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Supreme Court of Pakistan

1. Ajmir Shah v. I.G. Frontier Corps, KPK

https://www.supremecourt.gov.pk/downloads_judgements/c.a._4862_2018.pdf

Present

Mr. Justice Gulzar Ahmed, CJ., Mr. Justice Ijaz Ul Ahsan, and Mr. Justice Qazi Muhammad Amin Ahmed

Delay in filing departmental appeal - Waiting for decision on service appeal of colleague employee is no ground for condonation of delay

While hearing a petition of an employee of the Frontier Corps for leave to appeal the Court examined the correctness of the judgment of the Federal Service Tribunal whereby appeal of the petitioner had been dismissed being time barred.

The petitioner contended before the Court that he was waiting for the decision on the service appeal of his other colleague, and after the judgment of the Tribunal passed in favour of that colleague was upheld by the Supreme Court and implemented he filed his departmental appeal. The Court repelled this ground pleaded to justify the delay and for condonation thereof with the observation: "In our view, such could not have been a sufficient cause or reason for the petitioner to file his departmental appeal after more than 4 years and 5 months. It seems that petitioner himself was not aggrieved of the order by which he was dismissed from service and the assertion of the petitioner that he waited for the result of the service appeal of [his colleague employee]…shows that the petitioner relied upon the grievance of [his colleague employee]…and not of his own. Had [his colleague employee]…lost his case, that would have been the end of the matter and the petitioner would have not raised grievance against the order of his dismissal. The law does not leave choice to an employee to raise his grievance after his colleague is succeeded in the case. The employee has to raise his grievance immediately when cause to him has arisen and more so within the limitation period…provided by law." (Para 7)

Principle of implied extension of the limitation period is not applicable where the appellate authority does not have the power of granting extension

The second ground agitated before the Court was: the departmental appeal of the petitioner has been decided on merits and thus, the limitation for filing of the departmental appeal stood impliedly condoned by the appellate authority. The Court rejected this ground also by holding that "the power for extension of period for filing of a departmental appeal under Rule 14 [of the Frontier Corps Rules, 1961] was vested in the authority against whose order the appeal is preferred and no power of extension of a period for filing of a departmental appeal, apparently seems, is vested with the appellate authority under the scheme of law as laid down in the [Frontier Corps] Ordinance of 1959 and the rules made under it. Thus, we note that the principle of implied extension could not be pressed in the present case, for that, the appellate authority in law was not vested with the power of granting extension in filing of a departmental appeal." (Para 10)

2. Federal Govt. Employees Housing Foundation v. Ghulam Mustafa

https://www.supremecourt.gov.pk/downloads_judgements/c.a._1476_2018.pdf

Present

Mr. Justice Mushir Alam, Mr. Justice Umar Ata Bandial, Mr. Justice Qazi Faez Isa and Mr. Justice Ijaz Ul Ahsan

Acquisition of private land for a housing scheme of Government employees constitutes a valid "public purpose" within the scope of the said expression as used in Article 24 of the constitution of Pakistan, 1973

The Court dealt, amongst others, with the question: whether acquisition of private land

for a housing scheme of the Federal Government Employees Housing Foundation (FGEHF) constitutes a valid "public purpose" within the scope of the said expression as used in Article 24 of the constitution of Pakistan, 1973 and in the Land Acquisition Act, 1894.

The Court answered the question in affirmative after making exhaustive examination of all the relevant provisions of the Constitutional of Pakistan, 1973 as well as that of the Land Acquisition Act, 1894 and discussion of almost all the significant cases on the subject. The Court approvingly referred to the observations of the Indian Supreme Court made in different cases to the effect that "ordinarily, the Government is the best authority to determine whether the purpose in question is a public purpose or not", and that "public purpose includes any purpose wherein even a fraction of the community may be interested or by which it may be benefited." The Court noted that even in the cases relied upon by the High Court 'public purpose' for a segment of society was held to be a public purpose. The Court referred to its earlier judgments wherein it has been held that "the acquisition of land for residence of Government servant is a public purpose", and that "the acquisition of land for a housing society is recognized as a public purpose."

The Court noted that the High Court concluded that the 'public purpose' would be justified as long as the entire classes of employees in connection with the Federation are benefitted by the housing scheme, and held that "the opinion of the learned bench of the High Court cannot be maintained regarding 'public purpose' not being justified" with the observation that "the acquisition of land by the FGEHF was no longer for a specified class of Federal Government employees but now included every employee in connection with the affairs of the Federation." (Para 98-107 and 123)

3. *Justice Qazi Faez Isa v. President of Pakistan*

https://www.supremecourt.gov.pk/downloads_judgements/const.p._17_2019_detailed_reasoning.pdf

Present

Present**: Mr. Justice Umar Ata Bandial**, Mr. Justice Maqbool Baqar, Mr. Justice Manzoor Ahmad Malik, Mr. Justice Faisal Arab, Mr. Justice Mazhar Alam Khan Miankhel, Mr. Justice Sajjad Ali Shah, Mr. Justice Syed Mansoor Ali Shah, Mr. Justice Munib Akhtar, Mr. Justice Yahya Afridi and Mr. Justice Qazi Muhammad Amin Ahmed

The **core questions** dealt with in the case were: (i) Whether President is to form opinion under Article 209 (5) of the Constitution on the advice of the Prime Minister under Article 48(1) or in his own discretion under Article 48(2)? (ii) What is the liability of Judges in financial matters of their family members? (iii) Whether the Petitioner breached the provisions of Section 116(1)(b) of the Income Tax Ordinance, 2001 by not mentioning the assets of his spouse in his wealth statement? (iv) Whether covert surveillance was made to trace the properties of the Petitioner's family? (v) What is the legal status of the Asset Recovery Unit (ARU)? (vi) Whether filing of the impugned Reference against the Petitioner suffers from malafide of fact and malafide of law?

The President is to form his "opinion" under Article 209(5) of the Constitution on advice of the Prime Minister as provided in Clause (1) of Article 48 of the Constitution read with the Rules of Business, 1973. [Four Hon'ble Judges dissented]

Hon'ble Mr. Justice Umar Ata Bandial speaking for the majority of six judges held that the President of Pakistan is to form his "opinion" under Article 209(5) of the Constitution of Pakistan on advice of the Prime Minister as provided in Clause (1) of Article 48 read with Entry number 35 of Schedule V-B to the Rules of Business, 1973. His lordship, however, elaborated the scope of application of mind by the President despite being ultimately bound by advice of

the PM thus: "When the President is performing his function under Article 209(5) he is ultimately bound by the advice of the PM or the Cabinet, as the case may be, under sub-Article (1) of Article 48. However, the proviso to Article 48(1) ibid authorises the President to return, within fifteen days, the advice for reconsideration. Therefore, the President's power clearly grants him the jurisdiction to evaluate the worth of the advice tendered to him. If he is so inclined he may require the same to be reconsidered once by the PM or the Cabinet. Consequently, even Article 48(1) envisages that the President when performing his functions under this provision will apply his mind to the information before him. Otherwise the purpose of inserting a proviso, which permits the President to return the advice, becomes redundant if the President only has to mechanically agree with the PM or Cabinet." (Para 127)

Dissenting Opinions

The four Hon'ble Judges, namely, Mr. Justice Maqbool Baqar, Mr. Justice Faisal Arab, Mr. Justice Syed Mansoor Ali Shah, and Mr. Justice Yahya Afridi dissented and held, in essence, that the President of Pakistan is to form his "opinion" under Article 209(5) of the Constitution of Pakistan in his discretion as provided in Clause (2) of Article 48 of the Constitution.

Hon'ble Mr. Justice Faisal Arab, who generally agreed with the majority judgment, did not join majority opinion on this issue. His lordship held that from the contents of Article 209 (5) of the Constitution, it becomes clear that in forming his opinion the President is not dependent on the advice of the Prime Minister or the Cabinet. He can form opinion on any information that may have come to him from any other source. This is so as the Judiciary is separate and distinct from the Executive branch of the Government. It has to remain completely separate and uninfluenced by any decision of the Executive in the running of its affairs. The Executive being the biggest litigant in the country was not to be conferred with the power to decide against which judge an inquiry into his conduct or capacity should be conducted by the Supreme Judicial Council. While examining the power of the President to call for inquiry under Clause 5 of Article 209 of the Constitution, it clearly indicates that the President has to act in his own discretion to which he is entitled to by virtue of Article 48(2) of the Constitution. (Para 24)

Hon'ble Mr. Justice Maqbool Baqar held that functions and obligations of the judiciary cause friction and give rise to tension between the executive and the judiciary, and thus a unique role of neutral buffer has been assigned by the Constitution to the President. The president must personally and independently apply his mind as to whether a Judge has committed misconduct and, if so, whether it justifies the sending of reference against him. Sub-article (2) of Article 48 of the Constitution provides for the President to "act in his discretion in respect of any matter, in respect of which he is empowered by the constitution to do so". It is his exclusive domain and prerogative to form an opinion and decide as to whether it is desirable to send a matter under Article 209 of the Constitution to the SJC. (Para 47)

Hon'ble Mr. Justice Syed Mansoor Ali Shah held that the role of the President when considered in the background of fundamental principles of constitutional interpretation best assumes the role of an "arbiter" and a "buffer" between a partisan Government and a permanent neutral branch of the State, the Judiciary. The President is to examine the "information" placed before him under Article 209(5) as Head of State, acting as an arbiter between the two branches of the State, discharging his function as a person representing the unity of the Republic. This unique function of the President is co-equal with the role of the Council under the same clause of Article 209 of the Constitution. Both have to form an "opinion;" both have to perform a somewhat quasi-judicial function;

both have to take a decision on the basis of the information before them. Under Article 48(2), where the Constitution vests the President with a more personalized task of exercising his "discretion," he performs the same himself and not on the advice of the Cabinet or the Prime Minister. Quite similar is the function of forming an "opinion" which can only be done by the President himself. (Paras 56-57)

Hon'ble Mr. Justice Yahya Afridi held that the constitutional mandate of the worthy President, under clause (5) of Article 209 of the Constitution, is to form an "opinion": whether misconduct is made out against the Judge, and if so, then a reference is to be sent for an enquiry to the Council. This decision or for that matter, the "opinion" is to be based on the "information" received from "any source". The "advice" of the worthy Prime Minister when received by the worthy President, would only be an "information" received from a "source", and thus lose its efficacy as an "advice", within the contemplation of clause (1) of Article 48 of the Constitution. In such circumstances, the "advice" of the worthy Prime Minister would then fall within the exception to the general rule, as envisaged under clause (2) of Article 48 of the Constitution; where the worthy President would have to apply his independent mind on the matter and then act accordingly. (Para 33)

Judges are supposed to have knowledge of the financial interests of their family members, and are expected to make reasonable efforts to acquire such information when questioned by a competent forum. [One Hon'ble Judge did not decide this question, while two Hon'ble Judges dissented.]

Hon'ble Mr. Justice Umar Ata Bandial speaking for the majority of seven judges held Judges are supposed to have knowledge of the financial interests of their family members. However, if they do not, then they are expected to make reasonable efforts to acquire such information, more so when they are questioned by a competent forum to explain the financial interests of their family members. What constitutes 'reasonable effort' on the part of Judges will no doubt depend upon the circumstances of each case. However, a plea of lack of knowledge by a Judge in relation to the financial affairs of his family members is untenable. Accordingly, there is a continuing obligation on a Judge to keep himself informed about the financial interests of his family members. (Para 42)

Hon'ble Mr. Justice Yahya Afridi did not decide this issue. His lordship observed that the scope and extent of the culpability of a sitting Judge qua the actions and inactions of his spouse and children, is a matter which ought to have been expressly dealt with in the code of conduct. In absence of a clear provision therein, this issue has to be left open for determination by the Council, the authority competent under the Constitution to determine and prescribe the terms of the conduct of a sitting judge. (Para 22)

Dissenting opinions

Hon'ble Mr. Justice Maqbool Baqar held that the learned counsel for the Federation was suggesting to us to read the word "Judge", as employed in Article 209 of the Constitution, as meaning not only the judge himself, but also his/her spouse and children and expand/stretch the meaning of the word, so as to include even the "close associates" and family members" of the Judge,. This argument defies even the common sense, and to say the least is absolutely preposterous. (Para 94)

Hon'ble Mr. Justice Syed Mansoor Ali Shah held that the Code of Conduct is judge specific document and does not extend to family members and in no event, holds a judge vicariously responsible for the conduct of his family - his spouse and children - who are independent, natural and legal persons in their own right and can do whatever they want. "Conduct" and "misconduct" are

personal to a judge under the Code. Like any other citizen, a judge cannot be held accountable for the conduct of someone else, there is no such thing as vicarious responsibility of a judge, unless the law requires it or there is evidence that the wrong doings of the judge have been concealed behind the family façade. (Para 74)

Question as to alleged breach of Section 116(1)(b) of the Income Tax Ordinance, 2001 by the Petitioner by not mentioning the assets of his spouse in his wealth statement is to be determined in the first instance by the hierarchy of specialised fora specified in the Ordinance. [one Hon'ble Judge expressed a different view for not deciding this question, while two Hon'ble Judges with divergent opinions decided this question]

Hon'ble Mr. Justice Umar Ata Bandial speaking for the majority of six judges held that they are not inclined to decide this issue on the basis of either the respondents' interpretation of Section 116(1)(b) or on the basis of the petitioner's interpretation of the said provision, and considers that it would be better if this matter is determined in the first instance by the hierarchy of specialised fora specified in the Ordinance. His lordship held that the respondents' decision to charge the petitioner with a violation of Section 116 of the Ordinance on the basis of an interpretation that was devoid of judicial consideration let alone approval and lacked any definitive and consistent departmental practice, and in the absence of any determination by the tax authorities on the liability of either the petitioner or his spouse was conjectural. His lordship further held that without giving an opportunity to the petitioner's spouse to explain her sources of funds for the acquisition of London Properties and the reasons for not declaring such properties in her wealth statement, the making and filing of the Reference was premature, hypothetical and impulsive. (Para 117-120)

Concurring opinion

Similarly, **Hon'ble Mr. Justice Syed Mansoor Ali Shah** observed that the matter of alleged tax violation has not reached this Court in its usual legal course routing through the tax authorities, tax tribunal and the High Court; therefore, no definite finding can be given on the interpretation put forward by the parties, or any other possible interpretation, of Sections 116(1)(b) of the ITO. His lordship however held that even on the basis of interpretations canvassed by the parties, the opinion of commission of misconduct against the Petitioner on the basis of the alleged violation of the provisions of Section 116(1)(b) could not have reasonably been formed. (Paras 64-68)

Hon'ble Mr. Justice Yahya Afridi did not decide this issue. His lordship expressed that he would not comment upon the merits of the charges levelled against the Petitioner in the Reference, as the same falls in the exclusive domain of the Council. (Para 22)

Dissenting opinions

Hon'ble Mr. Justice Maqbool Baqar and Hon'ble Mr. Justice Faisal Arab, however, decided this question.

Hon'ble Mr. Justice Maqbool Baqar held that as patently manifest from the plain reading of the provisions of section 116 ITO 2001, and the Performa of wealth statement prescribed thereunder, the petitioner in the fact and circumstances of the case, was not at all obliged to make the disclosure of the assets of his independent spouse and adult children, and therefore no case can possibly be made out against the petitioner, for any non-compliance, or breach of the said provision. His lordship held that a filer is certainly not required to disclose the assets of his independent spouse and children through the wealth statement that he/she is required, to file along with his/her income return, otherwise there was no need for the provisions i.e. sub-section (1) of section 116,

enabling the Commissioner to seek such information through a notice. Therefore, neither was the petitioner obliged to make any declaration as suggested, nor has he committed any breach of the provision of Section 116 or for that matter any other provision of ITO 2001. His lordship further observed that the only two circumstances in which a Section 116(1) notice in relation to the said properties could be issued to the Petitioner were, (i) if the Commissioner believed at the relevant time that the Petitioner's income had escaped taxation and was not accounted for in his wealth statement under 116(2) or (ii) if the Commissioner issued a notice to the spouse of the Petitioner and she stated that she purchased the properties in question from money received from her husband, which he had not disclosed in his wealth statement. (Paras 34-42)

Hon'ble Mr. Justice Faisal Arab, who generally agreed with the majority judgment, did not join majority opinion on this issue. His lordship held that the declaration required under Section 116 of the Income Tax Ordinance, 2001 is regardless of ones' gender as the phrase used in the said section is 'person's spouse' and not wife. Thus, if a resident taxpayer is a husband then he is required to disclose the assets of his wife and if resident taxpayer is a wife then she is required to declare her husband's assets. Such a declaration has nothing to do with the spouse's financial dependency or otherwise on the resident taxpayer. Income tax law is not concerned with whether the spouse of a resident taxpayer is dependent or is a person of means. (Para 17)

Accessing the property records of the petitioner's family cannot be classified as either invasion of privacy or covert surveillance. [Two Hon'ble Judges dissented]

Hon'ble Mr. Justice Umar Ata Bandial speaking for the majority of seven judges held that the UK Land Registry website is an open source; property records are open to the public and no confidentiality is attached to such records. The acts of the officers of ARU and the Federal Government in accessing the property records of the petitioner and his family cannot be classified as either invasion of privacy or covert surveillance. (Paras 87-88)

Concurring opinion

Similarly, **Hon'ble Mr. Justice Yahya Afridi** held that had the information regarding the foreign property owned by the family members of the Petitioner not been freely and legally accessible, then it would have sufficed to establish the allegation of obtaining the said information through surveillance. However, the learned counsel for the Federation was able to demonstrate that the information regarding any property in the United Kingdom, including the one owned by the family member of the Petitioner could be retrieved or accessed through internet searches. Hence, the stance regarding mala fide of the Federal Government did not cross the legal threshold to saddle it with the responsibility of unlawfully obtaining the said information by surveillance. (Para 43)

Dissenting opinions

Hon'ble Mr. Justice Maqbool Baqar observed that for retrieving information regarding title from the HM Land Registry website one has to make certain payment, however not a single document, either by way of any email or the requisite receipts have been filed. It is clear that the whole rigmarole of "complaint" followed by an "investigation" was to cover up the fact that the information was, in fact, obtained by government agencies through covert surveillance. (Paras 78-79)

Hon'ble Mr. Justice Syed Mansoor Ali Shah held that in the absence of evidence that was to be furnished by ARU or the Law Minister as to record of the searches made on

the 192.com and UK HM Land Registry websites, it is but obvious that the information about the addresses of properties were obtained through no other means but through covert surveillance and interception of the intelligence agencies, without any authorization of law and by brutally trampling over the constitutional guarantees of privacy, personal freedom and dignity. (Paras 26-27)

Asset Recovery Unit (ARU) ARU is simply a coordinating office attached to the Cabinet Division. [One Hon'ble Judge did not decide this question, while two Hon'ble Judges dissented]

Hon'ble Mr. Justice Umar Ata Bandial speaking for the majority of seven judges held that the ARU is simply a coordinating office attached to the Cabinet Division with the main purpose of facilitating the collaborative efforts of the relevant statutory functionaries, and declared that there is no fatal defect in the creation of ARU. (Paras 70-76)

Hon'ble Mr. Justice Yahya Afridi did not decide the question by observing that in the present case, the controversy in hand can be resolved based on the legality of the actions taken by the Chairman of ARU, passing a definite finding on the legal status of ARU would be unnecessary, if not legally incorrect. (Para 44)

Dissenting opinions

Hon'ble Mr. Justice Maqbool Baqar held that the ARU and its Chairman both are unknown to law, Constitution and the rules of business framed thereunder. The ARU and its purported Chairmanship do not owe their existence to any law. Both are non-entities. (Para 52)

Hon'ble Mr. Justice Syed Mansoor Ali Shah held that Rule 4(5) of the ROB does not empower the Prime Minister to establish new agencies or offices; it simply authorizes him to refer the business of the Government to already established agencies and offices under the law. The Federal Government, as per Rules 2(1)(ii) and 4(4) of ROB, can only declare them attached with a particular Division, but cannot create them. His lordship held that the establishment of the ARU was absolutely without lawful authority, and in the absence of any legal status of the ARU, its Chairman and Members also had no legal position or status. (Para 15)

Preparation and framing of the Reference against the petitioner is not patently motivated with malice in fact; the scale and degree of the illegalities are such that the Reference is deemed to be tainted with mala fide in law. [Four Hon'ble Judges held the different views]

Hon'ble Mr. Justice Umar Ata Bandial speaking for the majority of six judges held that no malice in fact is made out on the allegation that the Reference is a direct consequence of the Dharna Judgment with the observations that the observations made by the Petitioner in the Dharna Judgment pale in comparison to the remarks passed by this Court in Air Marshal (Retd.) Muhammad Asghar Khan Vs. General (Retd.) Mirza Aslam Baig (PLD 2013 SC 1) in which far stronger observations about our politicians and political system failed to draw any adverse reaction from the Federal Government against any Judge, and that the recourse to a lawful remedy under Article 209(5) of the Constitution cannot be malicious unless for ill motives an information alleges wrong or distorted or exaggerated facts, or seeks relief that is inordinate or extraneous to the undisputed facts. (Para 55)

His lordship, however, held that the actions of the respondents had violated not only the express provisions of the Constitution, the ROB, the Ordinance and AMLA but had also ignored the law laid down in the CJP case. The errors committed by them in the preparation and framing of the Reference cannot be termed as mere illegalities. Instead,

in the context of Article 209 their errors amount to a wanton disregard of the law. Being arbitrary and illegal these act have ceased to be actions contemplated by any of the applicable laws such as the Constitution and the Ordinance (amongst others). As a result, although the preparation and framing of the Reference against the petitioner is not patently motivated with malice in fact, the scale and degree of the illegalities are such that the Reference is deemed to be tainted with mala fide in law. (Para 136)

Hon'ble Mr. Justice Faisal Arab and **Hon'ble Mr. Justice Yahya Afridi** did not held the filing of the Reference against the Petitioner to be suffering from either malafide of fact or mala fide of law.

Dissenting opinions

Hon'ble Mr. Justice Maqbool Baqar held that after examining and analyzing the various allegations, claims, and contentions of the parties, and the facts and circumstances of the case, as evident from the record, and in the light of the relevant statute, and the case law placed before the Court, by both the sides, he found that the allegations against the petitioner were wholly unfounded, baseless, frivolous, misconceived and mala fide, and that the petitioner was right in claiming the purported Reference to be a product of animosity, malice of law as well as of facts and that it streams from the ill-will harbored by some functionaries of the executive against the petitioner. (Para 102)

Hon'ble Mr. Justice Syed Mansoor Ali Shah held that blatant violations of the law and Constitution by the Chairman, and Legal Expert of the ARU, the officers of FBR, FIA and NADRA, the Law Minister and the Prime Minister when read in the background of the assertions made by the current ruling political parties (PTI and MQM) in their review petitions filed against the Faizabad Dharna judgment, regarding removal of the Petitioner from his office lead to a clear and a convincing finding that the whole process initiated under the garb of accountability of the Petitioner suffers from more than mere malafide of law and jumps up into the realm of malafide of fact also. Other than the legal and constitutional violations, extraneous considerations have come to surface, which reflect vindictiveness and ulterior motive. The facts of the case go beyond malafide of law and fall within the ambit of malafide of fact as they show bad faith and colourable exercise of powers for collateral and ulterior purposes not authorized by the law. (Para 80)

Seven-three difference of opinion on direction to FBR to proceed against the spouse and children of the Petitioner under the Income Tax Ordinance 2001.

The **majority of seven Hon'ble Judges**, after quashing the Reference against the Petitioner, made certain directions to the Commissioner, FBR to issue notices under ITO, 2001 to the spouse and children of the Petitioner for inquiring about their sources of funds for acquisition of the foreign properties by them, and to the Chairman FBR to submit a report of the decision of that proceedings to the Council. While the Registrar of the Court was asked to place that report before the Hon'ble Chief Justice for consideration of the matter by the Supreme Judicial Council under its suo moto powers.

Dissenting opinions

The **minority comprising three Hon'ble Judges**, namely, Mr. Justice Maqbool Baqar, Mr. Justice Syed Mansoor Ali Shah, and Mr. Justice Yahya Afridi dissented and did not join in those directions on the ground, amongst others, that the spouse and children of the Petitioner were not party to the proceedings. Any adverse order against them without providing them a fair opportunity of hearing would deprive them of their inalienable right to due process under the Constitution and the law, and would contravene the well-entrenched and deep rooted principle of audi alteram partem.

4. Manzoor Hussain v. Misri Khan

https://www.supremecourt.gov.pk/downloads_judgements/c.a._1698_2014.pdf

Present

Mr. Justice Qazi Faez Isa and Mr. Justice Amin-ud-Din Khan

Production of disputed documents in evidence through statement of counsel deprecated

While hearing a pre-emption case the Court noted that "copies of the acknowledgement receipt (exhibit P4), aks shajarah kishtwar (exhibit P2), registered post receipt (exhibit P3), mutation (exhibit P5) and jamabandi for the year 2000-2001 (exhibit P6) were produced and exhibited by the pre-emptor's counsel, but without him testifying."

The Court deprecated such practice of producing disputed documents (acknowledgement receipt and registered post receipt in this case) through statement of counsel, with the observations: "We have noted that copies of documents, having no concern with counsel, are often tendered in evidence through a simple statement of counsel but without administering an oath to him and without him testifying, especially in the province of Punjab. Ordinarily, documents are produced through a witness who testifies on oath and who may be cross-examined by the other side. However, there are exceptions with regard to facts which need not be proved; these are those which the Court will take judicial notice of under Article 111 of the Qanun-e-Shahdat Order, 1984 and are mentioned in Article 112, and facts which are admitted (Article 113, Qanun-e-Shahdat Order, 1984)." The Court further said that "[i]n not observing the rules of evidence unnecessary complications for litigants are created, which may result in avoidable adverse orders or in the case being remanded on such score, which would be avoided by abiding by the Qanun-e-Shahadat Order, 1984." (Paras 4 and 5)

5. Gul Tiaz Khan v. Registrar Peshawar High Court

https://www.supremecourt.gov.pk/downloads_judgements/c.a._353_2010.pdf

Present

Mr. Justice Gulzar Ahmed, CJ., Mr. Justice Sardar Tariq Masood, Mr. Justice Faisal Arab, **Mr. Justice Ijaz Ul Ahsan**, and Mr. Justice Sajjad Ali Shah

The executive, administrative or consultative actions of the Chief Justice or Judges of a High Court are not amenable to the constitutional jurisdiction of High Court under Article 199 of the Constitution.

The constitutional question before the Court was: whether the executive, administrative or consultative actions of the Chief justice or Judges of a High Court are amenable to the constitutional jurisdiction of High Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

The larger bench of five judges differed with and overruled the view taken by a three-judge bench in Muhammad Akram v. Registrar, IHC (PLD 2016 SC 961), and unanimously answered the question in negative.

Hon'ble Mr. Justice Ijaz Ul Ahsan speaking for the Court held: "Keeping in view Article 176, 192, 199 and 208 of the Constitution, and upon a harmonious interpretation thereof, in our humble opinion, no distinction whatsoever has been made between the various functions of the Supreme Court and High Courts in the Constitution and the wording is clear, straightforward and unambiguous in this regard. There is no sound basis on which judges acting in their judicial capacity fall within the definition of 'person' and judges acting in their administrative, executive or consultative capacity do not fall within such definition. In essence, the definitions of a High Court and Supreme Court provided in Articles 192 and 176 supra respectively are being split into two when the Constitution itself does not disclose such intention. It is expressly or by implication a settled rule of interpretation of

constitutional provisions that the doctrine of casus omissus does not apply to the same and nothing can be "read into" the Constitution. If the framers of the Constitution had intended there to be such a distinction, the language of the Constitution, particularly Article 199 supra, would have been very different. Therefore to bifurcate the functions on the basis of something which is manifestly absent is tantamount to reading something into the Constitution which we are not willing to do. In our opinion, strict and faithful adherence to the words of the Constitution, specially so where the words are simple, clear and unambiguous is the rule. Any effort to supply perceived omissions in the Constitution being subjective can have disastrous consequences. Furthermore, the powers exercisable under the rules framed pursuant to Article 208 supra form a part and parcel of the functioning of the superior Courts. In other words, the power under Article 208 supra would not be there but for the existence of the superior Courts. This 'but for' test, as mentioned by the learned Attorney general, is pivotal in determining whether or not a particular act or function carried out by a Judge is immune to challenge under the writ jurisdiction under Article 199 supra. This test is employed by courts in various jurisdictions to establish causation particularly in criminal and tort law – but for the defendant's actions, would the harm have occurred? If the answer to this question is yes, then causation is not established. Similarly in the instant matter, but for the person's appointment as a judge (thereby constituting a part of a High Court or the Supreme court under Article 192 and 176 supra respectively), would the function in issue be exercised? If the answer to this question is yes, then such function would not be immune to challenge under Article 199 supra. In this case with respect to the administrative, executive or consultative acts or orders in question, the answer to the "but for" test is unqualified no, therefore such acts or orders would in our opinion be protected by Article 199(5) of the Constitution and thereby be immune to challenge under the writ jurisdiction of the High Court." (Para 19)

6. *Zakia Hussain v. Farooq Hussain*

https://www.supremecourt.gov.pk/downloads_judgements/c.a._1355_2006.pdf

Present

Mr. Justice Umar Ata Bandial, **Mr. Justice Mazhar Alam Khan Miankhel** and Mr. Justice Munib Akhtar

Facts and circumstances of each case determine the effect of non-appearance of a party in the witness box in support of his case

The Court dealt with the question: whether non-appearance of a party in the witness box and appearance of his attorney in his place is fatal for his case.

The Court observed that there is no hard and fast rule available in law to answer the question. Facts and circumstances of each case are the determining factors in considering such like question. The Court elaborated that "[i]nitially, it is the party itself to depose about the first hand and direct evidence of material facts of the transaction or the dispute and its attorney having no such information cannot be termed as a competent witness within the meaning of Order III Rule 1 & 2 of CPC. Yes! The attorney can step-in as a witness if he possesses the first hand and direct information of the material facts of the case or the party had acted through the attorney from the very inception till the accrual of cause of action. Deposition of such an attorney under the law would be as good as that of the principal itself. Non-appearance of the party as a witness in such a situation would not be fatal. If facts and circumstances of the case reflect that a party intentionally did not appear before the court to depose in person just to avoid the test of cross examination or with an intention to suppress some material facts from the court, then it will be open for the court to presume adversely against said party as provided in Article 129 (g) of Qanun-e-Shahadat, Order 1984 (QSO, 1984)."

7. Muhammad Jawed v. First Women Bank

https://www.supremecourt.gov.pk/downloads_judgements/c.p._686_k_2019.pdf

Present

Mr. Justice Faisal Arab and **Mr. Justice Sajjad Ali Shah**

Only a legitimate expectation of acquiring right, not a vested right, subject to fulfilment of all the legal requirements is created in favour of the bidder declared successful in a public auction.

The Court dealt with the question: whether after having been declared the highest bidder in auction proceedings, any vested right or legitimate expectation of acquiring right in the subject property is created in favour of the successful bidder.

The Court held that no vested right in the subject property is created in favour of the successful bidder; however, a legitimate expectation is created in his favour against the other bidders, making him expect that his/her offer shall be accepted by the Court and the property in question against other competitors will be transferred in his/her name after all the legal requirements have been met.
The Court observed: "[T]he nature of a bid made in such auctions…is that of an offer which does not by itself give rise to any rights, as the same is always subject to acceptance by the Court after proper application of its judicial mind followed by the deposit of full purchase-money under Order XXI Rule 85 CPC. The Court explicated, "[E]xcept inherent human rights, rights and liabilities generally arise out of legal relationships that exist in the society, be they between the state and the citizens or among the citizens themselves. Since a bid, being an offer, standing alone does not create any such relationship, and neither does the aforesaid deposit, it logically follows that no rights can be said to arise out of the same. … In case the proposition that the declaration by the Court Auctioneer as highest bidder is to be treated as sale is accepted then it would amount to devolving the duty/function of the Court to see the appropriateness of the bid on the auctioneer which under no circumstances is permissible as functions of the Court cannot be delegated. The Court held that "vested/third party rights accrue in favour of a bidder when the auction-sale becomes complete, i.e. when a bid is accepted by the Court and thereafter the full purchase-money is deposited in terms of Order XXI Rule 85 CPC." (Paras 9, 9A and 10A)

As to the legitimate expectation of acquiring right in the property, the Court held that "the declaration of the highest bidder at the end of an auction is merely to let the participant bidders know who is to deposit the earnest money in terms of Order XXI Rule 84 CPC. As to the creation of legitimate expectation in favour of the highest bidder to the sale of subject property, such expectation is of course created in favour of the highest bidder but against the other bidders, making him expect that his/her offer shall be accepted by the Court and the property in question against other competitors will be transferred in his/her name after all the legal requirements have been met. However,…such expectation does not give rise to any right much less vested right in the property, (Para 9B)

8. Province of Punjab v. Javed Iqbal

https://www.supremecourt.gov.pk/downloads_judgements/c.p._1554_l_2020.pdf

Present

Mr. Justice Manzoor Ahmad Malik, Mr. Justice Sajjad Ali Shah and **Mr. Justice Syed Mansoor Ali Shah**

Proviso to Section 21 of the PEEDA Act, 2006 that states "departmental proceedings initiated against a retired employee shall be finalized not later than two years of his retirement" is of mandatory nature.

The question of law before the Court was: whether the proviso to Section 21 of the Punjab Employees Efficiency, Discipline and Accountability Act, 2006 is directory or mandatory.

The said proviso states that "departmental proceedings initiated against a retired employee shall be finalized not later than two years of his retirement."

The Court held that "the finalization of the departmental proceedings not later than two years of the retirement of the employee under the proviso to section 21 of the Act is a mandatory provision and any proceedings after the said statutory period shall stand abated and any orders passed after the efflux of the above time period are void and have no legal effect." (Para 13)

While holding so the Court, inter alia, observed: "The…provision [of the preamble and Section 1(4)(iii)] shows that the main purpose of Act is to enhance good governance in service matters and provide measures for improvement of efficiency, discipline and accountability of the employees. Employee is defined as a person who is in employment either in a Corporation or in the Government service. Employee (a person in service) is, therefore, the blue-eyed boy of the Act and the central focus of the law, which revolves around improving governance through improvement of efficiency, discipline and accountability of the serving employees. A retired employee, however, falls outside the focus and theme of the Act except a limited category of retired employees. The presence of a retired employee under the Act is recognized for the first time in the definition of the term "accused" under the Act, which provides for a person who is or has been an employee and against whom an action has been initiated under the Act. Retired employee is only recognized if there are disciplinary proceedings initiated against him and not otherwise. Section 1 (4) (iii) provides that the Act is applicable only to a retired employee against whom departmental proceedings have been initiated either while he was in service or within a period of one year after his retirement. Therefore, an employee who has retired for over an year and no departmental action has been initiated against him falls outside the mischief of the Act. Proviso to Section 21 of the Act provides an upper time limit for finalizing the departmental proceedings initiated against a retired employee i.e., no later than two years from the date of his retirement. The scheme of the Act shows that a retired employee recognized by the Act has a restrictive meaning i.e., a person against whom departmental proceedings have been initiated and finalized within certain strict statutory timelines. First, those retired employees, against whom departmental proceedings have been initiated either in service or within one year of their retirement. Second, against whom departmental proceedings have been finalized within two years of their retirement. A retired employee falling outside these two timelines falls outside the mischief of the Act." (Para 4)

9. Commissioner Inland Revenue v. Secretary Revenue Division

https://www.supremecourt.gov.pk/downloads_judgements/c.a._647_2018.pdf

Present

Mr. Justice Umer Ata Bandial, **Mr. Justice Munib Akhtar** and Mr. Justice Sayyed Mazahar Ali Akhtar Naqvi

The relevant area for seeking benefit of the exemption clause (126F) of Part I of the Second Schedule to the Income Tax Ordinance, 2001 is the area where the business activities are carried out to derive profits and gains, and not the area where the payment of that profits and gains is made or received.

The questions before the Court were: whether, in the facts and circumstances of the case, the respondent taxpayer is entitled, for the relevant tax years, to the benefit of exemption clause (126F) of Part I of the Second Schedule to the Income Tax Ordinance, 2001; and if so, whether he is entitled to return of any money incorrectly deducted as advance tax.

The exemption clause (since omitted) had provided in material part as follows: "(126F)

Profits and gains derived by a taxpayer located in the most affected and moderately affected areas of Khyber Pakhtunkhwa, FATA and PATA for a period of three years starting from the tax year 2010….”

The Court answered both the said questions in affirmative. The Court noted that “there is no dispute that the place of business of the respondent was located in a “moderately affected area” within the meaning of the exemption clause. No doubt the commission [profit of the respondent] paid by the franchisor was from, and in, an area outside the areas identified in the exemption clause, but equally there can be no doubt that the business activities were carried out within such an area. It seemed to us that the profits and gains made by the respondent therefore arose therein. Accordingly, the respondent was entitled to the benefit of the exemption clause.” (Para 4)

The return of any money incorrectly deducted as advance tax would not be tantamount to a “refund” within the meaning of Section 169(2)(e) of the Income Tax Ordinance, 2001.

As to the second question, the Court observed: “[C]lause (e) of subsection (2) thereof [s. 169], which disallows the refund of any tax deducted unless it comes within the condition laid down therein, cannot obviously stand in the way of the respondent taxpayer in the facts and circumstances of the present case. This is so because the question of any “refund” payable to it arose entirely, and only, because of the failure and refusal of the Commissioner to grant the exemption certificate applied for and to which the respondent was entitled as a matter of law. Clearly, the department cannot take the benefit of its own failure to correctly apply and follow the law. It appears from the record that the respondent applied for the certificate in a timely manner. The return of any money (incorrectly) deducted as advance tax would merely restore the position that, in law, existed all along. It would not be tantamount to a “refund” within the meaning of s. 169(2)(e). Furthermore, as already noted, to hold that the respondent was affected by s. 169 in the facts and circumstances of its case would be to entirely deny it the benefit of the exemption clause, which is clearly not warranted in law. Therefore, in our view s. 169 did not, and could not, stand in the way of the respondent enjoying the benefit of the exemption.”

10. Sazco (Pvt.) Ltd. Vs. Askari Commercial Bank

https://www.supremecourt.gov.pk/downloads_judgements/c.a._%20870_2020.pdf

Present:
Mr. Justice Umar Ata Bandial, Mr. Justice Sajjad Ali Shah and **Mr. Justice Yahya Afridi**

The principles governing the Letter of Credit/Documentary Credit stated

The Court summarized the principles governing the Letter of Credit/Documentary Credit in the following terms: -

I. All documents stipulated in the credit are to be tendered by or on behalf of the seller/beneficiary to the bank for seeking payment under the credit.
II. When the requisite documents are presented by or on behalf of the seller, the same are to be examined by the bank “with reasonable care”, to ascertain whether or not, the documents so tendered, on the face of it, comply with the terms and conditions of credit.
III. The doctrine of strict performance of the terms of the credit be observed and construed with such rigidity, so as to preserve the legitimacy of documentary credits subject to the facts and circumstances of each case.
IV. The rule of autonomy mandates bank to make the payment on the tender of conforming documents, irrespective of any dispute between the parties in respect of the underlying contract.
V. The rule of autonomy is, however, not absolute. It has an exception, when there

is a clear fraud, of which the paying bank has notice before the payment is made to the seller/beneficiary, and the evidence of the fraud is clear and convincing.

11. Muhammad Hayat v. State

https://www.supremecourt.gov.pk/downloads_judgements/crl.sh.a._12_2017.pdf

Present

Mr. Justice Mushir Alam, Chairman, Mr. Justice Sardar Tariq Masood, **Mr. Justice Qazi Muhammad Amin Ahmed**, Dr. Muhammad Al-Ghazali, Ad-hoc Member-I and Dr. Muhammad Khalid Masud, Ad-hoc Member-II

Holding of test identification parade in the police station is permissible under the law

The five-member shariat appellate Bench of the Court dealt with the questions: (i) whether holding of test identification parade in the police station is permissible under the law, and (ii) whether the test identification parade can be discarded on the ground of non-mentioning of the accused person's features in the FIR.
The Court answered the question (i) in affirmative and the question (ii) in negative.

Hon'ble Justice Qazi Muhammad Amin Ahmed speaking for the Bench observed: "Argument that police station was not an appropriate place for the holding test identification parade is entirely beside the mark inasmuch as the law does not designate any specific place to undertake the exercise … A combined reading of [Rule 26.32 of the Police Rules, 1934]…with Article 22 of the Qanun-i-Shahdat Order, 1984, does not restrict the prosecution to necessarily undertake the exercise of test identification parade within the jail precincts. Prosecution of offences and administration of justice are not dogmatic rituals to be followed relentlessly in disregard to the exigencies of situations, seldom identical or ideal. All that 'due process of law' requires is a transparent investigation and fair trial, in accord with statutory safeguards, available to an accused to effectively conduct his defence without being handicapped or embarrassed. In the absence of any statutory restriction to the contrary, the objection does not hold water." (Para 4)

The test identification parade cannot be discarded on the ground of non-mentioning of the accused person's features in the FIR

As to question (ii) the learned Judge observed: "Reference to omission of assailants' features in the crime report as a ground to discard the test identification parade is equally inconsequential; Part C of the Lahore High Court Rules and Orders Volume-III (adopted by the High Court of Balochistan) does not stipulate any such condition. In the natural course of events, in an extreme crisis situation, encountered all of a sudden, even by a prudent onlooker with average nerves, it would be rather unrealistic to expect meticulously comprehensive recollection of minute details of the episode or photographic description of awe inspiring events or the assailants. The pleaded requirement is callously artificial and, thus, broad identification of the assailants, in the absence of any apparent malice or motive to substitute them with the actual offenders, is sufficient to qualify the requirement of Article 22 of the [Qanun-i-Shahdat] Order…" (Para 4)

12. Muhammad Ejaz v. State

https://www.supremecourt.gov.pk/downloads_judgements/crl.p._540_2020.pdf

Present

Mr. Justice Mazhar Alam Khan Miankhel and **Mr. Justice Qazi Muhammad Amin Ahmed**

A Magistrate should allow an application for re-examination of an injured person only on tangible and sufficient grounds

In a bail matter, the Court took notice of an order of medical re-examination passed mechanically by a Magistrate without hearing the injured and without there being

any sufficient ground for exercise of such jurisdiction.

The Court deprecated the said order of the Magistrate with the observations: "The first medical officer has unambiguously ruled out possibility of any foul play, however, the learned Magistrate readily obliged the defence without affording opportunity of hearing to the injured; even the Law Officer is shown present as a silent spectator to the proceedings. The application moved on behalf of the accused is not only stereotype and slipshod but also self-destructive as well; on the one hand, it is asserted that the impugned medical report was totally false and fake with the alternate allegation of injuries being self suffered and fabricated in case these are noted during examination by the Board. There was no occasion for the learned Magistrate to hurriedly exercise ex-parte jurisdiction to the detriment of prosecution/injured in the face of allegations vague and non-specific. The first medical examination was protected by statutory presumption of being genuine under Article 129(e) of the Qanun-e-Shahdat Order, 1984 as well as under Article 150 of the Constitution of the Islamic Republic of Pakistan, 1973. Such formidable statutory protections cannot be summarily dismantled on the whims of an accused struggling to ward off consequences of criminal prosecution, therefore, a Magistrate must insist for tangible and sufficient grounds to plausibly justify exposure of a person already wronged to the inconvenience and embarrassment of a re-examination, a consideration conspicuously missing in the present case. While an accused is certainly entitled to "Due Process of Law" and a meaningful opportunity to contest indictment with a view to vindicate his position, the prosecution and its witnesses also deserve protection of law so as to prosecute the case with least inconvenience and without unnecessary hardship; equality before law without equal protection is a travesty; scales must be held strictly in balance." (Para 4)

Foreign Superior Courts

THE SUPREME COURT OF UNITED KINGDOM

1. *Ecila Henderson v. Dorset Healthcare University*

[2020] UKSC 43
https://www.supremecourt.uk/cases/docs/uksc-2018-0200-judgment.pdf

Coram
Lord Reed, President Lord Hodge, Deputy President Lady Black Lord Lloyd-Jones Lady Arden Lord Kitchin Lord Hamblen

Damages for negligence cannot be claimed by a psychotic patient from the healthcare institution on account of his own illegality and criminal act.

A claimant, during a serious psychotic episode, committed a criminal offence of manslaughter, which she would not have committed but for the defendant's negligence. Healthcare institution admitted liability for its negligent failure to return claimant to hospital when her psychiatric condition deteriorated. Claimant brought a negligence claim against healthcare institution, seeking damages for personal injury and loss of liberty.

The Supreme Court held that claimant cannot recover her damages for the consequences of having committed the offence, including her subsequent loss of liberty as her claim is barred by illegality defence, because the damages she claims result from: (i) the sentence imposed on her by the criminal court; and (ii) her own criminal act of manslaughter.

2. *Insurance Company Chubb v. Enka Insaat Ve Sanayi*

[2020] UKSC 38
https://www.supremecourt.uk/cases/docs/uksc-2020-0091-judgment.pdf

Coram
Lord Kerr Lord Sales Lord Hamblen Lord Leggatt Lord Burrows

The validity and scope of the arbitration agreement is governed by the law of the chosen seat of arbitration.

Where the parties have made no choice of law to govern the arbitration agreement, the court must determine the law with which the arbitration agreement is most closely connected. In general, the arbitration agreement will be most closely connected with the law of the seat of arbitration. The validity and scope of the arbitration agreement in such case should be governed by the law of the chosen seat of arbitration.

3. *Halliburton Company v. Chubb Bermuda Insurance Ltd*

[2020] UKSC 48
https://www.supremecourt.uk/cases/docs/uksc-2018-0100-judgment.pdf

Coram

Lord Reed, Lord Hodge, Lady Black, Lord Lloyd-Jones, Lady Arden

Legal duty of an arbitrator to disclose facts and circumstances which would give rise to the appearance of bias in arbitration proceedings.

The duty of impartiality is a core principle of arbitration law. In English law, the duty applies equally to party-appointed arbitrators and independently appointed arbitrators. The duty of disclosure of bias is not simply good arbitral practice but is a legal duty in English law. It is a component of the arbitrator's statutory obligations of fairness and impartiality. The legal duty of disclosure does not, however, override the arbitrator's duty of privacy and confidentiality in English law. Where information which needs to be disclosed is subject to a duty of confidentiality, disclosure can only be made if the parties owed confidentiality obligations give their consent. A failure to disclose relevant matters is a factor for the fair-minded and informed observer to take into account in assessing whether there is a real possibility of bias. In assessing whether an arbitrator has failed in a duty to make disclosure, the fair-minded and informed observer will have regard to the facts and circumstances as at and from the time the duty arose.

4. *C R v. Her Majesty's Senior Coroner for Oxfordshire*

[2020] UKSC 46
https://www.supremecourt.uk/cases/docs/uksc-2019-0137-judgment.pdf

Before

Lord Reed (President), **Lord Kerr**, Lord Wilson, **Lord Carnwath**, **Lady Arden**.

Applicable Standard of Proof in Inquest Proceedings is the Balance of Probabilities (the Civil Standard)

The appeal arose out of the death of the appellant's brother. At the inquest, the Coroner asked the jury to make a narrative statement of the circumstances of the death on a balance of probabilities. The jury answered that the deceased had a history of mental health issues and that on a balance of probabilities he intended fatally to hang himself and that increased vigilance would not have prevented his death. The appellant began judicial review proceedings to establish that the jury's conclusion was unlawful.

The question before the Court was: Is the applicable standard of proof in inquest proceedings in the case of suicide the balance of probabilities (the civil standard) or beyond reasonable doubt (the criminal standard)?
The Supreme Court held that the standard of proof required in order to reach determinations of suicide and unlawful killing at inquests is the balance of probabilities, and not beyond reasonable doubt. It observed that there was a general assumption that in civil proceedings, such as coronial proceedings, the civil standard of proof should be applied. Neither the Coroners and Justice Act 2009 nor the European Convention on Human Rights required the Court to apply a particular standard of proof to conclusions at an inquest. Suicides would likely be under-recorded if the criminal standard of proof were required. An inquest was not concerned with criminal

justice but with investigation of a death; societal attitudes to suicide had changed and this must be reflected. Other commonwealth jurisdictions applied the civil standard of proof to these conclusions. The status of Note iii to Form Two in the Schedule to the Coroners (Inquests) Rules 2013 better known as the Record of Inquest Form came under consideration. The majority held that Note iii – which states that the standard of proof for unlawful killing and suicide is the criminal standard – was merely reflecting Parliament's understanding of a common law rule which could thus be altered by the Supreme Court. By contrast, the view of the minority was that in note iii Parliament was stating the law itself.

SUPREME COURT OF CANADA

5. *C.M. Callow Inc. v. Tammy Zollinger et. al*

2020 SCC 45
https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/18613/index.do

Coram

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

Failure to correct a mistaken belief violated the duty of honest contractual performance

The plaintiff-company supplied property maintenance services to the defendants under two separate contracts. The winter contract was for a two-winter term expiring on April 30, 2014 and contained provisions permitting the defendants to terminate the agreement: (i) for cause; and (ii) if for any reason plaintiff's services were no longer required, on ten days' written notice. The defendants decided in early 2013 to terminate the winter contract under the without cause ten days' notice provision but decided not to tell the plaintiff of its decision at the time. They instead permitted the plaintiff to finish the summer contract, and even accepted some 'freebie' work. On September 12, 2013, the defendants notified the plaintiff that they were terminating the winter contract under the ten-days' notice provision. The plaintiff sued for breach of contract.

The question before the Court was, "[W]hat constitutes a breach of the duty of honest performance where it manifests itself in connection with the exercise of a seemingly unfettered, unilateral termination clause."

A five-judge majority, along with a three-judge minority who concurred in the result, held that the defendants breached their duty of honest performance by "knowingly misleading" the plaintiff into believing that the winter contract would not be terminated.

The Court observed that the requirements of honesty could and did go further than prohibiting outright lies and both the majority and minority reasons agree that "knowingly misleading" a counterparty can include "half-truths, omissions, and even silence, depending on the circumstances". The defendants' failure to correct the plaintiff's false impression amounted to a breach of the duty of honest performance. Côté J dissented to hold that the plaintiff's recourse could not be based on a breach of the duty of honest performance. He observed that although the defendants' conduct may not be laudable, it did not fall within the category of active dishonesty prohibited by that duty.

6. *Attorney General of Quebec v. Québec Inc.*

https://decisions.scc-csc.ca/scc-csc/scc-csc/en/18529/1/document.do

Coram

Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, **Brown, Rowe**, Martin and Kasirer JJ.

Unlike human being a Corporation do not enjoy right to protection against cruel punishment under Canadian Charter of Rights and Freedom.

The issue before the court was that a corporation was found guilty of carrying out

construction work as a contractor without holding a current license for that purpose, an offence under s. 46 of Quebec's Building Act. The penalty for an offence under s. 46 is a mandatory minimum fine which varies depending on whether the offender is an individual or a corporation. Applying this provision, the Court of Québec imposed the then minimum fine for corporations of $30,843. The corporation challenged the constitutionality of the mandatory minimum fine on the basis that it offended its right to be protected against cruel and unusual treatment or punishment under the s.12 of the Canadian Charter of Rights and Freedom.

The Court held that the text of s. 12, particularly the inclusion of "cruel", strongly suggests that the provision is limited to human beings. Justice Chamberland quite rightly emphasized that the ordinary meaning of the word "cruel" does not permit its application to inanimate objects or legal entities such as corporations. We therefore agree with Justice Chamberland as with our colleague (Abella J.'s reasons, at para. 86), that the words "cruel and unusual treatment or punishment" refer to human pain and suffering, both physical and mental. Therefore, s. 12 of Charter is meant to protect human dignity and respect the inherent worth of individuals. Its intended beneficiaries are people, not corporations.

SUPREME COURT OF APPEAL OF SOUTH AFRICA

7. *The President of RSA v. Women's Legal Centre Trust*

[2020] ZASCA 177
https://www.supremecourtofappeal.org.za/index.php/component/jdownloads/send/33-judgments-2020/3494-

Coram

Maya P, Saldulker, Van Der Merwe and Plasket JJA AND Weiner AJA

Non-recognition of Muslim marriages is a violation of the Constitutional right to dignity, to be free from unfair discrimination and right to equality and access to Court.

The issue before the Court was whether there is a constitutional obligation on the State to enact legislation recognising the Muslim marriages and what would be the appropriate remedy for a Muslim citizen in case a breach of a constitutional obligation relating to his matrimonial affairs has been established.

The Court observed that the importance of recognising Muslim marriages in our constitutional democracy cannot be gainsaid. In South Africa, Muslim women and children are a vulnerable group in a pluralistic society such as ours. The non-recognition of Muslim marriages is a travesty and a violation of the constitutional rights of women and children in particular, including, their right to dignity, to be free from unfair discrimination, their right to equality and to access to court. Appropriate recognition and regulation of Muslim marriages will afford protection and bring an end to the systematic and pervasive unfair discrimination, stigmatisation and marginalisation experienced by parties to Muslim marriages including, the most vulnerable, women and children.

The court finally held that the Marriage Act 25 of 1961 (the Marriage Act) and the Divorce Act 70 of 1979 (the Divorce Act) are declared to be inconsistent with ss 9, 10, 28 and 34 of the Constitution of the Republic of South Africa, 1996.

CONSTITUIONAL COURT OF SOUTH AFRICA

8. *Mahlangu and Another v Minister of Labour and Others*

[2020] ZACC 24
https://collections.concourt.org.za/bitstream/handle/20.500.12144/36637/Judgment%20CCT%20306-19%20Sylvia%20Bongi%20Mahlangu%20and%20Another%20v%20Minister....pdf?sequence=15&isAllowed=y

Coram

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

Exclusion of Domestic Workers from the Definition of "Employee" is Unconstitutional

Ms. Mahlangu, a domestic worker employed by the same family for 22 years, drowned in her employer's swimming pool. Her daughter approached the Department of Labour for compensation for her mother's death in terms of the Compensation for Occupational Injuries Act, 1993 ("COIDA") which entitles an employee or their dependants to compensation if, during the course of their employment, an accident occurs or a disease is contracted resulting in their disablement or death. Ms Mahlangu's daughter was denied compensation.

The Court was "required to consider the constitutionality of section 1(xix)(v) of COIDA, which expressly excludes domestic workers from the definition of an "employee", thus excluding them from the social security benefits provided for under COIDA."

The Constitutional Court found that COIDA must be interpreted both within the constitutional framework of the Bill of Rights which provided that everyone had the right to social security and through the prism of the foundational constitutional values of human dignity, equality and freedom. The Court stated that no legitimate objective was advanced by excluding domestic workers from COIDA and that, in considering those who were most vulnerable or most in need, a court should take cognizance of those who fell at the intersection of compounded vulnerabilities due to intersecting oppression based on race, sex, gender, class and other grounds. It went on to state that "to allow this form of state-sanctioned inequity goes against the values of our newly constituted society namely human dignity, the achievement of equality and ubuntu". "The invalidation of section 1(xix)(v) of COIDA will contribute significantly towards repairing the pain and indignity suffered by domestic workers. It should result in a greater adjustment of the architectural focus as to their place and dignity in society. Not only should this restore their dignity, but the declaration of invalidity will hopefully have a transformative effect in other areas of their lives and those of their families, in the future."

HIGH COURT OF AUSTRALIA

9. Peniamina v The Queen

http://eresources.hcourt.gov.au/showCase/2020/HCA/47

Coram

Bell, Gageler, Keane, **Gordon** and Edelman JJ

Defense of "Sudden provocation" has a dual aspect of being concerned both with the provoking conduct of the deceased and with the temporary loss of self-control excited by the provocation.

In this case the question before the court was that when a person who unlawfully kills another under circumstances which would constitute murder, but the act which causes death in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool, the person is guilty of manslaughter only?

The Court observed that the phrase "sudden provocation" is an awkward expression. Provocation as a partial defence to murder is, exceptionally, one respect in which the Criminal Code is not to be given effect according to the ordinary and natural meaning of its words without first having regard to the common law. It is well settled that the composite expression "sudden provocation" had, as it still does, a dual aspect being concerned both with the provoking conduct of the deceased and with "the temporary loss of self-control excited by the provocation".

FEDERAL CONSTITUTIONAL COURT OF GERMANY

10. In the proceedings on the constitutional complaint of Mr. S ...,

1 BvR 3214/15
https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/11/rs20201110_1bvr321415.html

Coram
Harbarth President and Paul, Bear, Britz, Ott, Christian and Radtke JJ.

Extended Data Use ("Data Mining") Pursuant to the Counter-Terrorism Database Act is in part Unconstitutional

The Counter-Terrorism Database Act created a joint database for different security authorities. The database is overseen by the Federal Criminal Police Office. Police and intelligence officers at federal and state level can access it. It is intended to speed up the sharing of data particularly for investigative purposes. Following the Federal Constitutional Court's Judgment - 1 BvR 1215/07 - whereby several provisions of the Act were declared to be incompatible with the Basic Law, the federal legislature amended the law and inserted section 6a which allows for "extended project-related data use". For the first time, it allowed authorities to search across several data fields to gain new insights, including the use of incomplete data. Security authorities pursuant to section 6a may engage in extended use ("data mining") of the data stored in the counter-terrorism database which goes beyond facilitating requests for information and covers operational measures. Thus, section 6a permits direct use of the counter-terrorism database, including generating new intelligence from the relationships between the stored data. Such use had previously only been permissible in urgent cases.

The constitutional complaint filed by a retired judge asserted that section 6a of the Act violated the complainant's fundamental right to informational self-determination.
The Court held that section 6a of the Act, in part, violated the complainant's fundamental right to informational self-determination flowing from the Basic Law. The provision permitted the authorities involved extended data use of the types of data stored in the database pursuant to section 3, with the exception of hidden data stored in the database pursuant to section 4 of the Act. It did not satisfy the special constitutional requirements deriving from the standard of a hypothetical recollection of data, which was applicable here in view of the principle of separation of police and intelligence data. Given the heightened impact on fundamental rights of extended use of a joint database for police authorities and intelligence services, such use must serve to protect especially weighty legal interests and must be subject to sufficient thresholds for carrying out measures constituting interference that were set out in precisely defined and clear provisions. The provision designed to gather data for police and intelligence services was disproportionate. The Court held that such broad searches should only be permitted once "a suspicion based on specific facts" already existed. Section 6a, Paragraph 2, Clause 1 of the Act did not satisfy these requirements whereas the remainder of section 6a did satisfy them.

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Disclaimer--The legal points decided in the judgements other than that of the Supreme Court of Pakistan have been cited for benefit of the readers; it should not be considered an endorsement of the opinions by the Supreme Court of Pakistan. And, please read the original judgments before referring them to for any purpose.