;
- the authority having power to make the rules or byelaws, and, where the rules or byelaws are to be made with the sanction, approval or concurrence of another authority, that authority also, shall consider any objection or suggestion which may be received from any person with respect to the draft before the date so specified;

The General Clauses Act, 1897Cont'd.

S.24A. Exercise of power under enactments:

- ▶ The authority, office or person making any order or issuing any direction under the power conferred by or under any enactment shall, so far as necessary or appropriate, give reasons for making the order or, as the case may be, for issuing the direction and shall provide a copy of the order or, as the case may be, the direction to the person affected prejudicially.
- ▶ In 2007 PTD (Trib) 1325 it has been held that the provisions of section 24A are of binding nature and the Income Tax Officer as well as all others in the hierarchy of the tax administration are bound to be fair, just, reasonable and to follow the same

The General Clauses Act, 1897Cont'd.

S.26. Provision as to offences punishable under two or more enactments

- ▶ Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence

QUESTIONS

THANK YOU