*Quarterly*

# Case Law Update

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## Supreme Court of Pakistan

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**https://www.supremecourt.gov.pk/downloads_judgements/c.a._754_2020.pdf**

**Present: Mr. Justice Gulzar Ahmed, HCJ** and Mr. Justice Ijaz ul Ahsan

***Exception to the principle of locus-poenitentiae applies only where lawful order has been passed by an authority having the power to do so under the relevant law and a person has bonafidely received a benefit under the said order without any positive action on his part***

In the background of a notification issued by the Higher Education Department allowing a special allowance to lecturers, and receiving of the said special allowance by the appellants who were instructors, not lecturers, the Court considered the question as to the application of the exception to the principle of locus poenitentiae to the recovery of such wrongly received special allowance from the appellants.

The Court, after referring to and discussing the previous case law on the point, held that "only where lawful orders have been passed by an authority having the power to do so under the relevant law and a person bona fide receives a benefit under the said law without any positive action on his part, such beneficiary can claim a right under the exception to the principle of locus-poenitentiae and claim that the benefit bona fide received by him by virtue of a lawful order passed by the competent authority… cannot subsequently be recovered by virtue of the protection available under the exception to the aforesaid rule." (Para 8)

The Court rejected the claim of the appellants for protection of the exception to the principle of locus poenitentiae to the recovery of wrongly received special allowance from them with the observation: "[T]he basic requirements which are sine qua non for the exception to the principle of locus poenitentiae being attracted, namely, issuance of a lawful order by the competent authority is missing. Further, we are not convinced that despite clear and unambiguous language of the notification, the Appellants were unaware that they were being paid an allowance to which they were not lawfully entitled and was being paid on the basis of a notification which was not applicable to them." (Para 9)

### 2. *Saeeda Sultan v Liaqat Ali*

**https://www.supremecourt.gov.pk/downloads_judgements/crl.m.a._62_p_2018.pdf**

**Present: Mr. Justice Mushir Alam** and Mr. Justice Munib Akhtar

***Where a judgment, decree, or order of Supreme Court is to be implemented, the appropriate remedy would lie in execution proceedings before the court of first instance, and not in contempt proceedings before the Supreme Court***

The petitioner filed a criminal miscellaneous application to take action against the respondents for committing contempt of the Court by non-implementing the Court's order whereby the Court had modified the decree passed by the court below in a partition suit. In this backdrop, the Court examined the difference between contempt proceedings and execution proceedings.

The Court held: "As a matter of general principle, where an order, judgment, and decree originating from the lower court reached the apex Court for final adjudication of the judgment or decree of the court below, such final order, judgment, or decree is to be implemented and executed by the Court of first instance under Section 38 read with Rule 15 of order XLV of the Code of Civil Procedure, 1908 and not through contempt [proceedings]." (para 17)

The Court further held: "Where a decree and/or order of this Court is to be implemented, the appropriate remedy would lie in execution proceedings. Whereas contempt would only lie under the

circumstances enumerated under Article 204 of the Constitution of Islamic Republic of Pakistan." (Para 18) The Court also referred to the provisions of the Contempt of Court Ordinance, 2003 promulgated in pursuance of the authority conferred under Article 204(3) of the Constitution and observed: "The aforesaid Ordinance does not contain any provisions for execution of the orders, judgments, or decrees of the Court in the contempt jurisdiction." (Para 20)

The Court deprecated the practice of misusing the contempt proceedings as a substitute of the execution proceedings and dismissed the application.

### *3. Province of Punjab v Murree Brewery Company*

**https://www.supremecourt.gov.pk/downloads_judgements/c.p._1369_l_2019.pdf**

**Present: Mr. Justice Mushir Alam**, Mr. Justice Sardar Tariq Masood and Mr. Justice Yahya Afridi

***Where the Government itself files the case with the wrong description of its nomenclature, the provisions of Section 79 of the Civil Procedure Code do not render the case unmaintainable***

A Division bench of the Lahore High Court had dismissed the intra-court appeal filed by the Chief Secretary, Government of Punjab, through Secretary Excise & Taxation for being non-compliant with Section 79 of the Code of Civil Procedure, 1908 (CPC) read with Article 174 of the Constitution of Pakistan, 1973, which provides that the Federation may sue or be sued by the name of Pakistan and a Province may sue or be sued by the name of the Province. The Court considered the question: whether the wrong description of the appellant's nomenclature in the title of the intra-court appeal was fatal to the maintainability of that appeal.

The Court observed that "the legislative intent and the purpose of the operation of this provision [of section 79 of the CPC] is for the State, or the Province, to be adequately represented and defended through the impleadment of the proper department. This purpose cannot be achieved if the concerned and proper department is not made a party to the suit, nor can it be achieved if the State, or Province, are not named in the suit." (Para 14)
The Court remarked: "However, where the Government itself files the Appeal, albeit with the wrong description, the provisions of S.79 of the CPC amount to mere nomenclature, which, if not followed, do not render the suit unmaintainable. The rationale being that… the object and purpose of S.79 of the CPC is for the Government to be properly represented and defended. The same purpose is still achieved where the Government themselves file an appeal, as in this case. While such mis-description is a contravention of S.79 of the CPC, it is not fatal to the case when it is indeed the Government filing the appeal themselves." (Para 19)
The Court held: "Respondent No. 1 was aggrieved by the notification dated 24.6.2015, subject matter of the Writ Petition, which was issued by the Secretary Excise & Taxation. In the title in the ICA's Chief Secretary, Government of Punjab through Secretary Excise and Taxation is shown to be the appellant, instead of province of Punjab, which qualifies under the exception of misconception, as the correct name i.e. Province of Punjab through Secretary, Excise & Taxation was not mentioned. Being a mere case of wrong, inaccurate, or misdescription of parties, the Court, being sanctuaries of justice, can rectify the bonafides error by exercising jurisdiction duly vested under S.153, Order 1, Rule 10 and Order XXVII-A of the Code of Civil Procedure, 1908 more particularly so when no prejudice is shown to have been caused to the Respondent, more particularly when the Secretary Excise & Taxation was the concerned Secretary competent authority to represent the Province of Punjab, in the matter in hand." (Para 26)
The Court, with the said observations, allowed the appeal, set aside the impugned judgment and remanded the matter back to

the High Court, for decision on merits; and the Appellant was directed to file amended title of the intra court appeal with proper description of the Appellant in conformity with Section 79 of the CPC and Article 174 of the Constitution.

### 4. *Justice Qazi Faez Isa v President of Pakistan*

**https://www.supremecourt.gov.pk/downloads_judgements/c.m.a._7084_2020.pdf**

**Present: Mr. Justice Umar Ata Bandial,** Mr. Justice Manzoor Ahmad Malik, Mr. Justice Mazhar Alam Khan Miankhel, Mr. Justice Sajjad Ali Shah, Mr. Justice Munib Akhtar and Mr. Justice Qazi Muhammad Amin Ahmed

***Minimum numerical strength of the review Bench is the numerical strength of the Bench which heard and decided the original matter, regardless of whether the judgment under review was passed unanimously or by majority***

The constitution petition titled Justice Qazi Faez Isa v. President of Pakistan and other connected constitution petitions filed under Article 184(3) of the Constitution of Pakistan, 1973 were heard by a ten member Bench of the Court and were disposed of by means of a Short Order dated 19.06.2020. Seven members of the Bench were party to the whole of the Short Order, while three members joined only in declaration contained in para 1 of the Short Order and did not join in directions contained in paras 3 to 11 thereof. Several review petitions were filed against the directions contained in paras 3 to 11. A Bench of seven members, who had passed the said directions contained in paras 3 to 11 of the Short Order, was constituted to hear the review petitions. Later, a member of the Review Bench, who was party to the majority judgment, retired and the matter was listed before the Bench comprising the remaining six members.

Miscellaneous applications were filed by the review petitioners seeking reconstitution of the Bench hearing review petitions by including those three members of the Bench also who had not joined in the directions contained in paras 3 to 11 of the Short Order. In this background, the question arose: what should be the numerical strength and composition of the review Bench in cases seeking review of the majority judgment of the Court?

**Hon'ble Mr. Justice Umar Ata Bandial** speaking for the majority of five members (one member of the Bench agreed with conclusion (a) only), after making an exhaustive survey of the relevant provisions of the Constitution, Supreme Court Rules and the previous practice of the Court depicted in case law, answered the question by holding that as a matter of the current law and practice of the Court: (a) the minimum numerical strength of the review Bench is the numerical strength of the Bench which heard and decided the original matter, regardless of whether the judgment under review was passed unanimously or by majority; (b) the review Bench should comprise the author Judge, if still on the Court, as its member, and in case he is unavailable then any other Judge who agreed with the author Judge should be included in the Bench; and (c) it is for the Hon'ble Chief Justice, as the master of the roster, to determine the composition of a Bench and he may, for like reason, constitute a larger Bench for hearing the review petition. (Para 31)

On this conclusion, the Court directed the Office to place the review petitions before the Hon'ble Chief Justice for such orders as are deemed appropriate.

### 5. *Inayat Ullah Khan v Shabir Ahmad Khan*

**https://www.supremecourt.gov.pk/downloads_judgements/c.p._2547_2019.pdf**

**Present: Mr. Justice Qazi Faez Isa** and Mr. Justice Sardar Tariq Masood

***Deposit of the balance sale consideration, without court's direction, by a person seeking specific performance of a contract helps establish that he was ready, able and***

***willing to perform his obligations under the contract***

In the appeal originating from a suit filed for specific performance of a contract, the Court highlighted the importance of deposit of the balance sale consideration by the buyer seeking specific performance of the contract, despite being not required to do so under the law.

The Court observed: "There is yet another aspect which goes against the issuance of a decree of specific performance to the respondent which is his failure to perform his own part of the contract, that is, tender the amount of sale consideration to the sellers (petitioner Nos. 1 and/or 2), and if they had refused to receive it, to tender it in court. The purported balance sale consideration was only deposited after the Trial Court had decreed the suit with regard to petitioner No. 1 and after the Appellate Court had decreed the suit with regard to petitioner No. 2. A person seeking the specific performance of a contract must first show that he is ready, able and willing to perform his obligations under the contract, but this the respondent had failed to do. The law does not require that the balance sale consideration must be tendered or deposited in court, but such tender/deposit helps establish that the buyer was not at fault. The respondent's learned counsel's contention that only after the court directs the deposit of the sale consideration, is it to be deposited, is misplaced." (Para 15)

***Amount Deposited in Court by a party to the case should be invested in some government protected security (such as Defence or National Savings Certificates)***

The Court further emphasized on a very important aspect of the cases involving deposit of cash amount in courts. The Court observed: "We may also take judicial notice of the fact that invariably the value of money depreciates over time and that of land appreciates. Courts adjudicating such cases should not be unmindful of this reality and should endeavor to secure the interest of both parties. In a suit for specific performance of land, if the seller/vendor has refused to receive the sale consideration, or any part thereof, it should be deposited in court and invested in some government protected security (such as Defence or National Savings Certificates); in case the suit is decreed the seller would receive the value of money which prevailed at the time of the contract and in case the buyer loses he can similarly retrieve the deposited amount." (Para 15)

### *6. Sheikh Muhammad Muneer v Mst. Feezan*

**https://www.supremecourt.gov.pk/downloads_judgements/c.p._962_2016%20.pdf**

**Present: Mr. Justice Qazi Faez Isa** and Mr. Justice Yahya Afridi

***Relation of an attesting witness with the alleged executant of the agreement, who has denied execution, is no justification for not examining the said witness to prove due execution of the agreement***

In the petition for leave to appeal arising out of a suit seeking specific performance of a sale-agreement, the petitioner (plaintiff) had not examined the attesting witnesses of the agreement as required under Article 79 of the Qanun-e-Shahadat, 1984, and thus his claim failed in all the three courts below. Before the apex Court, it was argued on behalf of the petitioner to justify non-examination of one attesting witness that the said witness was the husband of the respondent/defendant (alleged seller) and it was apprehended that he would deny having witnessed the execution of the agreement.

The Court repelled the said argument advanced to justify non-examination of the attesting witness thus: "The learned Mr. Piracha says that prudence dictated that the petitioner should not produce or summon Muhammad Ali, who was an attesting witness, because he was the husband of the respondent and it was apprehended that he will deny witnessing his wife signing the said agreement. Merely because a witness is

related to either party does mean he/she stops being a witness nor that he/she should not be produced/summoned as a witness. The above quoted verse of the Holy Qur'an states that it is the religious duty of a Muslim to come forward to testify when called upon to do so - *'The witnesses should not refuse when they are called on'* (for evidence). An attesting witness remains a witness irrespective of his or her relationship to the parties to an agreement. If a witness does not agree to testify he/she can be summoned through the court." (Para 13)

### *7. Safia Bano v Home Department, Govt. of Punjab*

**https://www.supremecourt.gov.pk/downloads_judgements/c.r.p._420_2016.pdf**

**Present:** **Mr. Justice Manzoor Ahmad Malik**, Mr. Justice Sardar Tariq Masood, Mr. Justice Ijaz ul Ahsan, Mr. Justice Mazhar Alam Khan Miankhel and Mr. Justice Syed Mansoor Ali Shah

***Carrying out the death sentence on a condemned prisoner who due to mental illness is unable to comprehend the rationale and reason behind his/her punishment, does not meet the ends of justice***

Three convicts, whose death sentence in murder cases had been upheld by the apex Court in appeals that were in continuation of their trial, knocked at the door of the Court for suspension of the execution of their death warrants and for commutation of their death sentence into life imprisonment invoking the review jurisdiction under Article 188 of the Constitution as well as the original jurisdiction of the Court under Article 184(3) of the Constitution. The ground pleaded for the relief prayed for was the mental ailment of the convicts, suffering from chronic schizophrenia (insanity). The core question before the larger Bench of the Court was: whether a mentally ill condemned prisoner should be executed.

**Hon'ble Mr. Justice Manzoor Ahmad Malik** speaking for the Court, after making an exhaustive survey of the latest jurisprudential developments on this subject in major common law jurisdictions and international conventions ratified by Pakistan, answered the question thus: "After considering the material discussed herein above, we hold that if a condemned prisoner, due to mental illness, is found to be unable to comprehend the rationale and reason behind his/her punishment, then carrying out the death sentence will not meet the ends of justice. However, it is clarified that not every mental illness shall automatically qualify for an exemption from carrying out the death sentence. This exemption will be applicable only in that case where a Medical Board consisting of mental health professionals, certifies after a thorough examination and evaluation that the condemned prisoner no longer has the higher mental functions to appreciate the rationale and reasons behind the sentence of death awarded to him/her. To determine whether a condemned prisoner suffers from such a mental illness, the Federal Government (for Islamabad Capital Territory) and each Provincial Government shall constitute and notify, a Medical Board comprising of qualified Psychiatrists and Psychologists from public sector hospitals." (Para 66)

The Court, on the said conclusion, converted the death sentence of two convicts into life imprisonment in exercise of its review jurisdiction, while the matter of the third convict who had already exhausted the review jurisdiction of the Court was directed to be referred to the President of Pakistan by making a mercy petition for conversion of his sentence.

### *8. Syed Iqbal Hussain v Pakistan Bar Council*

**https://www.supremecourt.gov.pk/downloads_judgements/c.m.a._6786_2020.pdf**

**Present:** Mr. Justice Umar Ata Bandial and **Mr. Justice Ijaz ul Ahsan**

***Pakistan Bar Council and its Executive Committee are not amendable to writ***

***jurisdiction of the High Court under Article 199 of the Constitution of Pakistan, 1973***

The petitioner challenged, in writ jurisdiction of the High Court under Article 199 of the Constitution, an order passed by the Executive Committee of the Pakistan Bar Council, whereby he had been declared disqualified to contest election to the office of the Vice-President of the Supreme Court Bar Association Pakistan for the Province of Khyber Pakhtunkhwa. The High Court dismissed his constitution petition being not maintainable. In this backdrop, the matter reached the apex Court and the primary question before the Court for determination was: whether the Pakistan Bar Council (PBC) or any of its committees is amendable to the writ jurisdiction of the High Court under Article 199 of the Constitution of Pakistan, 1973.

The Court observed that "Pakistan Bar Council is a body established under an Act of Parliament namely, the Legal Practitioners & Bar Councils Act, 1973… A bare reading of the 1973 Act reveals that other than the Attorney General for Pakistan being the ex-officio Chairman [of the] Pakistan Bar Council, nothing in the Act suggests any administrative control being exercised by the Federal or Provincial Government over the affairs of the PBC. The PBC is an entirely autonomous body which has independent elections and generates its own funding without any Government control. Thus, the state does not have any financial or other interests in the affairs of the PBC, nor does it perform any function in connection with the affairs of the Federation, a Province or a local authority….", while "a constitution petition is only maintainable if the association/body performs public functions in connection with the affairs of the Federation, Provinces or Local Authority, as envisaged under Article 199 of the Constitution." (Paras 7 and 8)

With the said observation, the Court answered the question in the negative by holding, "[N]either the Pakistan Bar Council nor any of its committees can be regarded as person performing functions in connection with the affairs of the Federation, Provinces or Local Authority within the contemplation of Article 199 of the Constitution of Pakistan. Accordingly, Respondents No.1 & 2 [PBC & its Executive Committee] are not amendable to writ jurisdiction of High Court." (Para 8)

### *9. Malik Munsif Awan v Federation of Pakistan*

**https://www.supremecourt.gov.pk/downloads_judgements/c.p._2148_2020.pdf**

**Present:** Mr. Justice Gulzar Ahmed, HCJ and **Mr. Justice Ijaz ul Ahsan**

***Routine and frequent judicial interference in the matters of discretionary powers of the Prime Minister would be violative of the concept of trichotomy of powers enshrined in the Constitution - judicial restraint in such matters should be the norm and interference only an exception***

The petitioner challenged, in writ jurisdiction of the High Court under Article 199 of the Constitution, the appointment of some persons made by the Prime Minister of Pakistan as his Special Assistants in exercise of his powers under Rule 4(6) of the Rules of Business, 1973. The High Court dismissed his constitution petition, and the petitioner impugned the judgment of the High Court in the Supreme Court.

The apex Court while affirming the judgment of the High Court noted that "such appointments fall within the domain of discretionary powers available to the Prime Minister of the country under the Constitution and the law," and emphasized that "[u]nless abuse, excessive exercise, mala fides or blatant arbitrariness is clearly demonstrated, casual, routine and frequent judicial interference in the matter would… be violative of the concept of trichotomy of powers enshrined in the Constitution. This would needlessly interfere with, hamper and obstruct the Prime Minister in the effective and efficient discharge and performance of his constitutional functions and obligations.

Therefore, judicial restraint in such matters should be the norm and interference only an exception and that too in exceptional and rare cases." (Para 23)

### *10. Govt. of Balochistan v Abdul Rauf*

**https://www.supremecourt.gov.pk/downloads_judgements/c.a._433_2020.pdf**

**Present:** Mr. Justice Gulzar Ahmed, HCJ, Mr. Justice Faisal Arab and **Mr. Justice Ijaz ul Ahsan**

***A caretaker Government is empowered only to carry out day to day affairs of the State with the help of available machinery. It cannot take policy decisions and permanent measures including recruitments and making appointments.***

Recruitment process against some posts in a department of the Government of Balochistan was made by a Recruitment Committee constituted by the Caretaker Government. After the election, new Government was formed, and the concerned department neither prepared the merit list nor announced the results, rather re-advertised the posts. The respondents, who had applied and participated in that recruitment process, approached the Balochistan High Court through a constitutional petition. They prayed that the department may be directed to publish the merit list and issue appointment letters accordingly. The constitutional petition was allowed. The appellants impugned the judgment of the High Court before the Supreme Court and raised the objection that a Caretaker Government was not empowered to conduct the process for recruitment in any department of the Government.

The apex Court of the country observed: "The mandate of a Caretaker Government is to hold the mantle in the interregnum when the term of the sitting Government has expired and the new Government is yet to take charge. A caretaker Government is empowered only to carry out day to day affairs of the State with the help of available machinery/resources/manpower. It cannot take policy decisions and permanent measures including recruitments, making appointments, transfers and postings of Government Servants. It must leave such matters to the elected Government which takes charge as a result of elections." (Para 7) The Court allowed the appeal and set aside the impugned judgment of the Balochistan High Court while holding, inter alia, that "a Caretaker Government/Cabinet lacks the power to make appointments, transfers and postings during the limited period that it holds office. Therefore, we are in no manner of doubt that the refusal of the Appellants to implement the recommendations of the Recruitment Committee constituted by the Caretaker Government had legal backing and lawful justification." (Para 8)

### *11. Munawar Ahmed v Muhammad Ashraf Shahid*

**https://www.supremecourt.gov.pk/downloads_judgements/c.p._2580_2020.pdf**

**Present:** Mr. Justice Umar Ata Bandial, **Mr. Justice Sajjad Ali Shah** and Mr. Justice Sayyed Mazahar Ali Akbar Naqvi

***Nature and scope of 'special damages' and 'general damages' that are claimed on the basis of alleged defamation, explained***

In an appeal originating from a suit filed by the respondent against the appellants, the Chief Editor and the Editor of a Daily Urdu Newspaper, for damages under the Defamation Ordinance, 2002, the Court explained the nature and scope of 'special damages' and 'general damages' claimed on the basis of alleged defamation and the necessary requirement for grant of such damages.

The Court observed: "Special damages are defined as the actual but not necessarily the result of the injury complained of. While awarding special damages, it is to be kept in mind that the person claiming special damages has to prove each item of loss with reference to the evidence brought on record. This may also include out-of-pocket

expenses and loss of earnings incurred down to the date of trial, and is generally capable of substantially exact calculation", while "[g]eneral damages normally pertain to mental torture and agony sustained through derogatory/defamatory statements. Since there is no yardstick to gauge such damages in monetary terms, therefore, while assessing damages on account of such inconvenience, the Courts apply a rule of thumb by exercising its inherent jurisdiction for granting general damages on a case to case basis." (Paras 7 and 9)

The Court further held that the "other aspect which needs to be kept in mind by the Courts while awarding general damages on account of mental torture/nervous shock is that damages for such suffering are purely compensatory to vindicate the honour or esteem of the sufferer, therefore such damage should not be exemplary or punitive as the sufferer should not be allowed to make profit of his reputation." (Para 10)

### *12. Irfan Bashir v Deputy Commissioner, Lahore*

**https://www.supremecourt.gov.pk/downloads_judgements/c.p._446_l_2019.pdf**

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

***Approaches of judicial restraint and judicial activism in exercise of power of judicial review, and making judicial overreach in exercise of that power, explained***

The High Court while hearing a matter regarding the signboards and advertisement boards placed by some traders on a road passed an order totally irrelevant to the lis before it and directed the petrol pumps not to fill in the petrol tanks of the motorcyclists who do not wear the helmets and to seal the petrol pumps which are found providing petrol to those motorcyclists. The matter reached the Supreme Court.

The Court while setting aside the said order of the High Court elaborated the concept of judicial restraint, judicial activism and judicial overreach in exercise of power of judicial review, thus:

"Judicial review is the power of the courts to examine the actions of the legislative, executive, and administrative arms of the government and to determine whether such actions are consistent with the Constitution. Actions judged inconsistent are declared unconstitutional and, therefore, null and void… While exercising judicial review, there comes a point when the decision rests on judicial subjectivity; which is not the personal view of a judge but his judicial approach. One judge may accord greater significance to the need for change, while the other may accord greater significance to the need for certainty and status quo. Both types of judges act within the zone of law; neither invalidates the decision of another branch of the Government unless it deviates from law and is unconstitutional. Activist judges (or judicial activism) are less influenced by considerations of security, preserving the status quo, and the institutional constraints. On the other hand, self-restrained judges (or judicial restraint) give significant weight to security, preserving the status quo and the institutional constraints. Both judicial activism and judicial self-restraint operate within the bounds of judicial legitimacy. It is one thing for a judge to progressively interpret the law because of human rights considerations about which he has substantial information. It is quite another to change or ignore the law for economic or social or political reasons based on polycentric considerations beyond the judge's expertise… When courts exercise power outside the Constitution and the law and encroach upon the domain of the Legislature or the ]Executive, the courts commit judicial overreach… Judicial overreach is transgressive as it transforms the judicial role of adjudication and interpretation of law into that of judicial legislation or judicial policy making, thus encroaching upon the other branches of the

Government and disregarding the fine line of separation of powers, upon which is pillared the very construct of constitutional democracy. Such judicial leap in the dark is also known as 'judicial adventurism' or 'judicial imperialism'." (Paras 4, 5 and 6)

### *13. Regional Operation Chief, NBP, Sargodha v Nusrat Perveen*

**https://www.supremecourt.gov.pk/downloads_judgements/c.p._2717_l_2015.pdf**

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

***Survivability of the right to sue in service matters on the death of the civil servant, in the context of fundamental rights guaranteed under the Constitution, explained***

In a petition originating from the order of a Service Tribunal the question before the Court was: whether the appeal filed by a civil servant in the Service Tribunal would abate on his death or his legal heirs could pursue the same.

The Court held that the appeal filed by a civil servant in the Tribunal would not abate on his death and his legal heirs could pursue the same. The Court observed: "The question whether after the death of the plaintiff or the petitioner proceedings would abate would primarily depend on the nature of cause of action and the relief claimed in the peculiar facts of each case. Service benefits may be enjoyed by the successors of the deceased civil servant. Some of those are inheritable which form part of the estate of the deceased while others are grants to be distributed among his family members according to law. The respondents in the instant petition would receive some benefits in case they are able to vindicate their stand before the Tribunal. Such a claim does not extinguish with the death of civil servant. Letting the claim lapse on the basis of an ultra textualist interpretation of the Act would be denying the heirs the right to seek adjudication on merits." (Para 8)

While holding so, the Court also explained the survivability of the right to sue in service matters on the death of the civil servant, in the context of fundamental rights guaranteed under the Constitution, thus: "Under our constitutional scheme, abatement of proceedings on the death of a civil servant, in a case, where the cause of action carries a survivable interest will unduly deprive the decedent civil servant, as well as, his legal heirs of their constitutional rights to livelihood, property, dignity and fair trial. Fundamental right to life including right to livelihood ensures the security of the terms and conditions of service; fundamental right to property ensures security of the pecuniary and pensionary benefits attached to the service; fundamental right to dignity ensures that the reputation of the civil servant is not sullied or discredited through wrongful dismissal, termination or reversion etc; and fundamental right to fair trial and due process, inter alia, safeguards and protects the survivable interest and ensures continuity of the legal proceedings even after the death of the civil servant, equipping the legal heirs to pursue the claim. Fundamental rights under the Constitution do not only protect and safeguard a citizen but extend beyond his life and protect and safeguard his survivable interests by being equally available to his legal heirs…[O]ther than pecuniary and pensionary benefits that inure to the benefit of the legal heirs, the right to restore one's reputation is also a survivable right and flows down to the legal heirs to pursue and take to its logical conclusion. Any slur on the reputation of a civil servant impinges on his human dignity and weighs equally on the dignity and honour of his family." (Para 11)

### *14. Atif Zareef v The State*

**https://www.supremecourt.gov.pk/downloads_judgements/crl.a._251_2020.pdf**

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

***"Two-finger test" (TFT) or the "virginity test" of the rape victim has no scientific justification and the general immoral character of the rape victim has no relevance under the law, in a rape trial***

In appeal arising out of a rape case, the Court, while reappraising the evidence, noted that during the cross-examination of prosecution witnesses, particularly the complainant /victim, the defence tried to build a case that the complainant/victim was a woman of immoral character for having illicit relations with someone, and therefore her testimony was unreliable and untrustworthy. The lady Doctor, who had medically examined the complainant/victim, was also cross-examined on these lines by questioning as to the hymen examination and two finger vagina test of the complainant victim.

In this background of the case, the Court considered it important to examine whether recording sexual history of the victim by carrying out "two-finger test" (TFT) or the "virginity test" has any scientific justification or evidentiary relevance to determine the commission of the sexual assault of rape, and whether the myth that "unchaste", "impure" or "immoral" women are more likely to consent to sexual intercourse and are not worthy of reliance have any legal basis. The Court examined the said questions in the light of Constitution, law and modern forensic science.

The Court observed: "Modern forensic science…shows that the two finger test must not be conducted for establishing rape-sexual violence, and the size of the vaginal introitus has no bearing on a case of sexual violence. The status of hymen is also irrelevant because hymen can be torn due to several reasons such as cycling, riding among other things… The medical officers instead of burdening themselves with reporting about the sexual history of the victim must ensure… in a case of sexual offence of rape to examine the external genital area for evidence of injury, seminal stains and stray pubic hair." (Para 9)

In the context of constitutional provisions, the Court held: "Dragging sexual history of the rape survivor into the case by making observations about her body including observations like "the vagina admits two fingers easily" or "old ruptured hymen" is an affront to the reputation and honour of the rape survivor… [R]eporting sexual history of a rape survivor amounts to discrediting her independence, identity, autonomy and free choice thereby degrading her human worth and offending her right to dignity guaranteed under Article 14 of the Constitution… A woman, whatever her sexual character or reputation may be, is entitled to equal protection of law. No one has the license to invade her person or violate her privacy on the ground of her alleged immoral character." (Para 11 and 12)

While noting the omission of Article 151(4) of the Qanun-e-Shahadat 1984, the Court held that "Omission of Article 151(4) of the QSO by the Legislature leaves no doubt in discovering and ascertaining the intention of the Legislature that in a rape case the accused cannot be allowed to question the complainant about her alleged "general immoral character." (Para 15)

### *15. Commissioner Inland Revenue v Tariq Mehmood*

**https://www.supremecourt.gov.pk/downloads_judgements/c.a._26_2015l.pdf**

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

***Change made to Section 127(1) of the Income Tax Ordinance, 2001 by subsection (25) of Section 15 of the Finance Act 2012, whereby the right of appeal against any order/assessment made under Section 122C of the Ordinance had been taken away, was discriminatory and therefore, ultra vires Article 25 of the Constitution of Pakistan, 1973***

In appeals arising under the Income Tax Ordinance, 2001 ("Ordinance"), the Court considered the question: whether the change made to Section 127(1) of the Ordinance by subsection (25) of Section 15 of the Finance Act ("FA") 2012, whereby the right of appeal against any order/assessment made under Section 122C of the Ordinance had been taken away, was discriminatory within the meaning of Article 25 of the Constitution of Pakistan, 1973.

The Court observed that "the position [as to right of appeal] can be regarding as falling in five periods. Prior to FA 2010 (period A), when s. 121 alone was in the field, there was a right of appeal against a best judgment assessment. Between FA 2010 and FA 2011 (period B), when s. 122C was brought in but s. 127 remained untouched, the right of appeal remained unaffected. There was a right against either the provisional assessment order or the (deemed) final assessment. The effect of FA 2011 (period C) was to take away the right of appeal against the provisional assessment order, but the right against the (deemed) final assessment remained unaffected. The purported effect of FA 2012 (period D) was to take away altogether the right of appeal against any order/assessment made under s. 122C. Finally, FA 2017 (period E) restored the position to what it had been prior to FA 2010." (Para 11)

The Court, after identifying the said five periods, remarked that "question therefore is whether period D constitutes an intelligible differentia and if so, does it have a rational nexus with the object sought to be achieved, to constitute reasonable classification? If the answer is in the affirmative, then there was no discrimination… However, if the answer is in the negative, then there was discrimination within the scope of Article 25, and the change made by FA 2012 in s. 127 was in violation of the Constitution." (Para 14)

The Court noted: "The first task is to determine the overall class from which the said respondents have been 'differentiated'. Obviously, that is not all of the taxpayers under the Ordinance; it is only a specific segment thereof that would be relevant. In our view, the proper segment comprises those taxpayers against whom a best judgment assessment was made (whether under s. 121 or s. 122C) on their failure to properly respond to a notice under s. 114(4). Now, all the taxpayers in this segment had a right of appeal under s. 127 up to FA 2010 (…period A…), and from FA 2017 onwards (period E). In between they also had a right of appeal between FA 2010 and FA 2011 (period B) and a curtailed right between FA 2011 and FA 2012 (period C). Between FA 2012 and FA 2017 (period D), within which the respondents now under consideration fell, there was no right of appeal at all." (Para 14)

The Court held: "Having carefully considered the matter, in our view there were no intelligible differentiae that distinguished, insofar as the right of appeal under s. 127 was concerned, taxpayers who fell in period D from the taxpayers who came in the other periods. Furthermore, the differentiation created as a result of FA 2012 did not have any rational nexus with the object sought to be achieved by s. 122C," (Para 15) and declared that "the change made to s. 127(1) by FA 2012 was discriminatory within the meaning of Article 25 and being in violation of the fundamental right so conferred liable to be struck down. It is so declared. (More precisely, subsection (25) of s. 15 of FA 2012 is declared to have been ultra vires the Constitution.)" (Para 17)

## Foreign Superior Courts

### SUPREME COURT OF UK

#### *1. Uber v Aslam*

**https://www.supremecourt.uk/cases/docs/uksc-2019-0029-judgment.pdf**
**[2021] UKSC 5**

**Before:** Lord Reed, President, Lord Hodge, Deputy President, Lady Arden, Lord Kitchin, Lord Sales, Lord Hamblen, Lord Leggatt (with whom Lord Reed, Lord Hodge, Lady Arden, Lord Sales and Lord Hamblen agree)

***Status of Uber drivers for the purpose of employment benefits***

The Appellants were providing private hire vehicle booking services through an app in the UK and internationally. The Respondents were their former drivers and were active users of that app. The Respondents claimed that they were "workers" under the relevant laws and were entitled to the minimum wage, paid leave and other legal protections. The Appellants urged that the respondents were independent, third party contractors and not "workers".

The Supreme Court observed that as on the facts there was no written contract between the drivers and Uber London, the nature of their legal relationship had to be inferred from the parties' conduct and there was no factual basis for asserting that Uber London acted as an agent for drivers. The correct inference was that Uber London contracts with passengers and engages drivers to carry out bookings for it. In any event, it is wrong in principle to treat the written agreements as a starting point in deciding whether an individual is a "worker". The correct approach is to consider the purpose of the relevant employment legislation. That purpose is to give protection to vulnerable individuals who have little or no say over their pay and working conditions because they are in a subordinate and dependent position in relation to a person or organization which exercises control over their work. The legislation also precludes employers, frequently in a stronger bargaining position, from contracting out of these protections. It was held that the Uber drivers were "workers" for the purposes of employment legislation and therefore entitled to be paid the minimum wage, to receive holiday pay and to benefit from other protections.

## SUPREME COURT OF THE PHILIPPINES

### *2. Pangilinan, et al. v Cayetano*

**https://sc.judiciary.gov.ph/17760/**

**Before:** Associate Justice Marvic M.V.F. Leonen

***President's power to formulate foreign policy is subject to the constitution and existing statute***

The Supreme Court acknowledged that the President, as primary architect of foreign policy, is subject to the Constitution and existing statute. Therefore, the power of the President to withdraw unilaterally can be limited by the conditions for concurrence by the Senate or when there is an existing law which authorizes the negotiation of a treaty or international agreement or when there is a statute that implements an existing treaty.

## THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

### *3. Solidarity and Another v Black First Land First and Others*

**http://www.supremecourtofappeal.org.za/index.php/component/jdownloads/send/35-judgments-2021/3528-solidarity-and-another-v-black-first-land-first-and-others-163-2020-2021-zasca-26-24-march-2021?Itemid=0**
**[2021] ZASCA 26**

**Coram:** Ponnan, Molemela and **Nicholls JJA** and Goosen and Unterhalter AJJA

***Court does not enjoy the power "not to decide a case that is properly brought before it"***

One Siyanda Gumede posted some comments on his Facebook page. This led to Solidarity, a registered trade union of predominantly white members, launching an application to seek an order declaring that the comments constituted hate speech and were an affront to human dignity and white people in general. Further ancillary relief was sought, including the payment of damages to the families of the children. After hearing oral

submissions, the judge adjourned the matter to consider the submissions. Thereafter, the Judge, at the front page of the judgment, wrote by hand, '[t]he judgment is a nullity in view of the SCA judgment of Jonathan Dubula Qwelane case'.

Later on, the matter was challenged before the Supreme Court of Appeal and it was held as follows:

> One of the primary functions of a court is to bring to finality the dispute with which it is seized. It does so by making an order that is clear, exacts compliance, and is capable of being enforced in the event of noncompliance. The court order in this matter did not achieve finality nor was it capable of being enforced.
>
> The high court simply failed to discharge its primary function. The order that it issued declared the proceedings a nullity, and hence declined to determine the dispute before the court. To like effect, the court, by rendering its own 'judgment' a nullity, left the parties without a binding decision. A court does not enjoy the power not to decide a case that is properly brought before it. Nor may a court declare its own proceedings to be a nullity.

## SUPREME COURT OF INDIA

### 4. *The State of Rajasthan v Love Kush Meena*

**https://main.sci.gov.in/supremecourt/2019/46786/46786_2019_38_1501_27192_Judgement_24-Mar-2021.pdf**

**Coram:** **Sanjay Kishan Kaul**, R. Subhash Reddy

***Right of public service after acquittal on benefit of doubt***

The moot point which arises for consideration of Supreme Court of India is whether a benefit of doubt resulting in acquittal of the respondent in a case charged under Sections 302, 323, 341/34 of the Indian Penal Code (IPC) can create an opportunity for the respondent to join as a constable in the Rajasthan Police service.

The Supreme Court observed what is important to note is the fact that the view of this Court has depended on the nature of offence charged and the result of the same. The mere fact of an acquittal would not suffice but rather it would depend on whether it is a clean acquittal based on total absence of evidence or in the criminal jurisprudence requiring the case to be proved beyond reasonable doubt, that parameter having not been met, benefit of doubt has been granted to the accused. The Court finally held that where in respect of a heinous or serious nature of crime the acquittal is based on a benefit of reasonable doubt, that cannot make the candidate eligible.

### 5. *State Bank of India v Ajay Kumar Sood*

**https://www.livelaw.in/pdf_upload/5546202135172 6890order12-mar-2021-390525.pdf**

**Before:** Justice D.Y. Chandrachud and Justice M.R. Shah

***Judgements are needed to convey the reasoning and process of thought underlining the conclusion which is arrived at by the adjudicatory forum. Judgments must be such which everyone can understand***

The Supreme Court has expressed its displeasure on the "incomprehensible" judgment of the Himachal Pradesh High Court and said such orders do "disservice to the cause of ensuring accessible and understandable justice to citizens". Judgments are intended to convey the reasoning and process of thought which leads to the final conclusion of the adjudicating forum. The purpose of writing a judgment is to communicate the basis of the decision not only to the members of the Bar, who appear in the case and to others to whom it serves as a precedent but above all, to provide meaning to citizens who approach courts for pursuing their remedies under the law.

## INTERNATIONAL COURT OF JUSTICE

### *6. Qatar v United Arab Emirates*

**https://www.icj-cij.org/public/files/case-related/172/172-20210204-JUD-01-00-EN.pdf**

**Present:** President Yusuf; Vice-President XUE; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa; Judges ad hoc Cot, Daudet; Registrar Gautier.

***Racial discrimination--- extent & scope***

Qatar made three claims of racial discrimination in the International Court of Justice - first claim arising out of travel bans and expulsion order, second claim arising from restrictions on Qatari media corporations and third claim asserting that measures taken result in "indirect discrimination" on the basis of Qatari national origin.

The Court observed that according to the definition of racial discrimination in Article 1, paragraph 1, of International Convention on the Elimination of All Forms of Racial Discrimination (CERD), a restriction may constitute racial discrimination if it "has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life". Thus, the Convention prohibits all forms and manifestations of racial discrimination, whether arising from the purpose of a given restriction or from its effect. In the present case, while the measures based on current Qatari nationality may have collateral or secondary effects on persons born in Qatar or of Qatari parents, or on family members of Qatari citizens residing in the UAE, this does not constitute racial discrimination within the meaning of the Convention. In the Court's view, the various measures of which Qatar complains do not, either by their purpose or by their effect, give rise to racial discrimination against Qataris as a distinct social group on the basis of their national origin.

## JUDICIAL CONDUCT COMMITTEE OF SOUTH AFRICA

### *7. In the matter between Africa 4 Palestine and Chief Justice Mogoeng Mogoeng*

**JSC/819/20 etc.**
**https://www.judiciary.org.za/images/news/2021/Judicial_Conduct_Committee_decision_on_complaints_against_the_Chief_Justice.pdf**

**Coram: Mojapelo J**

***Judges are to stay out of Politics and Duty comes before Faith: Pro-Israel comments of the Chief Justice violate Judicial Code of Conduct***

South Africa's Chief Justice Mogoeng Mogoeng (CJ) expressed his full support for Israel during a webinar hosted by the Jerusalem Post despite the government being in support of Palestine and opposing Israeli occupation of parts of the Palestinian territory. A huge public outcry followed including complaints to the Judicial Conduct Committee (JCC). Nevertheless, CJ remained adamant that he would never apologise and dismissed allegations that he was compromising the integrity of the judiciary by making political statements.
The question, before the JCC, was whether CJ had contravened the applicable judicial ethical rules.

JCC found CJ guilty of misconduct for willfully wading into political controversy with remarks questioning South Africa's foreign policy on Israel. It held that CJ had contravened five articles of the Judicial Code of Conduct, with the initial remarks and his subsequent statement declaring that he would rather "perish" than apologise for what he said. JCC reiterated that "[j]udges are to stay out of politics" and only permitted to pronounce on the legal and constitutional boundaries that may apply to those politics. "When called upon to pronounce, they do so

on the basis of the Constitution and the law and not on the basis of any preconceived notions — not even religion — however committed to those notions." The rationale for this is that any position taken by the government may find itself subject to legal review in court, and that adopting a political stance on matters that may land before them in court was therefore improper. JCC rejected CJ's submission that there was a distinction between politics and policy in this instance. Neither did it accept that freedom of religion offered him cover for the remarks on the state's stance towards Israel. JCC emphasised the need for the judiciary to comply with its own constitutional, legal and ethical obligations in order to ensure public confidence in its activities. CJ was given 10 days to tender a scripted apology to a meeting of the serving judges of the Constitutional Court alongside releasing it to the media. CJ, however, signified intention to appeal the decision which would be heard by at least three members of JCC.

## CONSTITUIONAL COURT OF SOUTH AFRICA

### *8. King N.O. v De Jager*

**[2021] ZACC 4**
**https://collections.concourt.org.za/bitstream/handle/20.500.12144/36627/%5bJudgment%5d%20CCT%20315-18%20King%20N.O.%20v%20De%20Jager.pdf?sequence=49&isAllowed=y**

**Coram**
Mogoeng CJ, **Jafta J**, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, **Mhlantla** J, Theron J and **Victor AJ**

***Prejudice from beyond the Grave Outlawed***

Five sisters claimed unfair discrimination after being disinherited because their great-grandparents in their will drafted in 1902 had specified that only male heirs could inherit family farms. Their applications remained unsuccessful before the High Court and the Supreme Court of Appeal.

At the heart of the matter, before the Constitutional Court, was the issue of freedom of testation in private wills, balanced against the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act (the Equality Act) and the Constitution.

All the judges agreed that the clause in the will which stipulated that only male descendants could inherit was invalid. They, however, offered different reasons. Mhlantla J held that impugned clause was inimical to the constitutional values and public policy and, therefore, it was necessary that common law rule of unenforceability of clauses contrary to public policy be extended to private disinheritance testamentary provisions.

However, Jafta J, in his majority opinion, held that there was no need to prefer the value of equality over those of freedom and dignity or to develop common law because the law had long recognized that clauses that were contrary to public policy were unenforceable. "Lest I be misunderstood, the Constitution does not require the testator to treat his or her family equally when gifting them with his or her property. Nor does it oblige him or her to leave any of his or her assets to them. They too have no entitlement to his or her property. But what the Constitution prohibits is unfair discrimination on the part of the testator when disposing of his or her property." "In each case where it is claimed that the testator has discriminated against someone, a careful analysis will be essential to determine whether the discrimination was indeed unfair. But where, as here, the unfairness is conceded, the need to decide this issue falls away." "The fact that the will we are dealing with here was executed in 1902, long before the Constitution and the (Equality) Act came into operation is immaterial. Both are applicable now because the respondents seek to enforce the will now."

Victor AJ agreed with Jafta J and held that the proper approach was direct application as

opposed to indirect application of the Bill of Rights. He reasoned that while the first judgment correctly pointed out the deficiencies of the common law freedom of testation, the option of developing the common law was not available due to the principle of constitutional subsidiarity.

## SUPREME COURT OF CANADA

### *9. Reference re Greenhouse Gas Pollution Pricing Act*

**2021 SCC 11**
**https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18781/index.do**

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

### *Legality and Constitutionality of "Carbon Tax" imposed by the Canadian Parliament*

In 2018, the Canadian Parliament enacted the Greenhouse Gas Pollution Pricing Act (Act) which details a minimum set of standards for pricing carbon leaving provinces free to establish their own policies beyond that initial threshold. However, the Act gives the federal government the power to apply its own carbon levy, known as the "backstop", on those provinces that either fall short of the national standard or have not implemented their own system. Three provinces challenged the constitutionality of the Act by references to their respective courts of appeal. In split decisions, the courts of appeal for Saskatchewan and Ontario held that the Act is constitutional, while the Court of Appeal of Alberta held that it is unconstitutional.

The issue was whether the Canadian Parliament had the constitutional authority to enact the Act.

Wagner CJ writing for the majority held, "Climate change is real. It is caused by greenhouse gas emissions resulting from human activities, and it poses a grave threat to humanity's future." The Act sets minimum national standards of greenhouse gas price stringency to reduce greenhouse gas emissions, pollutants that cause serious extra provincial harm. Parliament has jurisdiction to enact this law as a matter of national concern under the "peace, order, and good government" clause of the Constitution. Parliament has the authority to act in appropriate cases, where there is a matter of genuine national concern and where the recognition of that matter is consistent with the division of powers. Although the restriction created by the Act may interfere with a province's preferred balance between economic and environmental considerations, it is necessary to consider the interests that would be harmed — owing to irreversible consequences for the environment, for human health and safety, and for the economy — if Parliament were unable to constitutionally address the matter at a national level. If the provinces were to fail to address their greenhouse gas emissions, it would have an impact beyond their borders.

The Court also noted that the price on carbon, often referred to by its detractors as a "carbon tax," isn't actually a tax in the constitutional sense. They "cannot be characterized as taxes; rather, they are regulatory charges whose purpose is to advance the Act's regulatory purpose by altering behaviour,"

**Côté J disagreed** in part to hold that the Act is, in its current form, unconstitutional and cannot be said to accord with the matter of national concern formulated by the majority because the breadth of the discretion that it confers on the Governor in Council results in no meaningful limits on the power of the executive.

**Brown J dissented** and observed the Act's subject matter falls squarely within provincial jurisdiction. Rowe J also dissented to hold that the national concern doctrine is a residual power of last resort and that the national concern branch of the "peace, order, and good government" power cannot be the basis for the constitutionality of the Act.

### *10. Wastech v Greater Vancouver Sewerage and Drainage District*

**2021 SCC 7**
**https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18680/index.do**

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

***Duty to Exercise Contractual Discretion Reasonably***

Wastech was a company that moved and disposed of waste. The Greater Vancouver Sewerage and Drainage District (Metro) was responsible for the administration of waste disposal in the district.

Wastech and Metro had a long-term contract. The contract was for the removal and transportation of waste by Wastech. The contract said that Metro could choose to send the waste to any of three different disposal sites. Wastech would be paid a different rate depending on which site was chosen. Wastech was paid more if the site was farther away. The contract also gave Metro discretion to send the waste to the site of its choice. In 2011, Metro decided to send more waste to a closer location. This meant that Wastech did not reach the target operating ratio. As a result, Wastech said Metro violated the contract.

***The question was whether Metro had breached its duty to act reasonably in the exercise of contractual discretionary powers.***

In the arbitrator's opinion, Metro breached its duty by using its discretion in a way that prevented Wastech from having any chance of meeting the target operating ratio. Therefore, Wastech was entitled to compensation. The courts allowed Metro to appeal the arbitrator's decision. The judge set aside the arbitrator's award. The Court of Appeal upheld the judge's decision. The Court of Appeal said that the arbitrator applied the wrong legal test, and extended the duty of good faith further than the law allows. Finally, the matter was agitated before the Supreme Court of Canada.

**The Supreme Court upheld** the lower courts' decisions, setting aside the arbitrator's award. It said good faith does not allow a contracting party to use its discretion unreasonably.

The Supreme Court considered discretion to be used unreasonably when it is used in a way that is unconnected to the purposes for which the parties agreed to have discretion in the first place. In this case, the contract showed the parties agreed to give Metro discretion, so Metro could operate efficiently and keep costs low. The contract did not require Metro to use its discretion to ensure Wastech reached its target operating ratio in any given year. For this reason, the majority found that Metro exercised its discretion for the right purposes. Therefore, Metro did not violate the duty to act in good faith.

## FEDERAL CONSTITUTIONAL COURT OF GERMANY

### *11. In the proceedings on the constitutional complaint of Mr. W ...*

**2 BvR 916/11, 2 BvR 636/12**
**https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/12/rs20201201_2bvr091611.html**

**Coram**
König Vice President, Huber, Müller, Kessal-Wulf, Maidowski, Langenfeld JJ.

***Electronic Monitoring of Persons released from Prison is not Unconstitutional***

The complainants, who were released from prison after having served long sentence, claimed that statutory provisions relating to electronic monitoring violated guarantee of human dignity, general right of personality, right to informational self-determination, right to free movement, right to the inviolability of home, the prohibition of retroactivity, right to seek social reintegration

and the general principle of protection of legitimate expectations.

The Federal Constitutional Court held that the statutory provisions on the electronic monitoring of persons released from prison are compatible with the Basic Law. While such electronic monitoring constitutes a very intrusive interference with fundamental rights, in particular, with the fundamental right to informational self-determination and the general right of personality following from Article 2(1) in conjunction with Article 1(1) of the Basic Law, this interference is reasonable and is not disproportionate in relation to the weight of the legal interests electronic monitoring serves to protect. The mere determination of someone's whereabouts by means of GPS tracking does not generally encroach on the inviolable core of private life. Nor does the electronic determination of someone's whereabouts result in sweeping surveillance that would be incompatible with human dignity and turn the persons concerned into mere objects of state action. Electronic monitoring is subject to considerable restrictions both with regard to the group of persons subject to such a court-ordered direction and with regard to the seriousness of the criminal offences to be expected. Moreover, such a measure may only be imposed if there is a sufficiently specific danger that the person concerned will commit further serious criminal offences of the type listed in the statute. The rules on the use of collected data to monitor compliance with the direction to wear the electronic ankle tag, to punish non-compliance with court-ordered directions and to avert dangers to public security are appropriate. The electronic ankle tags that the persons concerned have to wear do not make it significantly more difficult for them to live an independent life or to be reintegrated into society. The complaints were rejected.

**ROYAL COURT OF JUSTICE**
**COURT OF APPEAL**
**(CIVIL DIVISION)**

### *12. Dale v Banga*

**https://www.bailii.org/ew/cases/EWCA/Civ/2021/240.pdf**
**[2021] EWCA Civ 240**

**Before:** Lord Justice Moylan**, Lady Justice Asplin** & Justice Hayden

***Judgement obtained by fraud---when the appellate court should not remand the case--- threshold test.***

The Court of Appeal declined to remit the issue of fraud to the lower court and dismissed the appeal. The court outlined what has to be proved in order to set aside a judgment on the basis of fraud, noting that "judgments are not set aside lightly". It is necessary to show that the judgment was obtained by fraud and that the fraud was that of a party to the action or was knowingly relied upon by that party; a mistake as to evidence, or the perjury of a witness, would not be sufficient. There has to be conscious and deliberate dishonesty in relation to the evidence given or matter concealed. The relevant evidence (or concealment) must be "material", i.e. fresh evidence shows the previous evidence was an operative cause of the court's decision to give judgment in the way it did. The materiality of the fresh evidence should be assessed by reference to its impact on the evidence supporting the original decision. The Court of Appeal proposed a two stage test as to whether the fraud issue should be remitted to the lower court:

The appellate court must determine whether the new evidence is capable of showing that the judge was deliberately misled by a party and that the judgment may have been obtained by fraud (the threshold test), which requires that:

- the new evidence must be sufficient to justify a pleading of fraud;
- it must be capable of showing that there was conscious and deliberate dishonesty which was a causative element of the judgment being decided the way it was; and

- the dishonesty must be that of a party to the action, or at least suborned by or knowingly relied upon by a party.
- If the threshold test is satisfied, it is a matter of the appellate court's discretion as to whether, on the facts and in the circumstances of the particular case, it is appropriate that the fraud issue should be remitted or otherwise dealt with within the same proceedings.

### *13. Bilta (UK) v Tradition Financial Services*

**https://www.bailii.org/ew/cases/EWCA/Civ/2021/221.pdf**
**[2021] EWCA Civ 221**

**Before:** Lord Justice David Richards Lord Justice Peter Jackson & **Lord Justice Nugee**

***Adjournment during trial----Grounds to be considered while granting adjournments***

The Court of Appeal allowed the appeal and adjourned the trial to the next date. The Court held that the test to be applied when considering an application to adjourn a trial is whether the trial will be fair in all the circumstances if it does go ahead. This assessment will be fact sensitive, although the inability of a party to attend the trial due to illness will almost always be a highly material consideration, and this principle also extends to important witnesses. The significance to be attached to the unavailability of an important witness will vary from case to case, in particular because the significance of oral evidence will vary. It may be critically important, or alternatively it may be that the contemporaneous documents are critical and the oral evidence is merely ancillary. But the unavailability of an important witness will usually be material and may be decisive. Having determined that a refusal to grant an adjournment would make the resulting trial unfair, a court should ordinarily grant the adjournment, regardless of the inconvenience to the other party or other court users, unless this is outweighed by an injustice to the other party that could not be compensated for.

## UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

### *14. United States of America v Kenneth Eugene Barrett*

**https://www.ca10.uscourts.gov/opinions/19/19-7049.pdf**
**2021 U.S. App. LEXIS 1425**

**Before:** **Hartz, Matheson** & Carson, Circuit Judges

***Balancing between the aggravating and mitigating circumstances while awarding punishment***

The U.S. Court of Appeals for the Tenth Circuit has granted habeas corpus relief to federal death-row prisoner finding that he was provided ineffective assistance of counsel in the penalty phase of his capital trial for the killing of an Oklahoma state trooper. Counsel of accused had unreasonably failed to investigate and present available mitigating evidence of brain damage, mental illness/bipolar disorder and chronic childhood trauma in the sentencing phase. It was held that the Court should strike a balance between the aggravating and mitigating circumstances while awarding punishment. Un-presented mitigating evidence had weakened the prosecution's case in aggravation and given the minimal mitigating evidence presented at trial, substantially strengthened case of accused for life imprisonment instead of death penalty.

*****

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