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SUPREME COURT OF PAKISTAN

FOREIGN SUPERIOR COURTS

Supreme Court of Pakistan

1. *Asad Ali v. Province of Punjab*

https://www.supremecourt.gov.pk/downloads_judgements/const.p._48_2019.pdf

Present: Mr. Justice Gulzar Ahmed, CJ, Mr. Justice Ijaz Ul Ahsan and Mr. Justice Sayyed Mazahar Ali Akbar Naqvi

Fundamental right to form or be a member of a political party guaranteed under Article 17 of the Constitution inherently implies in it the right to contest elections and, on success in such elections, to hold elected office for a duration provided by law

In the constitution petitions filed under Article 184(3) of the Constitution, the Court considered the question: whether Section 3(1) of the of the Punjab Local Government Act, 2019, which has dissolved the local governments constituted under the Punjab Local Government Act, 2013, is ultra vires the Constitution.

The Court held: "Article 17 enjoins upon the citizens right to form associations, unions, or form or be a member of a political party. This is a fundamental right given to the citizen by the Constitution. The right to form or be a member of a political party, nurtures in itself principles of democracy and liberties, which inheres in itself establishment of a popular government at the level of the State. Thus, the right to form or be a member of a political party inherently implies in it right to form or be a member of a political party and to contest elections and in succeeding such elections, to hold elected office for a duration provided by law. Therefore, the local government system established under Article 140A of the Constitution through Provincial Legislation, when translates into an elected local government for a specified period of time by law, cannot be dissolved before the period of its expiry, as such action will directly come in conflict with Article 17 of the Constitution read with Articles 140A, 7 and 32 of the Constitution." (Para 16)

The Court, after making an elaborative discussion on the provisions of Articles 140A, 7, 17 and 32 of the Constitution and referring to the previous relevant cases, answered the question in affirmative, declared Section 3(1) of the Punjab Local Government Act, 2019 to be ultra vires the Constitution and restored the Local Governments as were existing in the Province of Punjab prior to promulgation of the said Section, to complete their term in accordance with law.

2. *Wali Jan v. Govt. of KPK*

https://www.supremecourt.gov.pk/downloads_judgements/c.a._931_2020.pdf

Present: Mr. Justice Gulzar Ahmed, CJ, Mr. Justice Ijaz ul Ahsan and Mr. Justice Sayyed Mazahar Ali Akbar Naqvi

New plea cannot be allowed to be raised in the apex Court as a matter of course or right on the pretext of doing complete justice

The Court was hearing appeal against the judgment of the Service Tribunal. The appellant agitated before the Court that the fact of his acquittal in the criminal case had not been considered by the Tribunal while giving the impugned judgment.

The Court, after noting that the said fact was not pleaded in the memo of appeal before the Tribunal nor was it mentioned in the departmental appeal, refused to interfere in the judgment of the Tribunal on that ground. The Court held that "a party has no right to raise an absolutely new plea before this Court and seek a decision on it, nor could such plea be allowed to be raised as a matter of course or right on the pretext of doing complete justice." The Court further held that "this Court in its appellate jurisdiction will not generally determine a question of fact that has not been pleaded or raised by the party in the lower forum." (Para 5)

3. *Secretary, A.L.&C. Department v. Anees Ahmad*

https://www.supremecourt.gov.pk/downloads_judgements/c.a._40_2021.pdf

Present: Mr. Justice Gulzar Ahmed, CJ, Mr. Justice Mazhar Alam Khan Miankhel and Mr. Justice Sayyed Mazahar Ali Akbar Naqvi

The Departmental Promotion Committee (DPC) had not considered the case of the respondent for promotion, stating that he had retired by that time. The respondent filed appeal in the Service Tribunal, and the Tribunal by the impugned judgment directed the department to consider the case of the respondent for pro forma promotion. The Court was hearing the department's appeal against that judgment of the Tribunal.

Decision of Departmental Promotion Committee (DPC), omitting to consider the case of a government servant for promotion, is justiciable

Counsel for the department argued before the Court that only the DPC was competent to consider the grant of promotion and in case, it did not consider or grant promotion, no other forum was competent to decide the question of granting of promotion or pro forma promotion. The Court disagreed with the said argument, and held that "no doubt it is a function of the DPC to consider the case of promotion of the government servant but where the DPC, in violation of law and rules, omits to consider or omits to grant promotion, the remedies before statutory Courts/Tribunals are provided by law, and such remedies could be availed by the aggrieved government servant and it is for the Courts/Tribunals to consider and decide whether the DPC has validly omitted to consider or omitted to grant promotion in accordance with law and rules." (Para 8)

Once the case of a government servant has matured for promotion while in service and is placed before the DPC before retirement, it is incumbent upon the DPC to consider his case for promotion

The Court held that "though the law does not confer any vested right to a government servant to grant of promotion but the government servant surely has a right in law to be considered for grant of promotion…Once the case of respondent has matured for promotion while in service and placed before the DPC before retirement, it was incumbent upon the DPC to fairly, justly and honestly consider his case and then pass an order of granting promotion and in case it does not grant promotion, to give reasons for the same." (Para 9)

4. Muhammad Jamil v. Muhammad Arif

https://www.supremecourt.gov.pk/downloads_judgements/c.p._852_2020.pdf

Present: Mr. Justice Mushir Alam and Mr. Justice Qazi Muhammad Amin Ahmad

The appeal before the Court had originated from a suit, filed by a vendee, for specific performance of an agreement to sell relating to certain immoveable property. The Court examined the questions whether the time fixed in the agreement for payment of the remaining sale consideration and execution of the sale deed was essence of the contract, and whether the plaintiff (vendee) was willing and ready to perform his part of the contract, in the facts and circumstances of the case.

Mere plea of the plaintiff (vendee) that he is willing and ready to pay the consideration, without any material to substantiate it, cannot be accepted

The Court observed: "Agreement to sell…is comprised of reciprocal promises and corresponding obligations to be performed in the manner provided for. A vendee cannot seek enforcement of reciprocal obligation on the part of vender to execute sale deed, unless he demonstrate[s] that he not only has the financial capacity but he was and is also always willing and ready to meet the same…Mere plea that he is ready to pay the consideration without any material to substantiate this plea, cannot be accepted…The amount which he has to pay the defendant must of necessity to be proved to be available. Right from the date of the

execution of the contract till the date of the decree, he must prove that he is ready and willing to perform his part of the contract. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready to perform his contract." (Paras 17 and 18)

Archaic rule that generally time is not essence in contracts involving sale/purchase of immoveable property, cannot be used as a ground to grant specific performance, without considering terms of the agreement and circumstances of the case

As to the second question, the Court held: "The archaic rule that generally, time is not essence in contracts involving sale/purchase of immoveable property, could not be used as a ground to grant or otherwise specific performance, unless the circumstances that prove otherwise are highlighted and proved… [S]pecific time…set for performance of the contract, with consequences for both the parties committing breach of the timeline, made time essence of the contract." (Paras 28 and 32)

Vendee should offer to deposit the balance consideration in court to show his readiness and willingness

The Court further held: "Specific plea…raised in the written statement that for failure to make the payment of the balance sale consideration within the period stipulated in the agreement, the agreement stood rescinded and earnest amount forfeited…was sufficient notice to ring the bell of rescission, to put the Plaintiff on guard to promptly offer to deposit the balance consideration in the court to show his bonafides, readiness and willingness to perform his part of the reciprocal obligation." (Para 26)

5. *Punjab Public Service Commission v. Husnain Abbas*

https://www.supremecourt.gov.pk/downloads_judgements/c.a._359_2020.pdf

Present: Mr. Justice Gulzar Ahmed, CJ, and **Mr. Justice Ijaz Ul Ahsan**

One's legitimate expectancy cannot override or overshadow the other's constitutional or statutory right

The Punjab Public Service Commission (PPSC) advertised certain posts of a Government department and invited applications for participation in the examination to be held for appointment against the said posts. The fact of reservation of 20% zonal quota in the advertised posts, which was necessary under the appointment rules and policy, could not be mentioned in the advertisement. In the merit list issued by the PPSC, the respondent Husnain Abbas was notified to have qualified the examination and interview, and his merit in the list was within the range of number of advertised posts, but he was not issued the appoint letter. He filed a writ petition for redress of his grievance; the High Court allowed his petition and ordered for making his appointment. The PPSC, and one Samra Gull who had been appointed against one of the advertised posts on the basis of 20% zonal quota, appealed in the apex Court. The PPSC asserted that after noticing the error of not adhering to the appointment Rules and policy of 20% zonal quota, the PPSC issued a revised merit list, wherein the name of Hasnain Abbas was not within range of the number of posts advertised; he was therefore not issued the appointment letter.

It was argued before the apex Court on behalf of Hasnain Abbas that in view of non-mentioning of the fact of reservation of 20% zonal quota in the advertisement and the inclusion of his name in the first merit list, Hasnain Abbas had got a legitimate expectancy to be appointed against the advertised posts on open merit basis. The Court did not accept the plea of Hasnain Raza, accepted the appeals of the PPSC and Samra Gull, and set aside the judgment of the High Court.

The Court held that "no vested right had or could have accrued in favour of Respondent No.1 (Husnain Abbas) by virtue of an erroneous merit list which had clearly been prepared on the basis of an erroneous advertisement…published in violation of the Government policy, rules and regulations put in place by virtue of notification dated 25.05.2108. Only by reason of an error on the part of PPSC, it would neither be fair nor just to deprive a candidate from one of the Zones who had admittedly topped the merit list for zonal quota to be deprived of an appointment. Even on balance of equities, the right of the proforma Respondent (Samra Gull) stands on a better footing based upon Constitutional as well as legal protections as incorporated in the notifications in question. Compared to her case, the case of [Respondent No.1] Hussain Abbas at best stands on the foundation of a legitimate expectancy which cannot be allowed to override or overshadow another right which is based upon constitutional protections and statutory provisions put in place on the basis of an unmistakable constitutional mandate [under third proviso to Article 27(1) of the Constitution]. (Para 16)

6. Govt. of KPK v. Muhammad Younas

https://www.supremecourt.gov.pk/downloads_judgements/c.a._258_2020.pdf

Present: Mr. Justice Gulzar Ahmed, CJ, and **Mr. Justice Ijaz Ul Ahsan** and Mr. Justice Munib Akhtar

Decisions of cases on subjective feelings of sympathy, and by not adhering to the law, make the dispensation of justice variable and uncertain, which is an anathema to a system based upon laws.

On a writ petition filed by the respondent Muhammad Younas, a contract employee in a developmental project, the High Court had directed the appellant-Government to regularise his service under the Khyber Pakhtunkhwa Employees (Regularization of Services) Act, 2009. The Government appealed in the Supreme Court. The Court allowed the appeal and set aside the judgment of the High Court.

The Court held: "A plain reading of the…provisions [of the Policy governing appointment against project posts] makes it abundantly clear that contractual or *adhoc* employees appointed before 24.10.2009 i.e. the date of the commencement of the Act, were eligible for regularization. However, since the post against which the Respondent was appointed, was converted to the regular budget in 2014, it is clear that the Respondent falls outside the purview of the 2009 Act. Before the conversion of the post to the regular budget, the Respondent was simply a project employee. Under section 2(b) of the 2009 Act, project employees were categorically excluded from the benefit of regularization under section 3 of the 2009 Act. Through the Impugned Judgment, the learned High Court has, in essence, extended the cut-off date provided in the 2009 Act by almost four years which is not permissible under the law. Courts of law are required to interpret the law and can neither rewrite the law nor read into the law something which is not provided therein. No matter how sympathetic a Court may feel towards a litigant or a set of litigants, Courts are duty-bound and required by the Constitution of the Islamic Republic of Pakistan to adhere to the letter of law and not decide cases based on subjective feelings of sympathy which can vary from person to person. Law and its interpretation must be clear and consistent which is precisely why the adherence to the law is insisted upon as it lends stability to the system and increases the confidence of citizens in the law and the legal system. Involvement of subjectivity has the potential to make dispensation of justice variable and uncertain which is an anathema to a system based upon laws. Therefore, the Peshawar high Court in our opinion fell in grave error by concluding that the Respondents were entitled to regularization under the provisions of the 2009 Act despite the fact that the said Act was clearly inapplicable to them." (Para 6)

7. *Lung Fung Chinese Restaurant v. Punjab Food Authority*

https://www.supremecourt.gov.pk/downloads_judgements/c.p._1331_l_2017.pdf

Present: Mr. Justice Manzoor Ahmad Malik, **Mr. Justice Syed Mansoor Ali Shah** and Mr. Justice Amin-ud-Din Khan

A provision of the law that confers arbitrary and unguided power on an executive authority is ultra vires Article 25 of the Constitution: Section 13(1)(c) of the Punjab Food Authority Act 2011 to the extent of power to seal the premises was held to be so

A Food Safety Officer ("FSO") of the Punjab Food Authority sealed the appellant's restaurant, by a invoking his powers under Section 13(1)(c) of the Punjab Food Authority Act, 2011 ("Act"). The appellant challenged that action of the FSO and the vires of the Section 13(1)(c) of the Act, in the High Court through filing a constitution petition under Article 199 of the Constitution, but without success. The appellant impugned the judgment of the High Court in the Supreme Court. The apex Court accepted the pela of the appellant, set aside the judgment of the High Court and declared the provisions of Section 13(1)(c) of the Act, to the extent of power of the FSO to seal the premises, ultra vires the Constitution.

The Court held: "No ground or any other legislative guideline has been given in section 13(1)(c) that permits or empowers the FSO to exercise his discretion and invoke the power of sealing. Section 13(1)(c) simply states that FSO can seal any premises where he believes any food is prepared, preserved, packaged, stored, conveyed, distributed or sold…Nowhere does section 13(1)(c) provide when the sealing powers can be invoked…In the absence of any legislative policy or guideline clearly spelling out when the sealing can take place and there being no remedial process provided against sealing, the power of sealing in the hands of the FSO can easily be applied arbitrarily which cannot be permitted under our constitutional scheme, as any such act would offend fundamental rights under Articles 18, 23 and 25 of the Constitution. The power of sealing of premises by the FSO, in its present form, is therefore ex facie discriminatory. We, therefore, declare that the power of the FSO to "seal any premises" in section 13(1)(c) to be unconstitutional and illegal." (Para 5)

8. *Shahzada Qasier v. The State*

https://www.supremecourt.gov.pk/downloads_judgements/crl.p._801_l_2020.pdf

Present: Mr. Justice Manzoor Ahmad Malik, **Mr. Justice Syed Mansoor Ali Shah** and Mr. Justice Amin-ud-Din Khan

The petitioner, having failed in obtaining the relief of pre-arrest bail in lower courts, agitated his grievance against his arrest anticipated to be made by the police in a case wherein he was alleged to have conspired with the other accused persons in the commission of offence of murder. The petitioner was not alleged to have participated in the occurrence, as he was admittedly abroad at that time. The Court allowed his petition and admitted him to pre-arrest bail.

"Malafide" being a state of mind cannot always be proved through direct evidence, it is often to be inferred from the facts and circumstances of the case

The High Court had declined the relief of pre-arrest bail to the petitioner making the observation that "pre-arrest bail is an extra-ordinary relief and can only be extended to an innocent person who is implicated in the case on the basis of malafide, but the petitioner has failed to point out to any malafide." The Court commented upon the said observations of the High Court, thus: "The learned High Court did not appreciate that the 'malafide' being a state of mind cannot always be proved through direct evidence, and it is often to be inferred from the facts and circumstances of the case….Despite non-availability of the incriminating material against the accused, his implication by the complainant and the

insistence of the Police to arrest him are the circumstances which by themselves indicate the malafide on the part of the complainant and the Police, and the accused need not lead any other evidence to prove malafide on their part." (Paras 4 and 6)

Having the power to arrest is one thing, and the justification for the exercise of that power is quite another; a police officer that makes arrest of a person must be able to justify the exercise of that power in making the arrest apart from his having the power to do so

The Court, with regard to the police power to arrest a person accused of having committed a cognizable offence, observed: "No doubt, a police officer has, under Section 54 of the CrPC, the power to arrest a person who has been involved in any cognizable offence or against whom a complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned. Having the power to arrest is one thing but the justification for the exercise of that power is quite another. A police officer that makes arrest of a person must be able to justify the exercise of that power in making the arrest apart from his having the power to do so. He cannot make arrest of a person, only because he has the power to do so. He must also show sufficient grounds for making the arrest. Article 4(1)(j) of the Police Order, 2002 states this legal position when it prescribes that it is the duty of every police officer to "apprehend all persons whom he is legally authorised to apprehend and for whose apprehension sufficient grounds exist". And Rule 26.1 of the Police Rules, 1934 explains this by providing that the authority given under Section 54 of the CrPC to the police to arrest without a warrant is permissive and not obligatory. As per the said Rule whenever escape from justice or inconvenient delay in completion of the investigation or commencement of the trial is likely to result from the police failing to arrest, they are bound to do so, but in no other cases. Ordinarily no person is to be arrested straightaway only because he has been nominated as an accused person in an FIR or in any other version of the incident brought to the notice of the investigating officer by any person until the investigating officer feels satisfied that sufficient justification exists for his arrest. The investigating officers should not mechanically make the arrest of a person accused of having committed a cognizable offence, rather they must exercise their discretion in making the arrest of such person judiciously by applying their mind to the particular facts and circumstances of the case and consciously considering the question: what purpose will be served and what object will be achieved by arrest of the accused person?" (Para 5)

9. Naveed Asghar v. The State

https://www.supremecourt.gov.pk/downloads_judgements/j.p._147_2016.pdf

Present: Mr. Justice Manzoor Ahmad Malik, Mr. Justice Mazhar Alam Khan Miankhel and **Mr. Justice Syed Mansoor Ali Shah**

The Court was hearing appeal of three persons who were convicted by the lower courts for the charge of committing murder of five persons of a family by slitting open their throats through a sharp edged weapon. The incident was unseen, having been occurred in the house of the deceased persons at the night hours; the Court after reappraisal of the prosecution evidence came to the conclusion that the prosecution had failed to prove the charge against the appellants though legally admissible and reliable circumstantial evidence, beyond reasonable doubt in accordance with the law. The Court, thus, allowed the appeal and acquitted the appellants of the charge.

Gruesome nature of the offence is relevant at the stage of awarding suitable punishment after conviction, but not at the stage of appraising evidence to determine guilt of the accused person

The Court observed: "The ruthless and ghastly murder of five persons is a crime of heinous nature; but the frightful nature of

crime should not blur the eyes of justice, allowing emotions triggered by the horrifying nature of the offence to prejudge the accused. Cases are to be decided on the basis of evidence and evidence alone and not on the basis of sentiments and emotions. Gruesome, heinous or brutal nature of the offence may be relevant at the stage of awarding suitable punishment after conviction; but it is totally irrelevant at the stage of appraising or reappraising the evidence available on record to determine guilt of the accused person, as possibility of an innocent person having been wrongly involved in cases of such nature cannot be ruled out. An accused person is presumed to be innocent till the time he is proven guilty beyond reasonable doubt, and this presumption of his innocence continues until the prosecution succeeds in proving the charge against him beyond reasonable doubt on the basis of legally admissible, confidence inspiring, trustworthy and reliable evidence…It is, therefore, duty of the court to assess the probative value (weight) of every piece of evidence available on record in accordance with the settled principles of appreciation of evidence, in a dispassionate, systematic and structured manner without being influenced by the nature of the allegations. Any tendency to strain or stretch or haphazardly appreciate evidence to reach a desired or popular decision in a case must be scrupulously avoided or else highly deleterious results seriously affecting proper administration of criminal justice will follow." (Para 10)

An accused person cannot be deprived of his constitutional right to be dealt with in accordance with law, merely because he is alleged to have committed a gruesome and heinous offence

The Court emphasised the importance of the rule of law and the constitutional right of every person to be treated in accordance with law thus: "[I]n a criminal trial an accused person cannot be convicted on the basis of mere "suspicion" or "probability" unless and until the charge against him is "proved beyond reasonable doubt", a standard of proof required in criminal cases in almost all common law jurisdictions. An accused person cannot be deprived of his constitutional right to be dealt with in accordance with law, merely because he is alleged to have committed a gruesome and heinous offence. The zeal to punish an offender even in derogation or violation of the law would blur the distinction between arbitrary decisions and lawful judgments. No doubt, duty of the courts is to administer justice; but this duty is to be performed in accordance with the law and not otherwise. The mandatory requirements of law cannot be ignored by labelling them as technicalities in pursuit of the subjective administration of justice. One guilty person should not be taken to task at the sacrifice of the very basis of a democratic and civilised society, i.e., the rule of law. Tolerating acquittal of some guilty whose guilt is not proved under the law is the price which the society is to pay for the protection of their invaluable constitutional right to be treated in accordance with the law. Otherwise, every person will have to bear peril of being dealt with under the personal whims of the persons sitting in executive or judicial offices, which they in their own wisdom and subjective assessment consider good for the society." (Para 35)

10. D. G. Khan Cement Company Ltd. v. Government of Punjab

https://www.supremecourt.gov.pk/downloads_judgements/c.p._1290_l_2019.pdf

Present: Mr. Justice Manzoor Ahmad Malik and **Mr. Justice Syed Mansoor Ali Shah**

The case before the Court had stemmed from a Notification issued by the Industries, Commerce and Investment Department, Government of the Punjab ("Government"), under Sections 3 and 11 of the Punjab Industries (Control on Establishment and Enlargement) Ordinance, 1963 ("Ordinance"), introducing amendments in an earlier Notification to the effect that establishment of new Cement Plants, and enlargement and expansion of existing

Cement Plants shall not be allowed in the "Negative Area" falling within the Districts Chakwal and Khushab of the Punjab province.

The Court considered, inter alia, the questions: (i) Does the Government's decision of issuing the Notification lack statutory authority, and (ii) does the factual grounding for issuing the Notification compromise its legal validity? The Court answered both the questions in negative and, in the course of examining the said questions, discussed the Precautionary Principle in Dubio Pro Natura, and the concepts of climate change, climate justice, water justice, inter-generational justice and climate democracy, in addition to the scope of the authority of the Government to classify "Negative Area" under the Ordinance in the context of fundamental rights guaranteed by the Constitution.

Zoning of the Province into positive and negative areas is a means towards achieving organized and planned industrial growth without impinging on the social, environmental, ecological, civic and economic interests of the locals

The Court observed: "Organized and planned industrial growth is unquestionably in the public interest and is effectively regulated through section 3 of the Ordinance…The discretion of the Government to permit the setting up or enlargement of an industrial undertaking under section 3 is structured according to the conditions spelled out in section 3(b) of the Ordinance... [S]ection 3(b) refers to the area where the Government has already satisfied itself on the basis of the information available to it and after making such inquiry as to whether the industrial undertaking to be established or enlarged is prejudicial to national interest, or injurious to health of the residents of the local area in which the industrial undertaking is proposed to be set up or enlarged, or is a source of nuisance for the residents of the local area in which the industrial undertaking is proposed to be set up or enlarged and may declare such an area to be either positive or negative area or zone as the case maybe…Zoning of the Province into positive and negative areas is a means towards achieving organized and planned industrial growth without impinging on the social, environmental, ecological, civic and economic interests of the locals." (Para 4)

Legislative policy of organized and planned growth synchronizes well with our constitutional values set out in the preamble of the Constitution, as well as the Fundamental Rights and the Principles of Policy, in particular, the right to life and dignity, promotion of social and economic wellbeing of the people and safeguarding the legitimate interest of backward and depressed classes

The Court further observed: "Organized and planned growth in the world today would undoubtedly mean "sustainable development" and the terms prejudicial to national interest, injurious to health and source of nuisance would naturally encompass the pressing issues of the time i.e., climate change; environmental degradation; food and health safety; air pollution; water pollution; noise pollution; soil erosion; natural disasters; and desertification and flooding having an appreciable impact on public health, food safety, natural resource conservation, environmental protection, social equity, social choice, etc. The authority to regulate land use, introduce zones or negative or positive areas, has been recognized as the police power of the state, asserted for public welfare. The legislative policy of organized and planned growth, under the Ordinance, also synchronizes well with our constitutional values, set out in the preamble of the Constitution, as well as the Fundamental Rights and the Principles of Policy, in particular, the right to life and dignity, promotion of social and economic wellbeing of the people and safeguarding the legitimate interest of backward and depressed classes." (Para 5)

Courts while reviewing scientific and technical determinations generally exhibit deference to institutional competence because of the specialized nature of the subject matter

The Court held: "The courts while reviewing scientific and technical determinations generally exhibit deference to institutional competence because of the specialized nature of the subject matter. There is a risk that the courts will unravel layers of careful scientific work as a result of their combined ignorance and judicial second-guessing while reviewing science-based regulatory decisions. However, scientific complexity does not provide excuse to evade judicial scrutiny as it needs to be ensured that Government does not transgress its mandate or does not mangle scientific results to produce certain outcomes. Judicial oversight of specialized administrative decision-making is necessary to obviate the possibility of capture and incompetence. Accordingly, we keep ourselves restricted to the rationality of the Government's decision." (Para 14)

11. Shahbaz Garments (Pvt) Ltd. v. Government of Sindh

https://www.supremecourt.gov.pk/downloads_judgements/c.a._65_k_2019.pdf

Present: Mr. Justice Mushir Alam, Mr. Justice Maqbool Baqar and **Mr. Justice Munib Akhtar**

The Court was hearing the appeals that had arisen under the Sindh Employees' Social Security Act, 2016. The 2016 Act had replaced the Provincial Employees' Social Security Ordinance, 1965 as applicable in the Province of Sindh. The Court, in the case, considered certain constitutional dimensions, starting from the promulgation of the 1965 Ordinance as provincial legislation under the 1962 Constitution to its continuance as existing law under Article 268 of the 1973 Constitution first as a federal law and then, after the 18th Amendment, as provincial legislation and, ultimately, its replacement in Sindh by the 2016 Act. In that discourse, the Court enunciated the following principles of constitutional law:

A law enacted by one legislature (Federal or Provincial) in relation to any matter that is concurrent cannot be altered, repealed or amended by the other legislature

The Court observed: "The first point to note in relation to the Concurrent List (or any matters as are otherwise concurrent), and it is of fundamental constitutional importance, is that it is only the legislative field that is concurrent and not the laws made by the respective legislatures. Each law is distinct and peculiar to the legislature that makes it and it cannot be "acted upon", i.e., amended, substituted, altered or repealed by the other legislature." (Para 6)

Parliament was the appropriate legislature for an existing law that, in its pith and substance, was relatable to an entry on the Concurrent Legislative List, to alter, repeal or amend it under Article 268 of the Constitution

The Court held: **"**Article 268 provided that the appropriate legislature for any particular existing law could alter, repeal or amend it. What then was the appropriate legislature for an existing law that, in its pith and substance, was relatable to an entry on the Concurrent List, i.e., could alter, repeal or amend it? The answer was provided in Article 243 [sic–143] as it stood on the commencing day of the 1973 Constitution… As Article 243 [sic–143] made clear, a provincial law made under the 1973 Constitution in relation to any matter relatable to any entry of the Concurrent List was void to the extent of its repugnancy with any federal law so made or any existing law that, in its pith and substance, was so relatable. In other words, a Provincial Assembly could not alter, repeal or amend an existing law that in its pith and substance was relatable to an entry on the Concurrent List. It followed that only Parliament could do so, i.e., it was the appropriate legislature in relation to such existing laws. In other words, such laws stood allocated to the Federation

and this was so regardless of whether the existing law would have been regarded as a "federal" or "central" law or a "provincial" law under whatever constitutional dispensation it had been first enacted." (Para 6)

12. State Life Insurance Corporation of Pakistan v. Atta ur Rehman

https://www.supremecourt.gov.pk/downloads_judgements/c.a._350_2020.pdf

Present: Mr. Justice Umar Ata Bandial, Mr. Justice Sajjad Ali Shah and **Mr. Justice Munib Akhtar**

Rule of uberrimae fidei, i.e., of the utmost good faith, applicable in contracts of insurance and the conditions necessary to be established for avoiding the contract on the basis of breach of that rule explained

The Insurance Tribunal had decreed the insurance claim of the respondent lodged by him regarding the life insurance policy of his predecessor with the appellant, an insurance company, and the High Court had dismissed the appeal of the appellant by means of the judgment impugned before the Supreme Court. Before the apex Court, the primary plea taken by the appellant, while referring to Section 75 of the Insurance Ordinance 2000, was that there had been a breach of the duty of utmost good faith by the insured. It was submitted that the insured had made a material concealment by not disclosing his coronary disease, which vitiated the policy and allowed the appellant to avoid the same. In the said background, the Court considered some aspects of the rule of *uberrimae fidei,* i.e., of the utmost good faith. The Court observed: "Contracts of insurance belong to that limited category which are regarded as being *uberrimae fidei,* i.e., of the utmost good faith. This rule was developed over centuries by the common law in its many facets and aspects and was regarded as fundamental to insurance law. Section 75 merely codified the central aspect of the rule." (Para 4)

The Court set out certain extracts from a well-known treatise on the subject of Insurance law, namely, *MacGillivray on Insurance Law (14th ed., 2018),* and held that "a breach of the duty will allow the insurer to avoid the contract only if (a) the fact not disclosed was material to the insurer's appraisal of the risk; (b) was known or deemed known to the insured; (c) but was not known or deemed known to the insurer; (d) and it is for the insurer to show that the nondisclosure induced it to make the contract on the relevant terms." (Para 4)

Section 80 of the Insurance Ordinance 2000 makes special provisions for a contract of life insurance and creates a legal bar to be overcome by the insurer to avoid the contract under the rule of uberrimae fidei

The Court noted that "Section 80…makes certain special provisions for a policy of life insurance," and held that, under Section 80, "[a]fter two years, a life insurance policy cannot be avoided on the ground of any falsity or inaccuracy in, or of, any statement made of the sort indicated in the provisions, unless the insurer is able to show that (a) the statement was on a material matter or suppressed facts that it was material to disclose; (b) it was made fraudulently by the insured; and (c) the insured knew at the time of making the statement that it was false or suppressed facts that it was material to disclose. The conditions are cumulative, i.e., the failure by the insurer to establish any one of them is fatal for the defence (and the onus lies on the latter)." (Para 8)

The Court held that "Section 80 creates a legal bar which has to be overcome by the insurer, if it can do so in terms thereof. The bar itself is automatic and, given that it is triggered merely by passage of the stipulated period, hardly requires any evidence to be led by the claimants. It is for the insurer to take the plea that it is not hit by the bar, and then establish its case by leading appropriate evidence that the three conditions stipulated therein exist." (Para 8)

The Court while dismissing the appeal concluded: "In the present case, the appellant did not take the plea that the bar contained in s. 80 did not apply in the facts and circumstances of the case. Even otherwise, there is nothing on the record to show that the non-disclosure by the insured…was fraudulent. On any view of the matter the statement made by him [the insured] could not be taken by the appellant to defeat the policy and avoid the contract." (Para 9)

13. Akhtar Sultana v. Muzaffar Khan

https://www.supremecourt.gov.pk/downloads_judgements/c.p._3249_2015.pdf

Present: Mr. Justice Mushir Alam, **Mr. Justice Yahya Afridi** and Mr. Justice Qazi Muhammad Amin Ahmed

The petitioner had sought for leave to appeal from the apex Court of the country against the concurrent judgments of three courts below decreeing the civil suit filed by the respondents for declaration of their ownership rights of the suit property, and disputing the validity of two gift mutations and a sale deed in favour of the petitioner and of the deed of general power of attorney on the basis of which the said mutations and sale deed had purportedly been got sanctioned and registered. The apex Court, in the interest of justice, examined the findings of the courts below in the light of evidence produced by the parties in the suit, and declined the leave sought for holding that the petition was bereft of factual and legal merit. Before making the said examination, the Court elaborated the concepts of relevancy, admissibility, proof and evidentiary value of a piece of evidence, particularly the documentary one.

Relevancy, admissibility, proof, and evidentiary value of a piece of evidence elaborated

The Court observed: "The expression "relevancy" and "admissibility" have their own distinct legal implications under the Qanun-e-Shahadat as, more often than not, facts which are relevant may not be admissible. On the one hand, a fact is "relevant" if it is logically probative or disprobative of the fact-in-issue, which requires proof. On the other hand, a fact is "admissible" if it is relevant and not excluded by any exclusionary provision, express or implied… Mode of proof is the procedure by which the "relevant" and "admissible" facts have to be proved….[A] "relevant" and "admissible" fact is admitted as a piece of evidence, only when the same has been proved by the party asserting the same…Once a fact crosses the threshold of "relevancy", "admissibility" and "proof", as mandated under the provisions of the Qanun-e-Shahadat, would it be said to be admitted, for its evidentiary value to be adjudged by the trial court. The evidentiary value or in other words, weight of evidence, is actually a qualitative assessment made by the trial judge of the probative value of the proved fact. Unlike "admissibility", the evidentiary value of a piece of evidence cannot be determined by fixed rules, since it depends mainly on common sense, logic and experience and is determined by the trial judge, keeping in view the peculiarities of each case. (Paras 10-14)

Difference between the objection as to "mode of proof" and the objection of "absence of proof" explained

The Court held: "It is also important to note that the objection as to "mode of proof" should not be confused with the objection of "absence of proof". Absence of proof goes to the very root of admissibility of the document as a piece of evidence; therefore, this objection can be raised at any stage, as the first proviso to Article 161 of the Qanun-e-Shahadat commands that "the judgment must be based upon facts declared by this Order to be relevant, and duly proved". In other words, when the Qanun-e-Shahadat provides several modes of proving a relevant fact and a party adopts a particular mode that is permissible only in certain circumstances, the failure to take objection when that mode is adopted, estops the opposing party to raise, at a subsequent stage, the objection to the mode of proof adopted. However, when the

Qanun-e-Shahadat provides only one mode of proving a relevant fact and that mode is not adopted, or when it provides several modes of proving a relevant fact and none of them is adopted, such a case falls within the purview of "absence of proof", and not "mode of proof"; therefore, the objection thereto can be taken at any stage, even if it has not earlier been taken. (Para 13)

14. Tariq Ahmed v. NAB

https://www.supremecourt.gov.pk/downloads_judgements/c.p._1017_2021.pdf

Present: Mr. Justice Mushir Alam, Mr. Justice Yahya Afridi and **Mr. Justice Qazi Muhammad Amin Ahmed**

Mode of allowing the bail petitions in NAB reference, in lieu of deposit of the amounts allegedly embezzled by the accused persons, disapproved

In the petitions for leave to appeal, the Court examined the legality of the orders passed by the High Court of Sindh whereby that High Court had allowed the bail petitions both pre as well as post arrest, in different NAB references, in lieu of deposit of the amounts allegedly embezzled by the accused persons. The Court disapproved the said mode adopted by the High Court for deciding the bail petitions, and held that "a wholesale treatment of motions seeking bails, pre-arrest as well as post arrest, in an omnibus manner, in isolation to the distinct facts and circumstances of each case as well as different legal regimes applicable thereto, fails to commend our approval." (Para 3)

The same bench of the apex Court in another case, **Maqbool Ahmed v. NAB** (https://www.supremecourt.gov.pk/downloads_judgements/c.p._3031_2021.pdf), involving the identical issue held: "Such directions for release of an accused on bail have since been held by this Court as ultra vires in judgments more than one. An accused seeking bail desires transfer of his custody from Superintendent of the Jail, where he is confined, to his surety who undertakes his production as and when required by the Court and for that he has to make out a case in accordance with the law applicable thereto; he cannot be allowed or required to barter his freedom." (Para 2)

The Court observed that in the case of Talat Ishaq v. NAB (PLD 2019 SC 12) considerations for grant of post arrest bail to an accused confronting charge under the NAB Ordinance have clearly been illustrated, therefore, an accused facing indictment in a NAB reference has to qualify the parameters set down in the said case for grant of relief of bail to him. The Court converted the petitions into appeals and allowed the same, setting aside the orders impugned, and directed the High Court for deciding the bail petitions afresh on merit having regard to the law declared in Talat Ishaq case.

15. Muhammad Arshad v. Khurshid Begum

https://www.supremecourt.gov.pk/downloads_judgements/c.p._1530_2019.pdf

Present: Mr. Justice Mushir Alam, Mr. Justice Yahya Afridi and **Mr. Justice Qazi Muhammad Amin Ahmed**

Where fraud and collusion is alleged by a third person against the parties to a family suit in obtaining the decree, an application under Section 12(2) of the Code of Civil Procedure, 1908 filed by that person in family court is maintainable

The petitioner being aggrieved of attachment of his property in execution of a decree passed by a family court and confirmed by the appellate court in a family suit filed by respondent No.1 (wife) for recovery of maintenance, dower and dowry against respondent No.6 (her husband) filed an application under Section 12(2) of the Code of Civil Procedure, 1908 in the appellate court for setting aside the said decree, alleging fraud and collusion against them in obtaining the said decree to infringe his proprietary rights in the property purchased by him from respondent No.6. The said application was dismissed by the appellate court, treating it to be not maintainable under the Family Courts Act, 1964, and the

constitution petition filed by the petitioner in the High Court against that order of the appellate court also failed. The petitioner knocked at the door of the apex Court of the country for redress of his grievance by filing petition for leave to appeal.

The Court, thus, considered the question: whether exclusion of the provisions of the Code of Civil Procedure 1908, barring sections 10 and 11 thereof, stood in impediment to the petitioner's approaching the Family Court for reexamination of the judgment within the contemplation of section 12 (2) of the Code? The Court answered the question in negative, and held that the application filed by the petitioner under Section 12 (2) of the Code was maintainable. In reaching that conclusion, the Court observed: "The exclusion of normal rules of procedure and proof, applicable in civil plenary jurisdiction for adjudication of disputes in proceedings before a Family Court, is essentially designed to circumvent delays in disposal of sustenance claims by the vulnerable; this does not derogate its status as a Court nor takes away its inherent jurisdiction to protect its orders and decrees from the taints of fraud and misrepresentation as such powers must vest in every tribunal to ensure that stream of justice runs pure and clean; such intendment is important yet for another reason, as at times, adjudications by a Family Court may involve decisions with far reaching implications/consequences for a spouse or a sibling and, thus, there must exist a mechanism to recall or rectify outcome of any sinister or oblique manipulation, therefore, we find no clog on the authority of a Family Court to reexamine its earlier decision with a view to secure the ends of justice and prevent abuse of its jurisdiction and for the said purpose, in the absence of any express prohibition in the Act, it can borrow the procedure from available avenues, chartered by law…Impact of fraud practiced upon tribunals exercising plenary or limited jurisdictions, respectively, cannot be procedurally classified as in all jurisdictions it unredeemedly vitiates the very solemnity of adjudication, a wrong that cannot be countenanced and must be remedied through dynamic application of equitable principles of law." (Para 4)

16. Ijaz Bashir Qureshi v. Shams-un-Nisa Qureshi

https://www.supremecourt.gov.pk/downloads_judgements/c.a._1498_2016.pdf

Present: Mr. Justice Mushir Alam, Mr. Justice Sardar Tariq Masood and **Mr. Justice Amin-Ud-Din Khan**

The appeal before the Court had arisen of a civil suit filed by the appellant for declaration of his ownership rights in the suit property and challenging a gift deed executed by his mother, holding a purported irrevocable power of attorney on his behalf as well as on behalf of his other siblings, in favour of the respondent (his sister). The trial court had decreed the suit, but the High Court reversed the judgment of the trial court in appeal and dismissed the suit. The appellant knocked at the door of the Supreme Court, by filing appeal against the judgment of the High Court. The apex Court took up two questions for determination: (i) Does the writing 'irrevocable' on the caption of the deed make the power of attorney 'irrevocable'? and (ii) Can an attorney transfer the property of principal through gift? The Court answered the questions in the following terms:

Simple mentioning "irrevocable" in the caption of the deed of a power of attorney does not make it an irrevocable power of attorney

The Court held that "Its nature is to be determined by the Court [even] when it is written irrevocable…..[T]he test is where agent has himself an interest in the property which forms subject matter of the agency, the same cannot be terminated to the prejudice of such interest, in the absence of any express contract. Admittedly, the power of attorney subject matter of this suit was not given for consideration, therefore, it cannot be termed as irrevocable general Power of Attorney. It

was simply General Power of Attorney with the powers of transfer the property through sale etc. including through gift…[S]imply [by] mentioning in the caption of a power of attorney "irrevocable" it does not become an irrevocable power of attorney.(Para 6)

An attorney cannot by himself transfer the property of principal through gift even if the deed of power of attorney contains such power

Regarding the second question, the Court observed: "[I]n our view the gift can be made by the owner/principal only. The agent cannot [by] himself or herself transfer the immoveable property of principal through gift on the basis of any power of attorney even if the power of attorney contains the powers to transfer the property through gift. These powers can only be used for completion of codal formalities of the gift which must be [made] by the owner/principal himself/herself. The attorney cannot transfer the property of principal [by] himself/herself to anyone through gift and if that transfer is [made] by the attorney himself/herself, that is [an] invalid transfer. (Para 7)

The Court concluded that the respondent had not claimed that the gift of the suit property was made by the principal (appellant) rather she claimed the gift to have been made by the attorney, of the share of the appellant in the suit property, therefore, the gift is invalid to the extent of the share of the appellant. With the said findings, the Court allowed the appeal, set aside the judgment of the High Court and restored that of the trial court.

17. Shamona Badshah Qaisarani v. Election Tribunal

https://www.supremecourt.gov.pk/downloads_judgements/c.a._1399_2019.pdf

Present: Mr. Justice Umar Ata Bandial, Mr. Justice Qazi Muhammad Amin Ahmed and **Mr. Justice Sayyed Mazahar Ali Akbar Naqvi**

Every non-disclosure or mis-declaration of assets would not be sufficient enough to permanently disqualify a member of the Parliament or a candidate and to declare him to be dishonest. Some non-disclosures or mis-declarations can be termed as bad judgment or negligence but not dishonesty

The Court was hearing an appeal against a judgment passed by the Lahore High Court whereby that High Court had dismissed the constitution petition filed by the appellant and upheld the order of the Election Tribunal, rejecting the nomination papers of the appellants to contest election for a seat of a Provincial Assembly and declaring her to be not honest and thus disqualified to contest elections under Article 62(1)(f) of the Constitution, on the basis of non-mentioning of her agricultural property which she had inherited from her parents.

The Court examined, *inter alia*, the question: whether the non-mentioning of such property by the appellant in her nomination papers was sufficient enough to declare her to be dishonest and to disqualify her permanently in terms of Article 62(1)(f) of the Constitution. The Court answered the question in negative while concluding that "No wrongdoing was associated with the acquisition of the property or its retention, therefore,…the act of non-mentioning of the property could not have been termed as dishonest act, rather it could only be termed as bad judgment or negligence but certainly not dishonesty." (Para 9)

The Court, after referring to certain previous cases, held that "every nondisclosure or mis-declaration would not be sufficient enough to permanently disqualify a member of the Parliament or a candidate. The purpose and intention needs to be seen behind the nondisclosure or mis-declaration. The returned candidate would be disqualified only when if he/she has dishonestly acquired assets and is hiding them to derive certain benefits. If the non-disclosure or mis-declaration is such that it gives an illegal advantage to a candidate then it would lead to termination of his candidature….[M]erely the fact that a candidate has not declared an

asset in the nomination papers would not end in his disqualification but it has to be seen whether the act of non-disclosure of the asset is with dishonest intent or not and only if there is dishonest intent behind the nondisclosure, the candidate would be disqualified. It is the credibility of the explanation that would be the determining factor as to whether non-disclosure of an asset carries with it the element of dishonesty or not…[T]here can be many examples where it can be safely said that an omission on the face of it is not dishonest. Omission to list an inherited property or the pensionary benefits received by one's spouse or the plot allotted by the government in acknowledgment of services rendered are some of the instances which cannot be said that a member intentionally concealed its disclosure in order to cover some financial wrongdoing. Suchlike omissions at best could be categorized as bad judgment or negligence but not dishonesty." (Paras 7-8)

18. Khalil Ullah Kakar v. Inspector General of Police

https://www.supremecourt.gov.pk/downloads_judgements/c.a._909_2020.pdf

Present: Mr. Justice Gulzar Ahmed, CJ, Mr. Justice Ijaz Ul Ahsan and Mr. **Justice Sayyed Mazahar Ali Akbar Naqvi**

High Court cannot exercise its jurisdiction under Article 199 of the Constitution in respect of any matter relating to the terms and conditions of service of civil servants even if the orders of the departmental authorities are mala fide, ultra vires or coram non judice

The High Court had allowed the constitution petitions filed, under Article 199 of the Constitution, by the respondents (some Deputy Superintendents of Police in legal/prosecution branch) and directed the Provincial Police Officer to issue a joint seniority list of Deputy Superintendents of Police of all cadres/branches, and the appellants (Deputy Superintendents of Police in other branches) challenged that judgment of the High Court in the Supreme Court. The apex Court considered, *inter alia*, the question: whether the constitution petitions were maintainable before the High Court in view of the specific bar contained in Article 212(2) of the Constitution of the Islamic Republic of Pakistan, 1973.

The Court, after making an elaborative discussion on the provisions of Article 212 of the Constitution and referring to the previous relevant cases, answered the question in negative. The Court observed: "Article 212(2) of the Constitution specifically places an embargo on all other courts except Service Tribunal to grant an injunction, make any order or 'entertain' any proceedings in respect of any matter relating to the terms and conditions of service even if they are *mala fide, ultra vires* or *coram non judice*…The word 'entertain' used in Article 212(2) of the Constitution is of significance importance. This means that any petition or proceeding relating to the terms and conditions of service even should not be entertained by the High Court in its constitutional jurisdiction under Article 199 of the Constitution. In view of the facts and circumstances of this case, entertaining and then proceeding with the constitutional petitions amounts to defeating the express Constitutional mandate under which Tribunal is vested with jurisdiction to deal with the matters of civil servants." (Paras 8-9)

The Court further observed: "The jurisdiction conferred on the High Courts under Article 199 of the Constitution is an extraordinary relief and the same has to be exercised in aid of justice and not to interfere in jurisdictions of other statutory forums. When the law has provided an adequate remedy, constitutional jurisdiction under Article 199 of the Constitution cannot be exercised…[T]endency to bypass remedy provided under relevant statue by resorting to constitutional jurisdiction is to be discouraged so that legislative intent is not defeated." (Para 11)

Foreign Superior Courts

SUPREME COURT OF USA

1. *Brnovich v Democratic National Committee*

https://www.supremecourt.gov/opinions/20pdf/19-1257_new_4g15.pdf

Coram:
Roberts CJ, Thomas, Breyer, **Alito**, Sotomayor, **Kagan**, Gorsuch, Kavanaugh, and Barrett JJ

Arizona voting restrictions upheld

At issue, in the case, were two Arizona laws: one banned the collection of absentee ballots by anyone other than a relative or caregiver, and the other threw out any ballots cast in the wrong precinct. A federal appeals court struck down both provisions, ruling that they had an unequal impact on minority voters and that there was no evidence of fraud that would have justified their use.

The Supreme Court, however, reinstated the state laws, declaring that unequal impact on minorities in this context was relatively minor, that other states have similar laws and that states don't have to wait for fraud to occur before enacting laws to prevent it. The 6-3 vote was divided along ideological lines. Justice Samuel Alito wrote the decision for the court's conservative majority. He concluded that the relevant part of the Voting Rights Act of 1965 can be used to strike down voting restrictions only when they impose substantial and disproportionate burdens on minority voters, effectively blocking their ability to cast a ballot. "Where a state provides multiple ways to vote, any burden imposed on voters who choose one of the available options cannot be evaluated without also taking into account the other available means." Justice Alito wrote that states have a legitimate interest in rooting out fraud. "Fraud can affect the outcome of a close election, and fraudulent votes dilute the right of citizens to cast ballots that carry appropriate weight. Fraud can also undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome." Justice Alito said that the court was not announcing an ironclad standard for lower courts to apply in cases challenging voting restrictions. "As this is our first foray into the area, we think it sufficient for present purposes to identify certain guideposts that lead us to our decision in these cases." He proceeded to sketch out five guideposts:

- the burden imposed by the challenged restriction must be substantial
- courts should consider "the degree to which a challenged rule has a long pedigree or is in widespread use in the United States"
- "the size of any disparities in a rule's impact on members of different racial or ethnic groups is also an important factor"
- courts must consider all of the ways voters can cast ballots
- courts should consider the state's reason for the restriction

In dissent, Justice Elena Kagan wrote that the majority had done violence to the Voting Rights Act, a civil rights landmark. "Wherever it can, the majority gives a cramped reading to broad language. And then it uses that reading to uphold two election laws from Arizona that discriminate against minority voters." "What is tragic here," she wrote, "is that the court has (yet again) rewritten — in order to weaken — a statute that stands as a monument to America's greatness and protects against its basest impulses. What is tragic is that the court has damaged a statute designed to bring about 'the end of discrimination in voting.'" Justice Kagan said the majority's list of guideposts amounted to a recipe for voter suppression. "The list — not a test, the majority hastens to assure us, with delusions of modesty — stacks the deck against minority citizens' voting rights," she wrote. "Never mind that Congress drafted a statute to protect those rights — to prohibit any

number of schemes the majority's non-test test makes it possible to save."

SUPREME COURT OF UK

2. *Royal Mail Group Ltd (Respondent) v Efobi (Appellant)*

https://www.supremecourt.uk/cases/docs/uksc-2019-0068-judgment.pdf

Coram:
Lord Hodge (Deputy President), Lord Briggs, Lady Arden, Lord Hamblen, **Lord Leggatt**

Racial discrimination --- adverse inference in service matters

The Appellant, Mr Efobi, worked as a postman for the Respondent, Royal Mail. He was born in Nigeria and identifies as a black African and Nigerian. He has qualifications in computing and wished to obtain a managerial or technical role within Royal Mail. He applied unsuccessfully for over 30 such jobs. He, therefore, brought a claim against Royal Mail in the employment tribunal alleging that the rejection of his applications was the result of direct or indirect discrimination because of his race. He also made allegations of racial harassment and victimization.

The law imposed a two-stage test in discrimination cases. At the first stage, the claimant had the burden of proving facts from which the tribunal could conclude, in the absence of an adequate explanation, that an unlawful act of discrimination had been committed. If the claimant did not prove such facts, the claim failed. If the claimant proved such facts, the burden shifted to the employer to explain the reason(s) for its treatment of the claimant and to satisfy the tribunal that race (or another protected characteristic) played no part in those reasons. Unless the employer satisfied this burden, the claim succeeded.

Mr Efobi argued that the employment tribunal should have drawn inferences adverse to Royal Mail from the fact that none of the actual decision-makers gave evidence. The Supreme Court emphasized that tribunals should be free to draw, or decline to draw, inferences in the case before them using their common sense. In deciding whether to draw an adverse inference from the absence of a witness, relevant considerations will naturally include whether the witness was available to give evidence, what evidence the witness could have given, what other evidence there was bearing on the points on which the witness could have given evidence and the significance of those points in the context of the case as whole. How such matters should be assessed cannot be encapsulated in a set of legal rules.

The Supreme Court held that the employment tribunal in the present case cannot be faulted as a matter of law for not drawing the adverse inferences (that Mr Efobi argued for) from the fact that none of the actual decision-makers gave evidence. In any case, even if those inferences had been drawn, the facts that the recruiter had been aware of Mr Efobi's race and that the successful candidate was of a different race from him would not, without more, have enabled the employment tribunal to conclude that, in the absence of any other explanation, that there had been discrimination. Hence the burden of proof did not shift to Royal Mail to explain its decisions and the tribunal was entitled to dismiss the claim.

3. *Sanambar v Secretary of State for the Home Department*

https://www.supremecourt.uk/cases/docs/uksc-2019-0086-judgment.pdf

Coram:
Lord Reed, President; Lord Hodge, Deputy President; Lord Sales; Lord Stephens; **Sir Declan Morgan**

Deportation of a "foreign criminal" interferes with that individual's rights to private and family life under Article 8 of the European Convention on Human Rights

The appellant is a national of Iran. He was born in 1995. He arrived in the UK with his mother in 2005, having been given indefinite leave to remain. He has no family ties with Iran, although he speaks Farsi with his mother. However, he went on to commit a number of criminal offences in UK. In 2013, the Secretary of State decided that he could be deported to Iran, finding that the public interest in deportation outweighed other factors and would not breach his right to private and family life under Article 8 of the European Convention on Human Rights.

He succeeded in overturning the Secretary of State's deportation decision on appeal to the First-tier Tribunal (FtT). However, the Upper Tribunal (UT) set aside the FtT's decision on the basis the FtT had made a material error of law. Thus, he approached to the Supreme Court of UK.

The Supreme Court concluded that the UT gave careful consideration to the particular circumstances of the appellant's situation. It considered the nature and seriousness of the offences, the background of previous offending, and the continuing risks of re-offending despite the rehabilitative measures the appellant had undergone in custody. The UT accepted that the appellant had an established private and family life in the UK and was socially and culturally integrated. It did not, however, accept that there were very significant obstacles to the appellant's integration in Iran. It acknowledged that the appellant had not been in Iran since he was nine, was used to the life in and relative freedoms of the UK, could not read or write Farsi and would have difficulty in obtaining employment or training. On the other hand, the appellant spoke Farsi. He was academically capable, able to articulate himself appropriately and ambitious. He was not utterly isolated from Iranian culture, particularly because of his mother's ties to the country. While her ties were not his ties, the fact that she had visited Iran, retained a connection to the country and had a close friend there were factors which could reasonably be said to afford the appellant some assistance in terms of integration. There was ample material to justify the Upper Tribunal's conclusion that the obstacles to the appellant's integration in Iran were not very significant.

Accordingly, having regard to the UT's careful consideration of the *Üner* criteria, the seriousness of the appellant's offending and continuing risk of future offending, the Upper Tribunal was entitled to conclude that the deportation of the appellant would not be disproportionate or that there were very compelling reasons to prevent it. It gave relevant and sufficient reasons for its conclusion. There was substantial material to support its view that the interference with the appellant's private and family life was outweighed by the public interest in the prevention of crime.

4. Triple Point Technology, Inc v PTT Public Company Ltd

https://www.supremecourt.uk/cases/docs/uksc-2019-0074-judgment.pdf

Coram:

Lord Hodge (Deputy President), **Lady Arden**, Lord Sales, Lord Leggatt, Lord Burrows

The guidelines for the award of liquidated damages in case of termination of contract stated

Termination of a contract will only have a prospective effect on the parties' rights and obligations. If an entitlement to liquidated damages has accrued at the time of termination, such termination should not deprive the employer of its right to recover such damages, unless the contract clearly provides. Unless the contract provides clear wording to the contrary, the accrual of liquidated damages comes to an end on termination of the contract. After the contract is terminated the parties must seek damages for breach of contract under the general law. The employer is at liberty to prove any claim that it might have for unliquidated damages.

5. *Manchester Building Society v Grant Thornton UK LLP*

https://www.supremecourt.uk/cases/docs/uksc-2019-0040-judgment.pdf

Coram:

Lord Reed (President), **Lord Hodge** (Deputy President), Lady Black, Lord Kitchin, **Lord Sales**, Lord Leggatt, Lord Burrows

The professional advice and the scope of duty of care of the professional advisor

The Supreme Court affirmed that the appellant suffered a loss falling within the scope of the duty of care assumed by professional advisor, having regard to the purpose for which it gave its professional advice. The professional advisor is liable for the loss suffered by the appellant on account of advice given by him. The court considered that the more appropriate test should be in the case of negligent advice given by a professional adviser one looks to see what risk the duty was supposed to guard against and then look to see whether the loss suffered represented the fruition of that risk.

6. *General Dynamics United Kingdom Ltd v State of Libya*

https://www.supremecourt.uk/cases/docs/uksc-2019-0166-judgment.pdf

Coram:

Lord Lloyd-Jones, Lord Briggs, Lady Arden, Lord Burrows, Lord Stephens

The enforcement of an arbitral award against a foreign state

The Supreme Court affirmed that for enforcement of arbitral award against a foreign state it is mandatory that the defendant state received notice of the proceedings against it so that it had adequate time and opportunity to respond to proceedings of whatever nature which affected its interests.

7. *Her Majesty's Attorney General v Crosland*

https://www.supremecourt.uk/cases/docs/uksc-2021-0099-judgment.pdf

Coram:

Lord Lloyd-Jones, **Lord Hamblen**, Lord Stephens

The ulterior intention is not necessary to prove criminal contempt of court.

The criminal contempt of court is a conduct which goes beyond mere non-compliance with a court order and involves a serious interference with the administration of justice. It must be proved that the accused knew of the court order and deliberately breached it. It is not necessary to prove an ulterior intention to interfere with the administration of justice.

8. *Test Claimants in the Franked Investment Income Group Litigation v Commissioners of Inland Revenue*

https://www.supremecourt.uk/cases/uksc-2016-0229.html

Coram:

Lord Reed, President Lord Hodge, Deputy President Lord Carnwath Lord Lloyd-Jones Lord Briggs Lord Sales Lord Hamblen

That section 32(1)(c) of the Limitation Act 1980 applies only to mistakes of fact and not to mistakes of law.

This appeal arises in the course of long-running proceedings known as the Franked Investment Income ("FII") Group Litigation. The FII Group Litigation brings together many claims concerning the way in which advance corporation tax and corporation tax used to be charged on dividends received by UK-resident companies from non-resident subsidiaries. The Respondents to this appeal are claimants within the FII Group Litigation whose cases have been selected to proceed as test claims on certain common issues ("the

Test Claimants"). These issues are being determined in phases, with the courts' decisions affecting not just the other claims within the FII Group Litigation, but potentially also a number of other sets of proceedings brought by corporate taxpayers against the Commissioners for Her Majesty's Revenue and Customs ("HMRC")

The Test Claimants' case is that the differences between their tax treatment and that of wholly UK-resident groups of companies breached the EU Treaty provisions which guarantee freedom of establishment and free movement of capital. They seek repayment by HMRC of the tax wrongly paid, together with interest, dating back to the UK's entry to the EU in 1973.

Restitutionary claims for the recovery of money must normally be brought within six years from the date on which the money was paid. As an exception to that general rule, section 32(1)(c) of the Limitation Act 1980 provides that, in respect of an "action for relief from the consequences of a mistake", the limitation period only begins to run when the claimant "has discovered the … mistake … or could with reasonable diligence have discovered it."

Before the Court of Appeal, the Test Claimants argued that, where a claimant is seeking to recover money paid under a mistake of law, the effect of section 32(1)(c) is to postpone the commencement of the limitation period until such time as the true state of the law is established by a judicial decision from which there lies no right of appeal. In their cases, the Test Claimants said that this was when, in 2006, the Court of Justice of the European Union decided that relevant aspects of the UK tax regime were incompatible with EU law. HMRC argued that time instead began to run in 2001, when the Court of Justice decided that other aspects of the UK tax regime breached EU law. The Court of Appeal found in favour of the Test Claimants on this issue.

On appeal to the Supreme Court, HMRC argued that section 32(1)(c) of the Limitation Act 1980 applies only to mistakes of fact and not to mistakes of law, or alternatively that the Test Claimants could reasonably have discovered their mistake more than six years before they issued their claims in 2003. On either approach, a proportion of the claims would be time-barred.

9. Khan v Meadows

https://www.supremecourt.uk/cases/docs/uksc-2019-0011-judgment.pdf

Coram:

Lord Reed, President Lord Hodge, Deputy President Lady Black Lord Kitchin Lord Sales Lord Leggatt Lord Burrows

Doctor was held liable only for losses falling within the scope of her duty of care to advise

In 2006, the appellant, Ms Meadows, consulted her GP practice to establish whether she was a carrier of the haemophilia gene. Following blood tests, she was negligently led to believe by the respondent, Dr Khan, that she was not a carrier. In fact, the tests only confirmed that she did not herself have haemophilia. In 2010, Ms Meadows became pregnant with her son, Adejuwon. Shortly after his birth Adejuwon was diagnosed as having haemophilia. Subsequent genetic testing confirmed Ms Meadows was a carrier of the gene. Had Ms Meadows known that she was a carrier, she would have undergone foetal testing for haemophilia when she was pregnant. This would have revealed the foetus was affected. Ms Meadows would then have chosen to

terminate her pregnancy, and her son would not have been born.

It is not in dispute that Dr Khan is liable in negligence for the costs of bringing up Adejuwon attributable to his haemophilia. The dispute between the parties arises from the fact that Adejuwon was also born and subsequently diagnosed with autism, a condition which is unrelated to his haemophilia. The question is whether Dr Khan is liable for all costs related to Adejuwon's disabilities arising from the pregnancy or only those associated with his haemophilia. The High Court held that Dr Khan was liable for costs associated with both Adejuwon's haemophilia and autism. The Court of Appeal allowed Dr Khan's appeal, finding her liable for costs associated with Adejuwon's haemophilia only. In so doing, it considered the scope of duty principle as illustrated in SAAMCO as determinative of the issue.

The Supreme Court unanimously dismisses the appeal. It holds that there is no principled basis for excluding clinical negligence from the ambit of the scope of duty principle. Dr Khan is liable only for losses falling within the scope of her duty of care to advise Ms Meadows on whether or not she was a carrier of the haemophilia gene. She is not liable for costs associated with Adejuwon's autism. Lord Hodge and Lord Sales give the lead judgment with whom Lord Reed, Lady Black and Lord Kitchin agree. Lord Burrows and Lord Leggatt each give a concurring judgment.

10. Matthew v Sedman

https://www.supremecourt.uk/cases/docs/uksc-2019-0080-judgment.pdf

Coram:

Lord Hodge, Deputy President Lady Arden Lord Sales Lord Burrows Lord Stephens

Midnight deadline case – calculation of limitation period

This appeal concerns the calculation of limitation periods. The issue is whether, where a cause of action accrues at, or on the expiry of, the midnight hour at the end of a day, the following day counts towards the calculation of the limitation period.

The appellants are the current trustees of a trust (the "Trust"). They replaced the respondents, who were the trustees of the Trust until their retirement in 2014. The Trust had a shareholding in Cattles plc, a listed company. In April 2008, Cattles plc published an annual report and a rights issue prospectus containing misleading information. Trading in Cattles plc's shares was subsequently suspended, and in February 2011, schemes of arrangement were approved in respect of Cattles plc and a subsidiary, Welcome Financial Services Ltd ("Welcome"). A scheme of arrangement, in this context, is a court-sanctioned agreement between a company and its creditors. Because of the misleading information in the annual report and prospectus, the Trust had a claim against Cattles plc and Welcome under the schemes. Under the scheme of arrangement in relation to Welcome (the "Welcome Scheme"), a valid claim could have been made up to midnight (at the end of the day) on Thursday 2 June 2011.

The respondents did not make a claim in the Welcome Scheme on or before 2 June 2011. The appellants therefore commenced proceedings in negligence and breach of trust against the respondents (the "Welcome Claim") by a claim form issued on Monday 5

June 2017. Under the Limitation Act 1980, actions brought in tort, contract, and breach of trust cannot be brought after the expiration of six years from the date on which the cause of action accrued. The respondents contend that the Welcome Claim was issued out of time and is therefore statute-barred.

The issue in this appeal, therefore, is whether Friday 3 June 2011, the day which commenced immediately after the expiry of the midnight deadline for bringing a claim in the Welcome Scheme, counts towards the calculation of the six-year limitation period. If Friday 3 June 2011 is included, the limitation period expired six years later, at the end of Friday 2 June 2017. In that case, the Welcome Claim was brought out of time. If Friday 3 June 2011 is excluded, then the limitation period expired six years later, at the end of Saturday 3 June 2017. However, in order to bring the Welcome Claim, a claim form must be issued. That can only be done when the court office is open. The office is shut at the weekend. The parties therefore agree that if Friday 3 June 2011 is excluded, the final day on which proceedings could be brought is Monday 7 June 2017. In that case, the Welcome Claim was brought within the six-year limitation period and is not statute-bared.

The Supreme Court unanimously dismisses the appeal. In a midnight deadline case, there is a complete undivided day following the expiry of the deadline, which should be included when calculating the limitation period. The reason for the general rule that the day of accrual of the cause of action should be excluded from the reckoning of time is that the law rejects a fraction of a day. The justification for that rule is straightforward; it is intended to prevent part of a day being counted as a whole day for the purposes of limitation, thereby prejudicing the claimant and interfering with the time periods stipulated in the Limitation Act 1980. However, in a midnight deadline case, even if the cause of action accrued at the very start of the day following midnight, that day was, for practical purposes, a complete undivided day. Realistically, there is no fraction of a day. The justification in relation to fractions of a day therefore does not apply in a midnight deadline case.

The Welcome Claim was therefore brought out of time. Lord Stephens gives the only judgment, with which all members of the Court agree.

THE SUPREME COURT OF INDIA

11. Pasl Wind Solutions Private Limited v. GE Power Conversion India Private Limited

MANU/SC/0295/2021
https://indiankanoon.org/doc/79928496/

Before:
Hon'ble Judges/Coram: **Rohinton Fali Nariman**, B.R. Gavai and Hrishikesh Roy

The two Indian parties can choose a foreign seat of arbitration and such foreign arbitral award is enforceable in India.

The Supreme Court affirmed that nothing stands in the way of party autonomy in designating a seat of arbitration outside India even when both parties happen to be Indian nationals. The two Indian parties can choose a foreign (non-Indian) seat of arbitration. An award issued by an arbitral tribunal in such circumstances would be enforceable in India and that the parties could also seek interim relief in India.

HIGH COURT OF AUSTRALIA

12. Commonwealth of Australia v AJL20

https://eresources.hcourt.gov.au/downloadPdf/2021/HCA/21

Coram:
Kiefel CJ, and Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ

Constitutional validity of detention of unlawful non-citizens

The Court, in this case, considered the constitutional validity of detention of unlawful non-citizens under the Migration Act, 1958 ("the Act"). The respondent, a Syrian citizen, arrived in Australia in May 2005 as the holder of a child visa. On 2 October 2014, his child visa was cancelled on character grounds under section 501(2) of the Act. Having become an 'unlawful non-citizen', the respondent was detained on 8 October 2014, as required by section 189(1) of the Act. The primary judge of the Federal Court held that the respondent's continuing detention was unlawful because the Executive had not removed him from Australia "as soon as reasonably practicable" in accordance with section 198(6) of the Act and that his detention was not for the purpose of removal from Australia. The Federal Court considered that the period of detention authorised and required by the Act ceases when removal should have occurred had the Executive acted with all reasonable despatch. This reading of the Act was thought to be compelled by a need to observe the limitations on the Parliament's power to authorise detention by the Executive flowing from the separation of judicial power effected by Chapter III of the Constitution. The Commonwealth appealed this decision to the High Court on the basis that the detention was lawful because it was authorised and, indeed, required by section 196(1) of the Act.

The High Court agreed with the Commonwealth and allowed the appeal. The Court, by majority, held that sections 189(1) and 196(1) of the Act validly authorise and require the detention of an unlawful non-citizen until the actual event of their removal from Australia or grant of a visa. Detention so authorised and required does not involve constitutionally impermissible punishment of the detainee by the Executive because it is reasonably capable of being seen as necessary for the legitimate non-punitive purposes of segregation pending investigation and determination of any visa application or removal. The authority and obligation to detain is hedged about by enforceable duties, including that in section 198(6), that give effect to these legitimate non-punitive purposes and mean that the duration of detention is capable of determination. Upon performance of these hedging duties by the Executive, detention is to be brought to an end. Non-performance by the Executive erases neither these duties nor the legitimate non-punitive statutory purposes which they support. Rather, judicial power compels performance by the Executive of its duties, through the remedy of mandamus, so as to enforce the supremacy of the Parliament over the Executive.

13. Libertyworks Inc v Commonwealth of Australia

https://eresources.hcourt.gov.au/downloadPdf/2021/HCA/18

Coram:
Kiefel CJ, and Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ

Registration obligations with respect to communications activities on behalf of a foreign principal are justified

The President of the plaintiff, a private think-tank, met with the Executive Director of the

American Conservative Union ("ACU"), a corporation in the United States of America which holds an annual political conference called the Conservative Political Action Conference ("CPAC"), and it was agreed that the plaintiff and the ACU would collaborate in a CPAC event to be held in Australia in 2019. In August 2019, the plaintiff was asked by the Attorney-General's Department to consider whether it was required to register its arrangements with the ACU under the Act.

The questions before the Court was whether the Foreign Influence Transparency Scheme Act 2018 ("the Act") was invalid, to the extent it imposed registration obligations with respect to communications activities, on the ground that it infringed the freedom of political communication implied by the Constitution.

The High Court answered the primary question stated for its opinion to the effect that the provisions of the Act respecting communications activity by a person who acts on behalf of a foreign principal were not invalid on the ground that they infringed the implied freedom. A majority of the Court found that the Act, in its requirement of registration where communications activity is undertaken on behalf of a foreign principal, burdened the implied freedom but held that the burden was justified. The provisions were held to have a legitimate purpose, namely to achieve transparency as a means of preventing or minimising the risk that foreign principals will exert influence on the integrity of Australia's political or electoral processes. The provisions were proportionate to the achievement of that purpose. The majority concluded that other questions, concerning the extent of the Secretary's power to require information from a person prior to or after registration, did not arise for the opinion of the Court in the absence of a case advanced against the validity of the Act on that basis.

14. John Shi Sheng Zhang v The Commissioner of Police

https://eresources.hcourt.gov.au/downloadPdf/2021/HCA/16

Coram:
Kiefel CJ, and Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ

"Foreign interference" laws are constitutional

The plaintiff, an Australian citizen born in China, was employed at the New South Wales Parliament. In the context of an ongoing investigation, officers of the Australian Federal Police ("AFP") obtained search warrants issued under section 3E of the Crimes Act 1914 purporting to authorise search and seizure of material relevant to offences against section 92.3(1) and (2) of the Criminal Code. Corresponding orders relating to material seized were made under section 3LA of the Crimes Act following execution of those warrants. In a proceeding in the High Court's original jurisdiction, the plaintiff sought writs of certiorari quashing each warrant and each order together with a mandatory injunction requiring the destruction or return of the seized and copied material. He also sought declarations of invalidity of section 92.3(1) and (2) of the Criminal Code on the basis that they infringed the implied freedom of political communication.

The question before the Court concerned the validity of section 92.3(1) and (2) of the Criminal Code, which criminalised reckless foreign interference, and the validity of three search warrants and corresponding orders issued in respect of suspected offences against section 92.3(1) and (2).

The High Court unanimously held that the plaintiff's argument that each warrant failed to comply with section 3E(5)(a) of the

Crimes Act because it was “unclear” as to the identity of the foreign principal was untenable. As to the constitutional challenge, the Court found that the plaintiff, in failing to assert that the word “covert” would be incapable of being read down to ensure validity, implicitly acknowledged that parts of section 92.3(1) supporting the offences against section 92.3(1) to which each warrant related had some valid operation. That being so, his argument that those offences do not exist was rejected without need of determining the constitutional argument he presented. Accordingly, the Court held that the warrants were not wholly invalid on any of the identified grounds and otherwise the remaining substantive questions reserved were unnecessary or inappropriate to answer.

SUPREME COURT OF NORWAY

15. A (Counsel John Christian Elden) v. B (Counsel Marie Nesvik)

https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2021-955-a.pdf

Coram:
Justices: Matningsdal, Falkanger, **Ringnes**, Arntzen, Bergh

Basic rule “trial on the place where wrong took place, could not automatically apply to a claim arising from serious violations of someone's integrity

A US woman was raped by a Norwegian citizen on a Bahamas-registered cruise ship sailing in international waters. The assailant was convicted in the District Court and the Court of Appeal of Norway. The aggrieved person was also awarded aggravated damages of NOK 150 000, under the Criminal Procedure Act. So, the question before the Supreme Court of Norway was that which country’s law was applicable for a claim for aggravated damages after a sexual assault on board a Bahamas-registered cruise ship in the international waters.

The Supreme Court found that the basic rule on the place where the wrong took place could not automatically apply to such claims arising from serious violations of someone's integrity, submitted in connection with criminal proceedings. The choice of law must consequently be made based on the starting point in Norwegian international private law – the Irma Mignon formula. The EU's choice-of-law rules in Rome II could not lead to any other result. The Supreme Court also found that the case was most strongly connected with Norway. It was emphasised that the wrongdoer is a Norwegian citizen, and that the claim for aggravated damages had been decided by a Norwegian court in connection with the criminal proceedings. The connection to The Bahamas was remote, and was only due to the ship being registered in this state. The wrongdoer's appeal against the Court of Appeal's decision of the claim for aggravated damages was dismissed.

SUPREME COURT OF CANADA

16. R v Desautel

https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18836/index.do

Coram:
Wagner CJ and Abella, **Moldaver**, Karakatsanis, **Côté**, Brown, **Rowe**, Martin and Kasirer JJ.

Non-Canadians can have constitutionally-protected aboriginal rights under Canada's Constitution

In October 2010, Desautel, a citizen and resident of the United States of America, shot a cow‑elk in British Columbia. He was charged with hunting without a licence contrary to section 11(1) of British Columbia’s Wildlife Act (“the Act”) and hunting big game while not being a resident of the province contrary to section 47(a) of the Act. The trial judge held that Desautel was exercising an Aboriginal right to hunt for food, social and ceremonial purposes guaranteed by section 35(1) of the

Constitution Act, 1982. The Crown's two subsequent appeals were dismissed.

The Crown appealed to the Supreme Court raising a constitutional question, whether the relevant provisions of the Act are of no force or effect with respect to Desautel, by reason of an Aboriginal right within the meaning of section 35(1) of the Constitution Act.

The Court, by majority, held that persons who are not Canadian citizens and who do not reside in Canada can exercise an Aboriginal right that is protected by section 35(1) of the Constitution Act. Rowe, writing for the majority, held that on a purposive interpretation of section 35(1) of the Constitution Act, the expression "aboriginal peoples of Canada" means the modern‑day successors of Aboriginal societies that occupied Canadian territory at the time of European contact, and this may include Aboriginal groups that are now outside Canada. As Desautel is a member of the Lakes Tribe, which is a modern successor of the Sinixt, and as Desautel's claim satisfies the *Van der Peet* case test for an Aboriginal right under section 35(1) of the Constitution Act, sections 11(1) and 47(a) of the Act are of no force or effect with respect to him. The majority held that it is consistent with the purpose of reconciliation and section 35(1) of the Constitution Act to include "Aboriginal peoples who were here when the Europeans arrived and later moved or were forced to move elsewhere, or on whom international boundaries were imposed". The majority noted that the displacement of Aboriginal peoples as a result of colonization is well-acknowledged and that "an interpretation that excludes Aboriginal peoples who were forced to move out of Canada would risk 'perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers'".

In her dissenting opinion, Justice Côté held that only Aboriginal groups in Canada could be entitled to the protections of section 35(1), as the intent of the provision in 1982 had been to protect the rights of Aboriginal groups that were participants in and members of Canadian society, rather than of modern-day successor groups located outside of Canada. She further held that, even if the Lakes Tribe were an Aboriginal people of Canada under section 35(1), the evidence led at trial was insufficient to meet the continuity requirement of the *Van der Peet* test necessary for establishing an Aboriginal right to hunt in the Sinixt traditional territories in British Columbia. In particular, Côté J. stated that the trial judge made a "legal error" in concluding that that the chain of continuity had not been broken, given what she characterized as "no direct evidence between 1930 and 1982 and between 1982 and 2010" of the exercise of an Aboriginal hunting right in British Columbia by the Lakes Tribe. Justice Côté was joined by Justice Moldaver on this latter point and he concluded that Desautel had not demonstrated that the practice of hunting had sufficient continuity to establish an Aboriginal right under the test set out in *Van der Peet*.

17. Cathedral v Aga

https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18895/index.do

Coram:
Wagner CJ and Abella, Moldaver, Karakatsanis, Côté, Brown, **Rowe**, Martin and Kasirer JJ.

Courts are unlikely to interfere with voluntary associations

The respondents were expelled from the congregation of the Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral after a dispute arose about a movement within the church which some considered to be heretical. The respondents brought an action against the appellants, the church and members of its senior leadership, seeking a declaration that their expulsion was null and void, and other relief. The motion judge through a summary judgment dismissed the action, determining that the expelled members failed to allege or provide evidence of an underlying legal right. The Court of Appeal allowed the appeal by the expelled members, holding that the written constitution and bylaws of a voluntary organization constitute a contract setting out the rights and obligations of the members and the organization. It concluded that the parties entered into a mutual agreement to abide by the governing rules and that whether there had been a breach of contract on the basis of failure to comply with the rules was a genuine issue requiring a trial.

The Supreme Court unanimously held, "[j]urisdiction to intervene in the affairs of a voluntary association depends on the existence of a legal right which the court is asked to vindicate. Here, the only viable candidate for a legal right justifying judicial intervention is contract. The finding of a contract between members of a voluntary association does not automatically follow from the existence of a written constitution and bylaws. Voluntary associations with constitutions and bylaws may be constituted by contract, but this is a determination that must be made on the basis of general contract principles, and objective intention to enter into legal relations is required. In this case, evidence of an objective intention to enter into legal relations is missing. As such, there is no contract, there is no jurisdiction, and there is no genuine issue requiring a trial." The Court allowed the appeal and restored the order of the motion judge granting summary judgment and dismissing the action.

18. Corner Brook (City) v. Bailey

https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18962/index.do

Coram:
Wagner, Richard; Abella, Rosalie Silberman; Moldaver, Michael J.; Karakatsanis, Andromache; Côté, Suzanne; Brown, Russell; Rowe, Malcolm; Martin, Sheilah; Kasirer, Nicholas.

"Release contract" be interpreted according to the words used [in a contract] their ordinary and grammatical meaning, consistent with the surrounding circumstances.

On March 3, 2009, Mrs. Bailey struck Mr. Temple while driving her husband's car. Mr. Temple, an employee of the City of Corner Brook in Newfoundland and Labrador, was performing road work at the time. He sued Mrs. Bailey for the injuries he sustained. Meanwhile, the Baileys sued the City for the damage to the car and the injuries Mrs. Bailey sustained. On August 26, 2011, the Baileys settled with the City and signed a "release". The release stated that the Baileys agreed to exempt the City from any past, present or future claims of any kind related to the accident.

In the years that followed, Mr. Temple's lawsuit against Mrs. Bailey continued. In that lawsuit, Mrs. Bailey filed a claim against the City, in which she asked the judge to order the City to pay Mr. Temple for her, should she be found responsible for his injuries. This is known as a third party claim, because the City in this case was not a party to the lawsuit but was being drawn into it. The City objected to the third party claim and argued the release prevented Mrs. Bailey from trying to get the City to pay. The judge agreed with the City. But on appeal, the Court of Appeal agreed with Mrs. Bailey. The City then appealed to the Supreme Court of Canada.

The Supreme Court explained that a release is a contract and should be interpreted according to general principles of contract law as set out in the Court's previous decision of Sattva Capital Corp. v. Creston Moly Corp. These principles require courts to give"the

words used [in a contract] their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract". The surrounding circumstances consist only of objective evidence of the facts at that time. It does not include the subjective intentions of the parties, meaning what may have been going on in their minds at the time. The Supreme Court agreed with the City and allowed the appeal. The Court concluded the release that Mrs. Bailey had signed prevented her from making the third-party claim against the City.

19. Reference Re Code of Civil Procedure, s. 35

https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18933/index.do

Coram:

Wagner, Richard; Abella, Rosalie Silberman; Moldaver, Michael J.; Karakatsanis, Andromache; Côté, Suzanne; Rowe, Malcolm; Martin, Sheilah

Monetary ceiling of less than $85,000 was declared too high for the Court of Québec.

The Supreme Court of Canada was asked to decide if a change to the Code of Civil Procedure in Quebec infringed on the constitutionally protected jurisdiction of superior courts. In 2016, the provincial government changed article 35 of the Code of Civil Procedure to raise the monetary value of cases that could be heard by the Court of Québec from any amount under $70,000 to any amount under $85,000. The Court was also asked if certain powers of the Court of Québec, pertaining to appeals of administrative decisions, infringed on the powers of the Superior Court.

Superior Court judges in Quebec disagreed with the increase. They said that giving the Court of Québec the exclusive power to hear cases involving amounts of less than $85,000 violated section 96 of the Constitution. They argued that the Superior Court should have retained the power to hear cases of $70,000 and above. They also contested the appeal powers granted to the Court of Québec with respect to certain administrative decisions.

The court system across Canada is essentially the same. This is thanks to the Constitution, which divides provincial and federal government powers. Each province has a three-level court system: provincial (or lower) courts, superior courts, and appeal courts. The Constitution recognizes that provinces are responsible for administering justice in their respective jurisdictions. This includes organizing and maintaining the civil and criminal provincial courts, as well as civil procedure in those courts. Section 96 of the Constitution mentions special types of courts in Canada, known as the "superior courts". These courts are the highest courts in a province and benefit from a special protected status. In Quebec, the Superior Court and the Court of Appeal are the "superior courts". The federal government has a certain amount of power over those courts. For instance, the federal government is responsible for appointing superior court judges.

The Supreme Court's answers to the questions:

On the first question, the majority of the judges concluded that article 35 was unconstitutional. They noted that when the Constitution was enacted in 1867, the monetary ceiling for lower courts was $100. Based on expert evidence, they agreed that this amount would be equivalent to between $63,698 and $66,008, Canada-wide, today. However, they said that establishing this amount is only a first step in the analysis, and that a determination on whether the new ceiling amount was actually too high depended on several other factors. The majority concluded that the monetary increase gave the Court of Québec the exclusive jurisdiction to handle too wide a range of legal matters. This, they said, prevented the Superior Court from exercising its constitutionally protected right to decide on many legal matters at the heart of Quebec private law.

As such, the majority concluded the monetary ceiling of less than $85,000 was too high for the Court of Québec. They also said the provincial government failed to prove that access to justice was facilitated by the increase in the monetary ceiling for cases heard by the Court of Québec.

20. MediaQMI inc. v. Kamel

https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18904/index.do

Coram:
Wagner, Richard; Abella, Rosalie Silberman; Moldaver, Michael J.; Karakatsanis, Andromache; Côté, Suzanne; Brown, Russell; Rowe, Malcolm; Martin, Sheilah; Kasirer, Nicholas

Public may continue to consult court records but will no longer have access to exhibits that have been removed.

The main question for the Supreme Court was whether the public can still have access to exhibits in court records once a lawsuit has ended and the parties have removed their exhibits from the court record.

In Quebec, the Code of Civil Procedure gives any member of the public the right to access court records. The Code of Civil Procedure also contains a provision dealing with the removal of exhibits filed in a court record. During proceedings, parties may withdraw their exhibits if all of them consent. Once the proceedings have ended, parties have one year to retrieve their exhibits. If they do not, the exhibits may be destroyed.
The majority of the judges of the Supreme Court of Canada has upheld the finding of the Court of Appeal. They said that once parties retrieve their exhibits at the end of a proceeding, members of the public may continue to consult court records, but will no longer have access to exhibits that have been removed.

The Supreme Court also emphasized that the general rule is that court proceedings and records are open and public.

21. Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga

https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18895/index.do

Coram:
Wagner, Richard; Abella, Rosalie Silberman; Moldaver, Michael J.; Karakatsanis, Andromache; Côté, Suzanne; Brown, Russell; Rowe, Malcolm; Martin, Sheilah; Kasirer, Nicholas

Voluntary association and making financial contributions does not in itself form a legally binding relationship.

Five Toronto-area churchgoers sued their former church, the Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral, for having expelled them from the congregation. This followed the Church having appointed them as part of a committee to investigate a movement within the congregation that was said to go against its beliefs. When the committee concluded its investigation, it made recommendations to the senior leadership of the Church. However, the Archbishop and other senior leaders of the Church did not follow the committee's recommendations. The five churchgoers voiced their dissatisfaction, and in the end, the Church decided to expel them. They took the Church to court over this and asked to be reinstated.
Canada's highest court said the Court of Appeal made an error in finding that a contract was formed between the Church and the churchgoers. It noted that many informal agreements that people undertake do not necessarily result in a contract. An essential component for the formation of a contract was missing in this case, which was the intention to create legal rights and obligations towards one another.
In this unanimous decision, the judges of the Supreme Court noted that in the pursuit of common goals, many voluntary associations have rules, and sometimes even a constitution, bylaws and a governing body to adopt and apply the rules. These are practical

measures to help in the pursuit of shared objectives. But, they do not in and of themselves give rise to contractual relationships between the individuals who join. To illustrate their point, the judges said: "the members of the local minor hockey league, or a group formed to oppose development of green spaces, or a bible study group, for example, do not enter into enforceable legal obligations just because they have joined a group with rules that members are expected to follow."
Joining a congregation or voluntary association and making financial contributions does not in itself form a legally binding relationship.

CONSTITUIONAL COURT OF SOUTH AFRICA

22. J E Mahlangu v Minister of Police

https://collections.concourt.org.za/bitstream/handle/20.500.12144/36662/Judgment%20%20Mahlangu%20and%20Another%20%20v%20Minister%20of%20Police%20CCT%2088-20.pdf?sequence=13&isAllowed=y

Coram:
Jafta J, Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J, **Tshiqi J** and Victor AJ.

Compensation for unlawful detention

In 2005, a family was brutally murdered in their home in Mpumalanga. A few days later, the police entered Mahlangu's home without a warrant and arrested him for the crime. He was tortured until he made a false confession. He also falsely implicated his neighbour, Mtsweni, who was arrested without a warrant the same day. It later emerged that the police had no evidence to implicate Mahlangu or Mtsweni in the crimes and did not explain their constitutional rights to them before their arrest. The following day, they were taken to the magistrate's court. Neither was represented by a lawyer but both asked to be released on bail. However, the prosecutor, on the basis of false confession, asked the magistrate to postpone the hearing because he wanted to oppose the bail application. The magistrate postponed the case and ordered that Mahlangu and Mtsweni remain detained until their next appearance. Mahlangu later testified that the magistrate did not tell them they had a right to oppose the prosecutor's request for a postponement. They were later, after eight months, released once the true perpetrators of the crimes were arrested and the Director of Public Prosecutions declined to prosecute them.
Following their release, Mahlangu and Mtsweni started proceedings in the High Court to hold the Minister of Police liable for the violation of their constitutional rights, for psychological trauma and loss of income arising from their wrongful arrest, torture and eight month detention. The High Court accepted that the constitutional rights of Mahlangu and Mtsweni were violated by the police and that their arrests were unlawful. The court did find, however, that the Minister of Police was not liable for their eight month detention. This was because their detention ceased to be unlawful when the magistrate ordered their continued detention at their first court appearance the day after their arrest. The High Court therefore said the Minister was not liable for their lost income and any psychological trauma they suffered after the magistrate ordered their continued incarceration. The appeal to the Supreme Court of Appeal remained unsuccessful.

A unanimous Constitutional Court said the High Court and Supreme Court of Appeal incorrectly found that the Minister was not liable for the entire period of detention. According to the judgment, investigating officer knew there was no evidence aside from the false confession to justify keeping Mahlangu and Mtsweni in detention. He had a duty to disclose to the prosecutor that he knew the confession was obtained through

torture and that Mahlangu and Mtsweni had been unlawfully arrested. His decision to keep this information from the prosecutor was unlawful. The duty to disclose this information existed for the entire period that Mahlangu and Mtsweni were kept in detention. His failure to inform the prosecutor of the false confession while they were detained was the sole reason why they continued to remain in jail. The fact they did not apply for bail after their first appearance did not change the fact there was never a lawful reason to detain them in the first place. The Minister was therefore ordered to pay Mahlangu and Mtsweni compensation for the entire period of their eight month detention and violation of their constitutional rights. The Minister was also ordered to pay their legal costs.

FEDERAL CONSTITUTIONAL COURT OF GERMANY

23. In the proceedings on the constitutional complaints of individuals from Germany and others

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html

Coram:
President Harbarth, and Paulus, Baer, Britz, Ott, Christ, Radtke, and Härtel

Federal Climate Change Act is partly incompatible with fundamental rights

The Federal Climate Change Act 2019 ("the Act") makes it obligatory to reduce greenhouse gas emissions by at least 55% by 2030 relative to 1990 levels and sets out the reduction pathways applicable during this period by means of sectoral annual emission amounts. The plaintiffs asserted that the Act was too weak to effectively contain the consequences of the climate crisis today and in the future.

The Court denied the standing of the non-individual plaintiffs and rejected most of the remaining plaintiffs' arguments but held that the current version of the Act violates the fundamental rights of the individual plaintiffs residing in Germany. The Constitutional Court's central finding is that the existing provisions are unconstitutional because they irreversibly offload major emission reduction burdens onto periods after 2030, thereby violating the plaintiffs' fundamental rights in the future. It was held that every amount of CO_2 that is allowed today narrows the remaining options for reducing emissions in compliance with the obligations to limit the increase in the global average temperature to well below 2°C and preferably to 1.5°C above pre-industrial levels. Thus, the more permissible the Act is today, the more it reduces the options for future generations. The reduction of options in turn affects the exercise of every type of freedom rights because virtually all aspects of human life involve the emission of greenhouse gases and are thus potentially threatened by far more drastic restrictions after 2030. Therefore, the legislature should have taken precautionary steps to mitigate these major burdens in order to safeguard the individual plaintiffs' fundamental freedom rights. To that end, the existing statutory provisions on adjusting the reduction pathway for CO_2 emissions from 2031 onwards were insufficient to ensure that the necessary transition to climate neutrality is achieved in time. The Court also emphasizes Germany's international responsibility in the global climate crisis and notes that a state cannot evade its responsibility by referring to the greenhouse gas emissions of other states. The constitutional climate goal arising from Article 20a is more closely defined in accordance with the Paris target as being to limit the increase in the global average

temperature to well below 2°C and preferably to 1.5°C above pre-industrial levels. For this target to be reached, the reductions still necessary after 2030 will have to be achieved with ever greater speed and urgency. The legislature must enact provisions by 31 December 2022 that specify in greater detail how the reduction targets for greenhouse gas emissions are to be adjusted for periods after 2030.

EUROPEAN COURT OF JUSTICE

24. IX v WABE eV

C-804/18 and C-341/19
https://curia.europa.eu/juris/document/document.jsf?text=&docid=244180&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=2158975

Before:

K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Prechal, M. Vilaras, E. Regan, L. Bay Larsen, N. Piçarra and A. Kumin, Presidents of Chambers, T. von Danwitz, C. Toader, M. Safjan, F. Biltgen (Rapporteur), P.G. Xuereb, L.S. Rossi and I. Jarukaitis, Judges

Headscarves can be banned at work

The matter before the Court resulted from referrals from the Labour Court of Hamburg and the Federal Labour Court of Germany, which had requested the European Court consider whether the dismissal of two Muslim women from their employment over their non-compliance with orders to refrain from wearing their hijab was compliant with EU law on equal treatment in employment and occupation.

The first woman was dismissed from her employment at a childcare facility following her refusal to comply with a rule prohibiting employees from wearing any visible political, philosophical, or religious sign at the workplace when they are in contact with the children or their parents. She challenged her dismissal on the grounds that the prohibition directly targeted the wearing of the Islamic headscarf and therefore constituted direct discrimination, and that given its greater impact on migrant women it was also capable of constituting discrimination on the grounds of ethnic origin. The second woman challenged the legality of the instruction given to her by her employer, a company operating drugstores, to refrain from wearing, in the workplace, conspicuous, large-sized political, philosophical, or religious signs. She claimed that the company's internal rules violated her freedom of religion and that the company's policy did not enjoy unconditional priority over the freedom of religion and had to further be subject to a proportionality test.

The European Court in its ruling held that certain prohibitions in relation to the wearing of religious symbols could be justified under specific circumstances. "[I]ndirect discrimination on the grounds of religion or belief resulting from an internal rule of an undertaking prohibiting, at the workplace, the wearing of visible signs of political, philosophical or religious beliefs with the aim of ensuring a policy of neutrality within that undertaking can be justified only if that prohibition covers all visible forms of expression of political, philosophical or religious beliefs." The Court however did provide for a limit to such prohibitions by further holding that a "prohibition which is limited to the wearing of conspicuous, large-sized signs of political, philosophical or religious beliefs" would be liable to constitute direct discrimination on the grounds of religion or belief and could not, in any event, be justified.

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