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# NEWS, VIEWS AND LAW NOTES

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## **PUBLIC OPINION**

### What People Need from Lawyers

“Let justice be done though the heavens may fall.” That is the Lawyers Credo and that is what lawyers do: It is evident from history that lawyers have fought for justice. Lawyers fashion the framework of government and build the institutions that are the bulwark of free people. Leadership is thus the glory of profession of law. That is why the voices of lawyers are needed more than ever.

Whatever one’s beliefs are, lawyers stand concerned about the polarization of societies that is, dividing the nations?

Lawyers usually are concerned when public officials mock the foundations of a country or use racially charged rhetoric that tears apart the fabric of society.

The truth is that public needs lawyer's wisdom. They need lawyer's expertise. They need lawyer's ability to see both sides of an issue, to find common ground, and to bring people together.

Lawyers are under an obligation to teach their fellow citizens why societies need an independent judiciary and unbiased political administration in order to support the view why pluralism and tolerance are national heritage, and the source of strength.

### **Appeal Rights in Civil Matters**

Appealing a Court Decision:

Where an individual or a body corporate feels aggrieved with a court's decision or order or decree, one can appeal against the said order to a higher court.<sup>1</sup> An appeal is the judicial examination of the decision given by a Lower Court.<sup>2</sup> The higher

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<sup>1</sup> Right to appeal is statutory and substantive right. It is not merely a procedural right. Statutory right means that it is conferred by a statute.

<sup>2</sup> Appeal is an application or petition to a higher authority or a court of law for reconsideration of the decision of a lower authority or an inferior court of law. It is an application or a proceeding for review to be carried out by a higher tribunal of a decision given by a lower one. An appeal is one in which the question is, whether the order of the court from which an appeal is brought was correct on the materials presented before the lower court." See, Bhil Kanji Bhagwan v. Bhil Karsan Bijal: 2003 GLH (23) 385.

court may allow or reject the appeal or even can impose a harsher penalty<sup>3</sup>.

### **Appeals:**

The Code of Civil Procedure 1908, prescribes the rights, obligations and procedure for filing the appeals in civil matters.<sup>4</sup>

An appeal lies against an original decree, appellate decree or an order. These appeals can be filed within the prescribed time limit<sup>5</sup>.

### **Nature of an Appeal:**

An appeal is a continuation of the dispute between the parties. An appeal is required to be in the form of a memorandum accompanied by the copy of decree or order appealed against.<sup>6</sup>

### **Who can Appeal?**

As a general principle, no one can appeal unless: (i) one is a party to the proceedings or was treated as such; (ii) one is the

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<sup>3</sup> It would, therefore, be appropriate to get a legal advice before opting for an appeal.

<sup>4</sup> In Sections 96 to 111 read with Order XLI to XLV of the Civil Procedure Code, 1908. Order XLI to XLII provide procedure for institution of appeals both from original and appellate decrees.

<sup>5</sup> See Limitation Act, 1908. Generally period provided for filing an appeal is one calendar month.

<sup>6</sup> Provisions of order XLI to order XLII of code of Civil Procedure, 1908 provide detailed procedure, and the way how the appeals are to be conducted.

legal representative of the plaintiff or defendant, (iii) one is privy in estate, title or interest and the same is apparent on the face of the record. A person having a legal grievance, which might have deprived him of the benefit or bound by the order passed, is entitled to the right of appeal.<sup>7</sup>

An appeal can be preferred by any of the following persons:

- Any party to the suit adversely affected by the decree<sup>8</sup>, or order, and where such party is dead, by his legal representative.<sup>9</sup>
- Any transferee of the interest of such party, who, so far as such interest is concerned, is bound by the decree<sup>10</sup>.

### **Waiver of one's right to appeal**

If a party agrees not to appeal or waives his right to appeal, he cannot file an appeal and will be bound by an agreement if otherwise such agreement is valid. Such an agreement, however,

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<sup>7</sup> In case of doubt as to the existence of the right of appeal, the appellant may get a benefit of doubt.

<sup>8</sup> Hafiz Mohamud v. Swamp Chand, (1942) 2 Cal 434.

<sup>9</sup> Gajadhar v. Ganesh, (1871) 7 BomLR 149

<sup>10</sup> Provided that his name is entered on the record of the suit.

must be clear and unambiguous. Whether a party has or has not waived his right of appeal depends upon the facts and circumstances of each case. Similarly, where a party has accepted the benefits under a decree of the court, he can be estopped from questioning the legality of that decree. In Dexter's case the court observed: "It startles me that a person can say the judgment is wrong and at the same time accept the payment under the judgment as being right.... In my opinion, you cannot take the benefit of a judgment as being good and then appeal against it as being bad."<sup>11</sup>

But an agreement between the parties not to file an appeal is valid if it is based on lawful or legal consideration and if otherwise it is not illegal.

### **Appeal against ex-parte decree**

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<sup>11</sup> Dexters Ltd v. Hill Crest Oil Co. (1926) 1 KB 348

Against an ex parte decree one has to file an appeal against such a decree or order he may opt to file an application to set aside ex parte decree.<sup>12</sup>

In an appeal against an ex parte decree, the appellate court is competent to go into the question of the propriety or otherwise of the ex parte decree passed by the trial court.

### **Whether or not an appeal lies against a consent decree**

No appeal shall lie against a consent decree.<sup>13</sup> This provision is based on the broad principle of estoppel. It pre-supposes that the parties to an action can, expressly or impliedly, waive or forgo their right of appeal by any lawful agreement or compromise or even by conduct. The consideration for the agreement involved in the consent decree is that both the sides give up their right of appeal.

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<sup>12</sup> See Section 96(2) of the Code of Civil Procedure, 1908. The only limitation is that appellant can be heard only on the merits of the case.

<sup>13</sup> See Section 96(3) of the Code of Civil Procedure, 1908. Once the decree is shown to have been passed with the consent of the parties, Section 96(3) becomes operative and binds them. It creates an estoppel between the parties as a judgment on contest. Where there is a partial compromise and adjustment of a suit and a decree is passed in accordance with it, the decree to that extent is a consent decree and is not appealable. This provision, however, does not apply where the factum of compromise is in dispute or the compromise decree is challenged on the ground that such compromise had not been arrived at lawfully.

### **Appeal against preliminary decree**

An appeal lies against a preliminary decree. Failure to appeal against a preliminary decree, hence, precludes the aggrieved party from challenging the final decree.

### **Appeal against Orders**

An aggrieved party can file an appeal against the judgment, where a decree is not drawn up by the court.<sup>14</sup>

### **Representing the Appeal**

One has a right to represent in the court of appeal, but one should get legal advice about whether one has valid grounds to appeal.

### **ESSAY REVIEW:**

The Cost of Corruption

By Paolo Mauro, Paulo Medas, and Jean-Marc Fournier

FD: IMF: September, 2019

An important article has been published in the latest issue of FD, a publication of IMF in which the authors have described the cost of corruption for a political society. The authors have highlighted: the impact of corruption, how corrupt practices affect

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<sup>14</sup> See the provisions of Sections 104 and 105 of the Code of Civil Procedure, 1908.



the economies, the high spots for corruption, and the conclusions from which policy makers can learn lessons.

The authors emphasize on the costs of corruption as it leads to decrease in tax revenue and causes social toll in different directions.

**Noteworthy Points:**

**The corruption can lead to:**

- Substantial decrease in revenue collection.
- Overpayments for the purchase of goods and services.
- Distortions in spending priorities.
- Weakens the state's ability to promote growth, as it drains public resources away from being used for development.
- Diminishing of the public trust in the government.

**The corrupt practices can cause:**

- Unwanted tax exemptions
- Complex and opaque tax systems having discretion in the hands tax officials.
- Reduction in revenue potential.

**Following hot spots in this regard have been highlighted, where possibilities of corruption are much higher:**

- Oil and mining industry
- State owned enterprises
- Discretion in the hands of top decision making authorities
- Procurement policies of the Government:

### **Georgia's Case**

- The authors highlighted the case of Georgia which took effective steps to decrease the corruption. Resultantly, the reduction in corruption lead to: increases in tax revenue, and tax compliance culture and these healthy policies increased the government's capacity to introduce welfare oriented projects.

### **Lessons for policy makers:**

#### **Defining the high risk areas which may include:**

- Government procurements
- Revenue administration
- Management of natural resources

- In-effective internal controls to check corrupt practices
- Hiring of effective professionals who possess strong ethical values

The authors have emphasized that it is the duty of the government to restore the confidence of the people in the state.

### **IDEAS:**

#### **How to build resilient law firm leadership**

Resilient leadership requires people to cultivate three qualities, namely, (i) Authentic connection, (ii) Values, and (iii) grounded optimism.

#### **An Authentic Connection**

It is not about fitting in (having to conform to be admitted into a group), it is about belonging (being able to show up imperfectly and being accepted). How connected we feel to those in our work lives can make a difference in our ability to absorb and release the stress in a healthy way. Daily interactions make a

critical difference in times of challenge and change when teams must engage in hard conversations and difficult choices.

## **Values**

All law firms have an established set of guiding principles or values, whether they are memorialized or not. Those values must be applied consistently, regardless of whether they are managing up, managing down, or working peer-to-peer. The Resilient leaders:

- Professional value into behaviors
- Apply those behaviors consistently across the firm

## **Grounded Optimism**

Grounded optimism and a healthy acceptance of mistakes make us better, healthier thinkers. Managing a challenge or change in responsive, thoughtful ways reduces stress for everyone. Accordingly one has to practice grounded optimism, and to have a healthy relationship with mistakes

[Source: How to build Resilient Law Firm Leadership by Renee Branson].

### **BOOK REVIEW:**

The Game Changing Attorney  
By Michael Mogill  
Published by Lioncrest Publishing [2018]

The Game Changing Attorney is an interesting and useful book. If you are an attorney who wants to attract one's ideal clients in the new legal landscape of the modern solo or small firm practice, then it is a must read. In order to distinguish your brand and identity the same, the author offers real insight and valuable advice. The book teaches what lawyers need to know in the light. The book is often-funny, and presents a honest voice of Michael, making it an enjoyable read.

For the business of law, the author tells you the importance of the power of emotional connection. Any law firm owner, who wants to learn how to grow their practice exponentially, the Book is a must-read for him.

For many years to come, the book will be a go-to guide for to grow one's law firm. There is no doubt about the fact that one will grow his law firm if one follows the steps out lined in the book. This book presents fresh, honest, insightful, and jam-packed ideas for the growth of law firms.

### **NEW DEVELOPMENTS:**

#### **Developments in Law**

##### **1. Contract Law**

California Court of Appeal in the case of Magic Carpet Ride v. Rugger Investment Group, considered the following question:

“Whether a party substantially performed its contract obligations is a triable issue of material fact that defeats summary adjudication; a provision in the parties’ contract making time of the essence does not automatically make a defendant’s untimely performance a breach of contract

because there are triable issues regarding the scope of that provision and whether its enforcement would result in a forfeiture to the defendant and a windfall to the plaintiff.”

## **2. Criminal Law and Procedure**

California Court of Appeal in the case of *People v. Lucero*, observed as under:

“A declaration containing false testimony falls within the ambit of a book, paper, record, instrument in writing, or other matter or thing as used in Penal Code §134; the statute does not differentiate between real and testimonial evidence. A document does not need to be a forgery or altered to support a prosecution under §134; the elements of §134 and perjury by declaration under §118(a) do not correspond.”

## **3. Employment Law**

California Court of Appeal in the case of McCormick v. California Public Employees' Retirement System, observed as under:

"Employees are eligible for a disability retirement under the California Public Employees' Retirement System pursuant to Government Code §21156 when, due to a disability, they can no longer perform their usual duties at the only location where their employer will allow them to work, even if they might be able to perform those duties at a theoretical different location."

#### **4. Real Property**

California Court of Appeal in the case of Denham v. City of Richmond (Sierra Club), observed as under:

"An initiative adopted by a city council created an impermissible conflict within the city's general plan by



amending the open-space element to prohibit residential development that the land use element continued to allow; a court may direct a city to correct inconsistencies in its general plan when the inconsistency is created by an initiative amending an existing plan.”

[Source: LACBA Briefings, October 28, 2019]

### **Oregon Bar USA is considering grant of licensing without a law degree**

The Oregon State Bar's board of governors took major steps to liberalize rules around para-professional licensing and allowing people without law degrees to sit for the bar exam.

The board of governors approved recommendations from two separate bar task forces that are intended to increase access to justice in the state. The first recommendation is for a Para-professional licensing program, allowing grant of licenses to individuals to provide limited legal advice without a supervising attorney.

For to qualify under the program, an individual would need to be at least 18 years of age, holds a national certification exam, and either have an associate's degree from an approved or institutionally accredited paralegal studies program or a law degree or have 1,500 hours of experience as a paralegal under an attorney's supervision.

The most compelling argument for licensing paraprofessionals is that the bar's other efforts to close the access-to-justice gap has continued to fall short. This program intends to broaden the options available for persons seeking to obtain legal services, while continuing to strive for full funding of legal aid and championing pro bono representation by lawyers.

[ABA Journal, October 7, 2019]

#### **RECENT CASES:**

##### **International Arbitration Award**

Cortec Mining Kenya Ltd v. Republic of Kenya

Case NO. ARB/15/09

Decided on October 22, 2019.

It was a matter where Tribunal was confronted with a legal rule that under what circumstances an international tribunal can seize jurisdiction to decide the matter presented before it, and in what manner questions of investor compliance are reviewed? Through an international arbitration award the Tribunal while deciding the moot points considered the following important principles of law:

- Where a mining license was obtained in violation of domestic law, was it legal?
- Whether or not they obtained rights are protected.
- What are the effects of violations of domestic law?
- Whether or not a claimant is under burden to establish jurisdiction under BIT and ICSID conventions.

The Tribunal in this regard ruled that:

- An investor has to follow and meet substantial compliance requirements prescribed by the host state. The Tribunal

case to the conclusion that issue of compliance with domestic law was considered as central and focal point.

- The investor has to establish that required licensing was acquired in compliance with domestic law so as to make the investment as protected one.
- The acquisition of licensing must not be an act of favor and must meet all the required criteria.
- Procedural defects are considered as violation.
- Where an act was ab-initio void, it makes the investment non-protected, as matter going out of the scope of Tribunal.
- International investment agreements only protect investments made in compliance with domestic law. [see *Inceysa v. EL Salvador*, where the Tribunal found that it lacked jurisdiction concerning an investment made in breach of applicable law]<sup>15</sup>

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<sup>15</sup> On the other hand where a government fails to discharge its burden of proof and it fails to show that the investor had violated the legality clause it had no case.

- The purpose of international investment regime cannot be to protect investment made in violation of the laws of host state.
- There exists a requirements of due diligence on the part of investor to ensure their activities comply with domestic law.
- All agreements must be made in good faith.
- An investment like a licence (which is creative of the laws of the host state) stands linked with an implied legality requirement to the notion of investment under the ICSID convention.
- Where a license has been obtained in compliance with the domestic law, it becomes a protected investment under BIT.
- Legal compliance issues are an evolving topic in investment treaty making.
- However, a note of caution is that international arbitral tribunals may have limited expertise to interpret domestic legal requirements and it leads to a problem area in the

coordinated application of domestic and international norms.

### **SUPREME COURT OF PAKISTAN**

#### **Anti Terrorism law, explained by the Supreme Court of Pakistan.**

The court observed that the law prohibits possession of inflammatory materials, and where the same is recovered from the possession of an accused whether or not the same was distributed, the act of possession of such inflammatory material by itself is an offence within the framework of Anti-Terrorism Law.

[Qari Muhammad Ishaq Ghazi v. The State: 2019 SCMR 1646]