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( Revised Edition)

# BENCH BOOK

A GUIDE FOR DISTRICT JUDICIARY



[ KHYBER PAKHTUNKHWA JUDICIAL ACADEMY ]  
BENCH BOOK – A GUIDE FOR DISTRICT JUDICIARY

# Contents

<b>List of Abbreviations .....</b>	<b>1</b>
<b>Preface.....</b>	<b>Error! Bookmark not defined.</b>
<b>Chapter I: Constitutional Framework.....</b>	<b>4</b>
1.1 Introduction.....	4
1.2 Legislation.....	4
1.2.1 Modes of Legislation .....	5
1.2.2 Delegated Legislation .....	6
1.3 Executive.....	6
1.4 The Judiciary.....	7
1.4.1 The Courts.....	7
1.4.1.1 First Tier.....	7
1.4.1.2 Second Tier .....	7
1.4.1.3 Third Tier .....	8
1.4.1.4 Fourth Tier .....	8
1.4.1.5 The Federal Shariat Court .....	9
1.4.1.6 Special Courts .....	9
1.4.1.7 Tribunals .....	9
1.4.1.8 Hierarchy of Courts.....	9
1.4.1.9 Classes of Judicial Officers.....	10
1.4.2 Independence of Judiciary .....	10
<b>Chapter II: Judicial Ethics.....</b>	<b>11</b>
<b>Chapter III: Precedents, Laws, and Interpretation of Statutes .....</b>	<b>12</b>
3.1 Course for subordinate courts in following the precedent .....	12
3.1.1 Decision of Supreme Court of Pakistan.....	12
3.1.1.1 Conflicting views of the Supreme Court.....	13
3.1.2 Decision of High Court.....	13
3.1.2.1 Conflicting views of different High Courts .....	13
3.1.2.2 Conflicting views of different High Courts other than own High Court .....	13
3.1.2.3 Conflicting views of one High Court.....	13
3.1.3 Decision of Privy Council and Federal Court of India.....	13
3.1.4 Pre-Independence Privy Council and High Court decision .....	14
3.1.5 Pre- Independence Privy Council and Federal Court decision .....	14

3.1.6	Pre- Independence Privy Council and Supreme Court decision .....	14
3.1.7	Reported & Unreported Judgments.....	14
3.1.8	Binding Nature of Precedents .....	14
3.2	Kinds of Laws and Interpretation.....	14
3.2.1	Kinds of Laws .....	15
<b>Chapter- IV: Fair Trial .....</b>		<b>17</b>
4.1	Fair Trial and Due Process of Law .....	17
4.1.1	Criminal cases .....	19
4.1.2	Civil Cases .....	20
4.2	Basic Criterion for Fair Trial & Due Process.....	20
4.2.1	Pre-Trial Rights.....	20
4.2.2	The Hearing .....	21
4.2.3	Post-Trial Right.....	21
4.3	Commitment to International Instruments .....	21
<b>Chapter V: Civil Courts .....</b>		<b>23</b>
5.1	Introduction.....	23
5.2	Establishment.....	23
5.3	Jurisdiction.....	23
5.3.1	Pecuniary Jurisdiction .....	24
5.3.2	Original jurisdiction .....	24
5.4	Civil Trial.....	25
5.4.1	Summary Rejection.....	25
5.4.2	Parties and their appearance.....	25
5.4.3	Issuance of Processes .....	25
5.4.3.1	Vigilant Supervision of the Service of Processes .....	26
5.4.3.2	Substituted Service through Publication in Newspaper .....	28
5.4.4	Written Statement .....	30
5.4.5	Case Management and Scheduling Conference (Order IX-A).....	30
5.4.5.1	Management and disposal of miscellaneous applications.....	31
5.4.5.2	Discovery management and scheduling orders.....	33
5.4.5.3	Trial management and scheduling orders .....	33
5.4.5.4	Settlement conference and scheduling order.....	34
5.4.5.5	Framing of issues, Filing of List of Witnesses, and Recording of Evidence .....	34
5.4.6	Disposal of Case at First Hearing .....	35

5.4.7	Spot Checks & Local Commission .....	35
5.4.8	Adjournments.....	36
5.4.9	Hearing of final arguments .....	36
5.4.10	Judgment and decrees .....	37
5.5	Execution .....	38
5.6	Withdrawal, Payment in court, Security & Commission.....	41
5.7	Suits in Particular Cases.....	41
5.7.1	Suit involving Government.....	41
5.7.2	Suits involving Military, Corporations, Firms & Trustees etc.....	42
5.7.3	Suits involving Minors or persons of unsound mind .....	42
5.7.4	Pauper suits .....	42
5.7.5	Suit relating to Mortgages of Immovable Property.....	43
5.7.6	Inter-pleader suits.....	43
5.7.7	Special case.....	43
5.8	Summary procedure on Negotiable Instruments.....	43
5.9	Arrest and Attachment before Judgment .....	44
5.10	Temporary injunctions and interlocutory orders.....	44
5.11	Appointment of receiver .....	45
5.12	Appeals from final judgment or decrees .....	45
5.13	Appeal against Orders.....	45
5.14	Reference, Review and Revision .....	45
5.14.1	Review .....	45
5.14.2	Revision .....	46
5.15	Costs.....	47
5.16	Limitation.....	47
5.17	Court Fee and Suit valuation.....	48
<b>Chapter VI: Case &amp; Court Management .....</b>		<b>50</b>
6.1	Introduction.....	50
6.2	Civil Case Management.....	51
6.3	Criminal Case Management.....	51
6.4	Alternative Dispute Resolution (ADR).....	52
6.4.1	Guidelines for ADR .....	52
<b>Chapter VII: Family Courts.....</b>		<b>55</b>
7.1	Introduction.....	55

7.2	Nikah or Marriage.....	55
7.3	The Family.....	56
7.4	Conciliation.....	56
<b>Chapter VIII: Rent Controller (Urban).....</b>		<b>61</b>
8.1	Introduction.....	61
8.2	The West Pakistan Urban Rent Restriction Ordinance, 1959.....	61
8.3	Guidelines for expeditious disposal.....	62
<b>Chapter IX: Criminal Trial.....</b>		<b>64</b>
9.1	General Law of Criminal Procedure.....	64
9.2	Jurisdiction.....	65
9.3	Appointment of Magistrates.....	66
9.4	Offences.....	67
9.4.1	Cognizable & Non-cognizable offences.....	67
9.4.2	Bailable & non-bailable offences.....	67
9.4.3	Compoundable & non-compoundable offences.....	67
9.5	Pre-trial Proceedings.....	67
9.5.1	Information regarding Registration of the Case in Cognizable Offences.....	68
9.5.2	Recording of FIR in cognizable case, Mandatory.....	69
9.5.3	Investigation, General.....	69
9.5.4	Arrest.....	70
9.5.4.1	Arrest of Accused.....	71
9.5.4.2	Arrest of Juvenile Accused.....	71
9.5.5	Production of Accused before Magistrate.....	72
9.5.6	Right to representation by counsel.....	72
9.5.7	Physical Remand or Police Custody.....	73
9.5.8	Court competent to grant Police Remand.....	73
9.5.9	When accused cannot be produced.....	74
9.5.10	Remand in Sessions Trial.....	74
9.5.11	Police Remand of Accused already in Judicial Custody.....	74
9.5.12	Remand of Female Accused.....	74
9.5.13	Remand of Juvenile Accused.....	75
9.5.14	Grant/Refusal of Police Custody.....	75
9.5.15	Transit Custody.....	75
9.5.16	Judicial Remand.....	75

9.5.17	Recording of statements by Police.....	76
9.5.18	Power to record statements and confessions.....	76
9.5.18.1	Statement of Witness .....	76
9.5.18.2	Victim of rape .....	77
9.5.19	Recording of Confessional Statements of Accused .....	77
9.5.19.1	Formalities to be observed for recording judicial confession .....	78
9.5.19.2	Non-compliance of provisions under 164 read with 364, CrPC .....	79
9.5.19.3	Judicial Confession on Oath.....	80
9.5.20	Medical Examination of Witness/Accused .....	80
9.5.21	Determination of Age of Accused.....	82
9.5.21.1	Record of NADRA.....	83
9.5.22	Identification Parade .....	83
9.5.22.1	Procedure and guidelines for Identification Parade .....	84
9.5.23	Exhumation Proceedings.....	85
9.5.23.1	Death in Mysterious Circumstances (S. 176 CrPC).....	86
9.5.23.2	Who can request for Exhumation.....	87
9.5.23.3	Consent of LRs in exhumation.....	87
9.5.23.4	Jurisdiction of Magistrate.....	87
9.5.23.5	Limitation for Conducting Exhumation .....	88
9.5.24	Discharge of Accused .....	88
9.5.24.1	Release of accused due to deficiency of evidence .....	88
9.5.25	Submission of Challan or Police Report .....	89
9.5.26	Interim Report.....	90
9.5.27	Duties of Magistrate on receipt of Challan .....	90
9.5.28	Cognizance of offences by Ordinary Criminal Courts.....	90
9.5.29	Cognizance of offences by Special Courts.....	91
9.5.30	Complaint Cases .....	91
9.5.30.1	Examination of complainant .....	91
9.5.30.2	Procedure by Magistrate not competent to take cognizance of the case .....	92
9.5.30.3	Postponement of issue of process .....	92
9.5.30.4	Dismissal of complaint.....	93
9.5.30.5	Complaint in case of Zina .....	93
9.5.30.6	Complaint in case of Qazf.....	94
9.5.30.7	Complaint in case of fornication .....	94

9.5.31	Challan Case and Complaint Case: Which is to be tried first .....	95
9.6	Trial.....	95
9.6.1	Trial by Magistrates .....	95
9.6.1.1	Separate Trial of Juvenile Accused.....	96
9.6.1.2	Disposal of cases through diversion.....	97
9.6.1.3	Framing of Charge .....	98
9.6.1.4	Discharge of Accused .....	98
9.6.1.5	Summary Trial .....	100
9.6.1.6	Recording of Evidence.....	100
9.6.1.7	Non-appearance of Prosecution Witnesses .....	101
9.6.1.8	Lunatics.....	102
9.6.1.9	Pardon .....	103
9.6.2	Trial by Court of Sessions.....	104
9.6.2.1	Supplies of the Copies.....	104
9.6.2.2	Framing of Charge .....	104
9.6.2.3	Acquittal of Accused.....	105
9.6.2.4	Examination of the Accused .....	105
9.6.2.5	Bails and bonds .....	106
9.6.2.6	Habeas corpus .....	106
9.6.2.7	Public Prosecutor .....	106
9.6.2.8	Irregular Proceedings .....	107
9.6.2.9	Case property .....	107
9.6.2.10	Judgment .....	108
9.6.2.11	Submission of sentence for confirmation.....	109
9.6.2.12	Execution .....	109
9.6.2.13	Postponement of capital sentence on pregnant woman.....	110
9.6.2.14	Benefit of Section 382B of CrPC.....	110
9.6.2.15	Scandalous or false and frivolous pleas to be considered in passing sentence ...	110
9.7	Criminal Appeal.....	111
9.7.1	Suspension of Sentence.....	111
9.8	Revision .....	112
9.9	Justice of Peace .....	112
9.9.1	No hearing of the nominated accused .....	113
9.10	Punishments .....	114

9.10.1	Forfeiture of property and Fine .....	114
9.11	Compromise in offences punishable under Sharia.....	115
9.12	Prosecution for False Complaint.....	116
<b>Chapter X:</b>	<b>Special Laws.....</b>	<b>117</b>
<b>Chapter XI:</b>	<b>Law of Evidence .....</b>	<b>119</b>
11.1	The Qanoon-e-Shahadat Order, 1984 .....	119
11.2	Hearsay .....	120
11.2.1	Doctrine of Res gestae .....	120
<b>Chapter XII:</b>	<b>Administrative Responsibilities of the District Judiciary .....</b>	<b>122</b>
12.1	Oversight and inspection of their own courts .....	122
12.2	The assessment of training and other needs of the District Judiciary .....	122
12.3	Key role of the District and Sessions Judges .....	123
12.4	Supervision by controlling courts .....	123
12.5	Financial management & budget .....	123
12.6	Judicial buildings .....	124
12.7	Facilities for litigants and counsel .....	124
12.8	Interference with judicial discretion or powers.....	124
12.9	Proceedings in Case of Certain Offences Affecting the Administration of Justice .....	125
12.10	Trial in family and rent cases.....	125
12.11	Citizen Court Liaison.....	125
<b>Annex-A</b>	.....	<b>126</b>
<b>Annex-B</b>	.....	<b>128</b>
<b>Annex-C</b>	.....	<b>130</b>
<b>Annex-D</b>	.....	<b>135</b>

## List of Abbreviations

- CNSA--- Control of Narcotics Substances Act, 1997.
- CPC--- The Code of Civil Procedure, 1908.
- CrPC---The Code of Criminal Procedure, 1898.
- FCA---The Family Court Act, 1964
- JEC2---Judicial Estacode 2<sup>nd</sup> Edition 2011.
- JJSA---The Juvenile Justice System Act, 2018
- KPDCR--Khyber Pakhtunkhwa District Courts Rules and Orders, Instructions, Circulars & Standing Orders.
- PHCR--- Peshawar High Courts Rules of Procedure.
- PO---Prohibition Order, 1979
- PPC---Pakistan Penal Code, 1860.
- QSO--- Qanoon-e-Shahadat Order,1984.
- RC--- Rent Controller.

## Preface

The first edition of the Bench Book for District Judiciary was published in 2016 during my first tenure as the Director General, Khyber Pakhtunkhwa Judicial Academy. This second edition stands revised to accommodate the latest case law, amendments, and procedural changes made during 2016-2021.

The following amendments as initiated by law have been fully incorporated properly where so requires as per details below:

- The Constitution (Eighteenth Amendment) Act No. X of 2010.
- The Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010.
- The Khyber Pakhtunkhwa Mental Health Act, 2017.
- The Juvenile Justice System Act, 2018.
- The Code of Criminal Procedure (Khyber Pakhtunkhwa)(Amendment) Act, 2019 (Act No. XLI of 2019).
- The Khyber Pakhtunkhwa Alternate Dispute Resolution Act, 2020.
- The Khyber Pakhtunkhwa Code of Civil Procedure (Amendment) Act, 2020 (Act No. XLIX of 2020).
- The Khyber Pakhtunkhwa Domestic Violence Act, 2021.

It merits mention that this Bench Book is a handy guide for the judicial officers who on each occasion have to consult much bulky material for reaching the relevant law. This effort on their part consumes a lot of time and causes delay in disposal of judicial business. With handy reference a lot of time of court shall be saved and it shall also aid to better and timely service delivery.

It is hoped, that this edition will, too, prove more useful for the Bench & the Bar. The Khyber Pakhtunkhwa Judicial Academy will welcome any suggestion if made to enhance and improve the value of this book. The Academy would further be obliged if any error or misprint is pointed out as to be properly rectified as desired.

Let me add here that the task of revising this edition could not have been possible without the inspiring leadership of his lordship Mr. Justice Qaiser Rashid Khan, Hon'ble the Chief Justice, Peshawar High Court, Peshawar/Chairman, Board of Governors, Khyber Pakhtunkhwa Judicial Academy. Ms. Farah Jamshed, D&SJ/Dean Faculty, Mr. Ihsanullah Khan Mahsud, D&SJ/Senior Director Administration, Mr. Azhar Ali, D&SJ/Station Director,

Ms. Farah Attaullah Khan, D&SJ/Senior Director Research & Publication, Mr. Ghulam Abbas, D&SJ/Former Senior Director Research & Publication, Syed Yasir Shabbir, AD&SJ/Director Instruction-I, Ms. Wadeya Mushtaq Malik, AD&SJ/Director Instruction-II, and Mr. Muhammad Farooq, Research Officer, actively facilitated the accomplishment of undertaking.

**(Zia-ud-Din Khattak)**  
Director General

## Chapter I: Constitutional Framework

### 1.1 Introduction

The Constitution is the fundamental law of the land that provides a framework for the Federal and Provincial Governments within which to function. Pakistan has a written Constitution, known as the Constitution of the Islamic Republic of Pakistan, 1973 (*hereinafter referred to as 'the Constitution'*). The erstwhile constitutions were the Government of India Act 1935, Constitution of 1956, Constitution of 1962, and Interim Constitution of 1972. All legalities flow out of the Constitution. Pakistan is the Federal Republic to be known as the Islamic Republic of Pakistan.<sup>1</sup> Islam is the State Religion of *Pakistan*.<sup>2</sup> The limits of each organ of the state are circumscribed by the Constitution. The limits of the judiciary are also determined.<sup>3</sup> All laws shall be void if inconsistent or in derogation of Fundamental Rights.<sup>4</sup> The *vires* of an Article of the Constitution can be looked into by the Supreme Court if against the *grund norm* (*the Objective Resolution*).<sup>5</sup> The trichotomy of powers is the main feature of the Constitution with the legislature, judiciary, and executive functioning within the allotted spheres. The laws are framed by the legislature, interpreted by the judiciary, and executed by the executive.

### 1.2 Legislation

Pakistan is a Federation having federal and provincial legislatures. The federal legislature is bicameral (upper house is Senate and the lower house is National Assembly collectively called '*Majlis-e- shoorā*' [*Parliament*] including the president). The provincial legislatures are unicameral and called Provincial Assemblies. The subjects of legislation are divided amongst the federation and its units. The Federal Legislature can legislate on subjects mentioned in Federal Legislative Lists while Provincial Assemblies can legislate on all residuary subjects. Article 142 of the Constitution reserves three subjects for concurrent legislation by both the legislatures. However, in case of inconsistency between these laws, the one framed by Federal Legislature shall prevail.<sup>6</sup>

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<sup>1</sup> Article 1 of the Constitution

<sup>2</sup> Article 2 of the Constitution

<sup>3</sup> Article 175 of the Constitution

<sup>4</sup> Article 8 of the Constitution

<sup>5</sup> Article 2A of the Constitution, PLD 2015 SC 401

<sup>6</sup> Article 143 of the Constitution

### 1.2.1 Modes of Legislation

The Constitution provides two basic modes of legislation in the form of Acts and Ordinances.

#### **Act**

An Act creates a new law or changes existing law. An Act is a Bill that is passed by the concerned legislature. Act passed by the Parliament is called Act of the Parliament, whereas, Act passed by the Provincial Assembly is called Act of the Provincial Assembly.<sup>7</sup>

#### **Ordinance**

An “Ordinance” is a piece of legislation the President makes in the case of the federal government and by the Governor in the case of the Provincial government. The procedure for promulgation of an ordinance is different from that of an Act. Article 89 of the Constitution empowers the President to promulgate an Ordinance when the Senate or National Assembly is not in session, whereas, Article 128 empowers the Governor to promulgate an Ordinance when the concerned Provincial Assembly is not in session. Ordinances are temporary legislation, the duration of a Federal Ordinance being 120 days extendable to a further maximum of 120 days by a resolution of the national assembly and it shall stand repealed at the expiration of the extended period, or if before the expiration of that period a resolution disapproving it is passed by the Assembly, upon the passing of that resolution, and a Provincial Ordinance being 90 days extendable to a further maximum of 90 days by a resolution of the provincial assembly and it shall stand repealed at the expiration of the extended period, or if before the expiration of that period a resolution disapproving it is passed by the Assembly, upon the passing of that resolution. The courts should be careful not to enforce an Ordinance that has ceased to be law under Articles 89 and 128 of the Constitution.

To convert the Ordinance into permanent law the concerned legislature shall have to pass it before expiry. An Act is a regular way of legislation by the concerned legislature and is made by a simple majority of the concerned legislature. The legislature cannot enact a law that is inconsistent or in derogation of Fundamental Rights guaranteed by Chapter I of the Constitution. The Constitutional legislation can be made by Federal Legislature only by a two-thirds majority of both the houses of *Majlis-e- shoora (Parliament-See Part XI of the Constitution)*. Normally one Legislature cannot legislate for another but when the legislature

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<sup>7</sup> Article 260 of the Constitution

of a Province so allows by a resolution then Federal Legislature can legislate for the province. But once made the concerned Provincial Legislature can repeal or amend the law so enacted.<sup>8</sup> Similarly in case of emergency the *Majlis-e- shoor*a (Parliament) shall have power to make laws for a Province, or any part thereof, with respect to any matter not otherwise within the legislative competence of Federation.<sup>9</sup>

### 1.2.2 Delegated Legislation

Both constitutional law and ordinary laws can further empower anybody or person to legislate for regulating the Constitution or concerned Law.<sup>10</sup> Such legislation is normally called delegated or subordinate legislation. But once this delegated legislation is made in accordance with the rules of legislation not violating the principle of harmony with parent law then it assumes the status of parent law in effect and restrictions.<sup>11</sup> Articles 99 and 139 of the Constitution and concerned provision of different laws-some of which are given in **Annex-A**, conferring powers on High Courts.

### 1.3 Executive

The executive authority of the Federation shall extend to the matters with respect to which *Majlis-e-Shoor*a (Parliament) has the power to make laws, including the exercise of rights, authority, and jurisdiction in and in relation to areas outside Pakistan. The executive authority of the Province shall extend to the matters with respect to which the Provincial Assembly has the power to make laws. However, in any matter with respect to which both *Majlis-e-Shoor*a (Parliament) and the Provincial Assembly of a Province have the power to make laws, the executive authority of the Province shall be subject to, and limited by, the executive authority expressly conferred by the Constitution or by law made by *Majlis-e-Shoor*a (Parliament) upon the Federal Government or authorities thereof. On the recommendation of the Federal Government, *Majlis-e-Shoor*a (Parliament) may by law confer functions upon officers or authorities subordinate to the Federal Government. On the recommendation of the Provincial Government, the Provincial Assembly may by law confer functions upon officers or authorities subordinate to the Provincial Government.<sup>12</sup> The outlines of the structure of

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<sup>8</sup> Article 144 of the Constitution

<sup>9</sup> Article 232 of the Constitution

<sup>10</sup> Article 99 & 139 of the Constitution

<sup>11</sup> *Bennion's Statutory interpretation* 1984 edn.p-152,Section 64 as referred to by *SM Zaffar on page 762 in understanding the statutes by Brite Books*

<sup>12</sup> Articles 97, 98, 99, 137, 138, and 139 of the Constitution

Federal and Provincial Governments have been given in Chapter 3 of Part III, and Chapter 3 of Part IV of the Constitution.

## 1.4 The Judicature

### 1.4.1 The Courts

Part-VII of the Constitution deals with the subject of the judicature and Chapter-1 thereof deals with the Courts. The Supreme Court of Pakistan, High Court of each Province, and High Court of Islamabad Capital Territory have been established under the Constitution<sup>13</sup>, while all other Courts have been established under the law. There is mainly four-tier judicial system to hear civil and criminal cases:

#### 1.4.1.1 First Tier

##### Civil Side

On the civil side, at the lowest and first tier, there are the Civil Judges. The Civil Judges have been conferred jurisdiction to try all suits of civil nature, i.e. Land suits, Small cause (now Small claims) suits, and Unclassed suits. The Courts of Civil Judges have also been conferred jurisdiction to entertain and decide the suits and applications relating to matrimonial and family disputes, child custody matters, and disputes between the landlord and tenant.

##### Criminal Side

On the criminal side, at the lowest and first tier, there are the Judicial Magistrates. There are three classes of Judicial Magistrates and they have been conferred jurisdiction to try criminal cases. The Court of Magistrate of **First Class** has been conferred jurisdiction to try cases in which he can impose a sentence of imprisonment for a term not exceeding three years including solitary confinement and a fine not exceeding forty-five thousand rupees. The Court of Magistrate of **Second Class** can try criminal cases in which it can pass a sentence of imprisonment for a term not exceeding one year including solitary confinement and a fine not exceeding fifteen thousand rupees. The Court of Magistrate of **Third Class** can try criminal cases and pass a sentence of imprisonment for a term not exceeding one month and a fine not exceeding three thousand rupees.

#### 1.4.1.2 Second Tier

The second tier of Courts in Pakistan is the Court of District and Sessions Judge and Additional District and Sessions Judge. The District and Sessions Judges and the Additional

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<sup>13</sup> Article 175 (1) and Article 203C (1) of the Constitution

District and Sessions Judges have two distinct jurisdictions, that of dealing with civil matters and criminal matters. In civil matters, normally civil revisions, civil appeals against the orders and judgments and decrees of Civil Judge are heard and decided by the District and Sessions Judges and Additional District and Sessions Judges, while in cases of negotiable instruments and civil suits of any amount or value of the subject matter as may be prescribed by the High Court, they act as Court of civil original jurisdiction. They also have jurisdiction to entertain transfer applications from one Court to another Court. In conducting criminal cases, they have jurisdiction to pass any sentence authorized by law but the sentence of death passed by them shall be subject to confirmation by the High Court.

#### *1.4.1.3 Third Tier*

The third tier of Courts is the High Court for each Province and for the Islamabad Capital Territory. It has been conferred jurisdiction to hear an appeal, reference, review, and revisions arising from the orders, judgments, and decrees passed by the subordinate courts of civil and criminal jurisdictions. The High Court has also been conferred jurisdiction of judicial review under Article 199 of the Constitution to pass writ of Certiorari, writ of Mandamus, writ of Quo warranto, writ of Habeas corpus and writ of Prohibition.

#### *1.4.1.4 Fourth Tier*

The fourth tier of Courts in Pakistan is the Supreme Court of Pakistan. Under Article 184(1) of the Constitution, the Supreme Court has been conferred the original jurisdiction to the exclusion of every other Court, in any dispute between two or more Governments, and the term Government has been explained to mean Federal Government and the Provincial Governments, in which case the Supreme Court shall pronounce declaratory judgment. Under Article 184(3) of the Constitution, the Supreme Court has also been conferred the original jurisdiction in matters relating to the question of public importance with reference to enforcement of any of the fundamental rights. Under Article 185 of the Constitution, the Supreme Court has been conferred the appellate jurisdiction to hear appeals from judgments, decrees, final orders, or sentences passed by the High Courts. Under Article 186 of the Constitution, the Supreme Court has been conferred advisory jurisdiction that if at any time, the President considers that it is desirable to obtain the opinion of the Supreme Court on any question of law which he considers of public importance, he may refer the question to the Supreme Court for consideration.

#### *1.4.1.5 The Federal Shariat Court*

There is a Federal Shariat Court established under Article 203C of the Constitution. Under Article 203D it has jurisdiction to examine and decide the question of whether or not any law or any provision of law is repugnant to the Injunctions of Islam. Under Article 203DD it has jurisdiction to decide any appeal arising out of any criminal court under the law relating to enforcement of Hudood Laws.

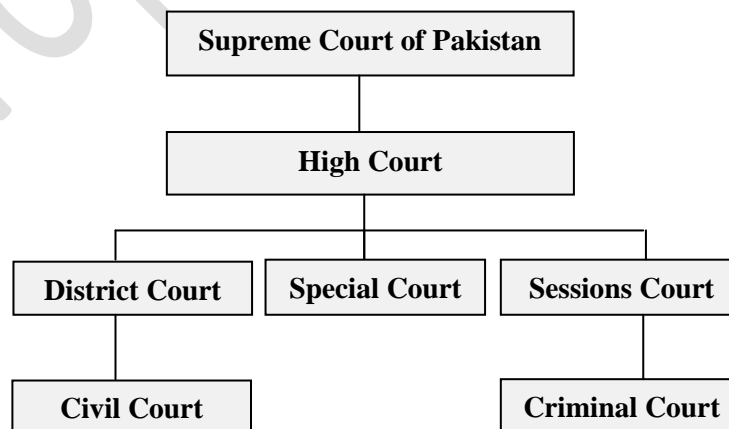
#### *1.4.1.6 Special Courts*

There are many other Courts established under various laws, which include, Accountability Courts, Commercial Courts, Anti-Terrorism Courts, Anti-Corruption Courts, Special Courts (Offences in Banks), Special Courts (Control of Narcotic Substances), Special Courts Customs, Taxation and Anti-Smuggling, and Labour Courts, etc.

#### *1.4.1.7 Tribunals*

There are many Tribunals established under the provisions of the Constitution and the law. Under Article 212 of the Constitution, the Service Tribunals have been established at the Federal and Provincial levels to decide the matters relating to the terms and conditions of service of the civil servants. Under Article 225 of the Constitution, the Election Tribunals are constituted to hear and decide election disputes. There are many other Tribunals which include, the Labour Appellate Tribunals, Customs Appellate Tribunals, Anti- Dumping Appellate Tribunals, Environmental Protection Tribunals, Insurance Appellate Tribunals, etc.

#### *1.4.1.8 Hierarchy of Courts*



#### 1.4.1.9 Classes of Judicial Officers

S.#	Nomenclature	Classification	Court
1	District & Sessions Judge (BPS-21)	District Judge	District Court
		Sessions Judge	Sessions Court
2	Additional District & Sessions Judge (BPS-20)	Additional District Judge	District Court
		Additional Sessions Judge	Sessions Court
3	Senior Civil Judge (BPS-19)	Senior Civil Judge (Administration)	
		Senior Civil Judge (Judicial)	Civil Court
4	Civil Judge-cum-Judicial Magistrate (BPS-18)	Civil Judge (1 <sup>st</sup> Class)	Civil Court
		Civil Judge (2 <sup>nd</sup> Class)	Civil Court
		Civil Judge (3 <sup>rd</sup> Class)	Civil Court
		Judicial Magistrate (1 <sup>st</sup> Class)	Criminal Court
		Judicial Magistrate (2 <sup>nd</sup> Class)	Criminal Court
		Judicial Magistrate (3 <sup>rd</sup> Class)	Criminal Court

#### 1.4.2 Independence of Judiciary

The independence of the judiciary is one of the basic features of the Constitution as enshrined in the Objective Resolution. No law including a constitutional amendment can be made that abridges the power of the Judiciary to the detriment of its independence<sup>14</sup>. The judiciary is empowered to check the legislative and executive powers. In order to ensure the independence of the judiciary, the appointment and removal of judges of the superior court have been taken out of substantive control of the executive<sup>15</sup>. The appointment, removal, administrative & judicial control of ordinary courts also rests with respective High Courts.<sup>16</sup> The constitutional mandate of independence of the judiciary from the executive was carried out by legislature and executive on the basis of judicial pronouncements.<sup>17</sup>

<sup>14</sup> PLD 2015 SC 401

<sup>15</sup> Article 175-A and 209 of the Constitution

<sup>16</sup> Article 203 of the Constitution, PLD 1998 SC 1445--2009 PLC (CS)841- PLD 2011 SC 407--2011 SCMR 1030

<sup>17</sup> PLD 1994 SC 105- PLD 1989 K 404

## Chapter II: Judicial Ethics

The moral principles that govern or influence a person's behavior are called ethics. Code of conduct establishing standards and norms, laying down guidelines for ethical and moral values in the judicial system are judicial ethics. Etiquette and mannerism are part and parcel of judicial ethics. These shape conduct of a person. These either bring him respect or degrade him in society. The conduct of a judge (both inside and outside the court) plays a vital role in creating a trust of litigants in judges and building confidence in the institution. The judges are not infallible in their decisions but the public should have unshakable faith that the decisions are not influenced by extraneous considerations. This is possible only if judges follow the code of conduct. The code of conduct for members of the superior judiciary is devised by Supreme Judicial Council under Article 209 of the Constitution. The conduct of judicial officers has so far been regulated by the Khyber Pakhtunkhwa Government Servants (Conduct) Rules, 1987, being civil servants within the meaning of the Khyber Pakhtunkhwa Civil Servants Act, 1973. These rules are primarily meant for all government servants. However, the job requirement of the judicial officers warrants special behavior for the judges which demand:

- Subservience to will of Allah Almighty;
- Highest quality of Intellect & Character; and
- Urge of earning Rizq-e-Halal.

Therefore, Hon'ble the Peshawar High Court, Peshawar, considered it imperative to further provide a Code of Conduct for members of the district judiciary, in addition to the existing rules (**Annex-B**). Any violation of the Code of Conduct or the Rules as aforesaid shall be tantamount to 'misconduct' and culpable under the Khyber Pakhtunkhwa Government Servants (Efficiency & Discipline) Rules, 2011.

## Chapter III: Precedents, Laws, and Interpretation of Statutes

To adjudicate disputes, understanding the legal system is imperative. We have a common law system being a legacy of the colonial era. In this system, the precedents are given due weight in interpreting laws and deciding rights. Sticking to an earlier decision in similar situations is called the principle of '*stare decisis*'. This principle ensures certainty and predictability resulting in rule of law and transparency being elements of good governance. The following part deals in detail, the place of precedents in our system.

The hallmark of justice is that it should be certain and universal. The doctrine of precedent was developed to provide the necessary certainty and universality. At its heart is a simple principle: the Law expounded in one case should be followed in later, similar cases means to keep to the *ratio decidendi* of past cases”, or literally, “stand by the thing which has been decided.” The primary rationales for the doctrine of precedent are:-

- Certainty,
- Equality,
- Efficiency, and
- The appearance of justice.

All courts are bound by the decisions of the superior courts. The highest court in a judicial hierarchy can overrule its previous decisions. A judge does not have to follow the decisions of other judges at the same level in the same judicial hierarchy. These decisions will however be persuasive in the interest of consistency. A decision of a court in a different hierarchy may be of considerable weight, but will not be binding. Only the *Ratio Decidendi* is binding. *Obiter Dicta*, although not binding, is yet persuasive.

### 3.1 Course for subordinate courts in following the precedent

#### 3.1.1 Decision of Supreme Court of Pakistan

Any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other courts in Pakistan.<sup>18</sup>

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<sup>18</sup> Article 189 of the Constitution

### ***3.1.1.1 Conflicting views of the Supreme Court***

Where there is a conflict of opinion between two Benches of the Supreme Court, the courts should follow the larger Bench in preference to that of a smaller Bench .<sup>19</sup>

### **3.1.2 Decision of High Court**

Subject to Article 189 of the Constitution, any decision of a High Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all courts subordinate to it.<sup>20</sup>

#### ***3.1.2.1 Conflicting views of different High Courts***

In case of contrary view of two High Courts on one point, the decision of High Court of the concerned province is to be followed irrespective of the chronological consideration.<sup>21</sup>

#### ***3.1.2.2 Conflicting views of different High Courts other than own High Court***

Where conflicting views of different High Court, other than own High Court, are in the field then subject to case the latest is to be followed.

#### ***3.1.2.3 Conflicting views of one High Court***

- a) The decision of Full Bench of the Court cannot be dissented from by a Division Bench or a Single Bench.<sup>22</sup>
- a) The decision of a Division Bench of the Court cannot be dissented from by a Single Bench or by another Division Bench.<sup>23</sup>
- b) The decision of a Single Bench can be dissented from by another or the same Single Bench and can be overruled by a Division Bench.<sup>24</sup>

### **3.1.3 Decision of Privy Council and Federal Court of India**

The Government of India Act 1935 enacted that the law laid down by the Federal Court and the Privy Council shall be binding upon all the Courts of the sub-continent of India. The law remained applicable to the Courts in Pakistan after the partition. After independence where there is a conflict of opinion between the Privy Council and the Federal Court or the Supreme Court of Pakistan, the law declared by the Federal Court or Supreme Court will be binding on

<sup>19</sup> AIR 1976 C 2433, PLD 2004 SC 600, PLD 2007 SC 79

<sup>20</sup> Article 201 of the Constitution

<sup>21</sup> 1983 CLC 2382

<sup>22</sup> PLD 1960 Lah 687

<sup>23</sup> PLD 1981 Kar 138, PLJ 1981 Kar. 194

<sup>24</sup> PLD 1964 Kar 34, PLD 1960 Lah 687

the Courts of the country. It is however to be noted that though the decision of the Privy Council is not binding in Pakistan yet being an exposition of law by one of the highest judicial tribunals in the world can be considered as guidelines for the proper exposition of law.<sup>25</sup>

#### **3.1.4 Pre-Independence Privy Council and High Court decision**

The Privy Council judgment prevailed inasmuch as it was the final Court of appeal from the High Courts.

#### **3.1.5 Pre- Independence Privy Council and Federal Court decision**

The Privy Council was a Court of Appeal also from the Federal Court. Hence the High Court was bound to follow the Privy Council decision.

#### **3.1.6 Pre- Independence Privy Council and Supreme Court decision**

The Supreme Court decision will prevail. All Courts in Pakistan are bound to follow the decision of the Supreme Court even though they are contrary to decisions of the Privy Council.

#### **3.1.7 Reported & Unreported Judgments**

The Judgments of Superior Courts whether reported or unreported have got the same binding force.<sup>26</sup>

#### **3.1.8 Binding Nature of Precedents**

Principles of law laid down by Superior Courts are not only guidelines for decision by Subordinate Courts but also in the nature of dicta to be rigidly followed by those.<sup>27</sup>

### **3.2 Kinds of Laws and Interpretation**

The primary function of courts is to interpret the law. But this is not possible until courts understand different types of statutes and laws and their constitutional status. To deal with the types of legislation the following list shall help a lot in understanding the variety of statutory documents.

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<sup>25</sup> *PLD 1956 FC 331, PLR 1956 Lah 202*

<sup>26</sup> *PLD 1968 Lah 148*

<sup>27</sup> *PLD 1982 Lah 214, PLJ 1982 Cr 101*

### 3.2.1 Kinds of Laws

- 1 Constitutional
- 2 Sub Constitutional
- 3 Act (*Article 75 & 116 of Constitution*)
- 4 Ordinance (*Article 89 & 128 of Constitution*)
- 5 Order [*Article 59 (1) (b)- Article 66 (3) -Article 160(4) (6) (7)- Article 168(3)& 169- Article 233 (2)- 247(6)- Article 250(b)- Article 258-Article 267-Article 268(3) of Constitution*]
- 6 Regulation (*Article 247(4) –Article 247(5) of Constitution*)
- 7 Delegated (Secondary –Regulatory-- Subordinate – Subsidiary)
- 8 Rules( delegated)
- 9 Regulations
- 10 By laws (delegated)

While interpreting the above-mentioned laws the primacy shall be given to Constitution and no sub constitutional legislation can be made which militates against the Constitution. Similarly delegated legislation cannot be framed which is in conflict with parent law. In case of contradiction between Federal and Provincial Laws within the legislative competence of both, the Federal law is to prevail.<sup>28</sup> In case of general law and special law dealing with the same subject special law shall prevail and in case of conflict between local and special law local law shall prevail.<sup>29</sup> There are two types of the repeal of statutes; express and implied. The implied repeal shall not be readily presumed unless both the laws cannot stand together on any premise.<sup>30</sup> If a word used in a statute has no definition in that statute then resort for definition can be made to concerned General Clauses Act for definition purposes.

While interpreting a statute, the court should try to infer the intention of the legislature from the text itself which is called textual interpretation by using a literal approach and when such approach results in absurdity then courts can have resort to the golden rule of resorting to favourable meanings to word in order to avoid absurdity, if the word has more than one meanings or wider meanings to the word having one meaning. Similarly, the courts in such situations can resort to the rule of purposive interpretation.<sup>31</sup> The repeal of the laws, in the

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<sup>28</sup> Article 243 of the Constitution

<sup>29</sup> AIR 1930 Mad 963,968 & 969

<sup>30</sup> PLD 2008 SC 779- 2002 CLD 1392- PLD 2014 Peshawar 170- AIR 2003 SC 3236

<sup>31</sup> Section 24 A Federal General Clauses Act

absence of any provision in repealing law, shall have the effect of saving the actions as mentioned in section 6 of Federal General Clauses Act or *pari materia* Section in Provincial General Clauses Act. The repeal of amending law simpliciter does not affect the amendment brought about in the main law by amending law (*Section 6A of Federal General Clauses Act, 1897 or pari materia Section in Provincial General Clauses Act, 1956*). In order to revive a repealed law mere repeal of repealing law shall not be sufficient unless express revival is made by a new law.<sup>32</sup>

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<sup>32</sup> *Section 7 of Federal General Clauses Act or pari materia Section in Provincial General Clauses Act*

## Chapter- IV: Fair Trial

### 4.1 Fair Trial and Due Process of Law

Right to a 'fair trial' means the right to a proper hearing by an unbiased competent forum, with the latter component being based on the maxim: "*Nemo debet esse iudex in propria causa*" that "no man can be a judge in his own cause". The said principle has been expounded to mean that a Judge must not hear a case in which he has a personal interest, whether or not his decision is influenced by his interest, for "justice should not only be done but be seen to have been done". The right to a fair trial has been associated with the fundamental right of access to justice, which should be read in every statute even if not expressly provided for unless specifically excluded. While incorporating Article 10-A in the Constitution and making the right, to a 'fair trial' a fundamental right, the legislature did not define or describe the requisites of a 'fair trial', which showed that perhaps the intention was to give it the same meaning as is broadly universally recognized and embedded in jurisprudence in Pakistan.<sup>33</sup>

Articles 4 & 10-A of the Constitution ensures that all individuals shall enjoy equal protection of the law and shall be treated in accordance with the law, which is their inalienable right. Every person for determination of his civil rights and obligations or in any criminal charge against him should be entitled to a fair trial and due process.<sup>34</sup> Concept of fair trial and due process has always been the golden principles of administration of justice but after incorporation of Article 10-A in the Constitution, it has become more important, that due process should be adopted for conducting a fair trial and an order passed in violation of due process might be considered to be void.<sup>35</sup> The august Supreme Court has also held that the right to a fair trial "should be read in every statute even if not expressly provided for". Since the legislature did not define or describe the requisites of a "fair trial", "the intention was to give it the same meaning as is broadly universally recognized and embedded in jurisprudence in Pakistan."<sup>36</sup> Some rights expressly enumerated by courts as part of a fair trial include:<sup>37</sup>

- All courts/tribunals shall be independent, impartial, and established under the law;
- All persons shall be equal before the courts/tribunals in the determination of their rights and obligations;

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<sup>33</sup> PLD 2012 SC 553

<sup>34</sup> *Sarfaraz Saleem vs Federation of Pakistan* (PLD 2014 SC 232)

<sup>35</sup> *Babar Hussain Shah vs Mujeeb Ahmed Khan* (2012 SCMR 1235).

<sup>36</sup> *Ibid, Babar Hussain Shah vs Mujeeb Ahmed Khan* (2012 SCMR 1235)

<sup>37</sup> PLD 2012 SC 553

- Everyone shall be entitled to a fair hearing within a reasonable time;
- Everyone shall have a right to be defended by a counsel;
- Subject to law, everyone shall have a right of public hearing;
- The procedure of trial as provided by the statute shall be followed; and
- The statute must provide a remedy of appeal.

Law, custom or usage having the force of law, which is inconsistent with the fundamental rights including the right to a 'fair trial' would be void by virtue of Article 8 of the Constitution.<sup>38</sup> The right of 'access to justice to all' is a well-recognized inviolable right enshrined in Article 9 of the Constitution. This right is equally found in the doctrine of 'due process of law'. The right of access to justice includes the right to be treated according to law, the right to have a fair and proper trial, and a right to have an impartial Court or Tribunal. The term 'due process of law' has been summarized as follows:-

- a. He shall have due notice of proceedings that affect his rights.
- b. He shall be given a reasonable opportunity to defend.
- c. That the Tribunal or Court before which his rights are adjudicated is so constituted as to give reasonable assurance of his honesty and impartiality; and
- d. That it is a Court of competent jurisdiction.<sup>39</sup>

The basic requirements of the doctrine of "due process of law" are enshrined inter-alia in Article 4 of the Constitution. It is intrinsically linked with the right to have access to justice. This right inter-alia includes the right to have a fair and proper trial and a right to have an impartial Court or Tribunal. A person cannot be said to have been given a fair and proper trial unless he is provided a reasonable opportunity to defend the allegation made against him.<sup>40</sup>

The trial mainly gives the impression of a procedure to be followed by courts in dealing with a case. There are mainly two different types of trials i.e. civil and criminal. The civil disputes proceed in accordance with the civil procedure and criminal disputes in accordance with the criminal procedure. There are then general and special procedural codes for civil trials and criminal trials. The general procedural codes are in detail covering the maximum possible stages of proceedings while special procedural laws are not so much in detail. Some special civil law and criminal law give their own special procedure and in matters not covered by that

<sup>38</sup> *Suo Moto Case No.4 OF 2010- (PLD 2012 SC 553)*

<sup>39</sup> *W. W. Willoughby in 'Constitution of United States, Second Edition, Vol. II, 2012, Nabu Press) at page 1709*

<sup>40</sup> *Watan Party vs Federation of Pakistan (PLD 2012 SC 292)*

special procedure, the courts are empowered to have resort to the general law on the subject. But there are certain special statutes that make the general procedural code inapplicable at all. Irrespective of the applicable procedure, the present position in Pakistan, after the insertion of Article 10-A in the constitution has made the adherence to the basic principle of a fair trial as necessary. Now no law can exclude the basic criteria of Fair Trial and due process.

#### 4.1.1 Criminal cases

The Constitution mandates a "fair trial and due process". Person arrested for an offence must be informed of the grounds of his arrest; must be permitted to consult with and be defended by a lawyer; must be provided with the information of the offence he was charged for; must be provided with an opportunity to cross-examine witnesses who deposed against him; must be given an opportunity to explain the circumstances disclosed in evidence against him; and must also be provided an opportunity to produce evidence in his defence. Said ingredients are necessary to ensure the fairness of a trial.<sup>41</sup> Accused of the most heinous or gruesome offence is entitled as of right to a fair trial by a tribunal designated by law with a meaningful opportunity to vindicate and defend his position both before prosecuting authority as well as the Court. Collective human wisdom, since times immemorial has not been able to evolve a better or more humane procedure to prosecute and convict offenders other than due process of law, with procedural safeguards under the Constitutional guarantees of a fair trial, to hand down sentences mandated thereunder on the preponderance of legal evidence without compromising on the principle of inherent human dignity.<sup>42</sup> In all criminal cases, the courts must ensure that the prosecution had duly informed the close family members of the accused under detention about his involvement in a criminal case so that he may be able to communicate with them and seek their assistance in hiring a counsel of his choice with whom he could communicate in order to seek legal assistance.<sup>43</sup> Right of the fair trial meant a grant of a proper hearing to an accused person by an unbiased competent forum, and that justice should not only be done but be seen to be done. Right of fair trial cast on an adjudicatory tribunal or forum a duty to treat a person in accordance with the law, to grant him a fair hearing, and for itself to be an impartial and a fair tribunal.<sup>44</sup> Right of accused to be defended by a legal practitioner/counsel of his choice. Article 10 (1) of the Constitution stipulated that an accused shall not, "be denied the right to consult and be defended by a legal practitioner of

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<sup>41</sup> *Muhammad Bashir vs Rukhsar* (PLD 2020 SC 334)

<sup>42</sup> *Ali Raza alias Peter vs The State* (2019 SCMR 1982)

<sup>43</sup> *Said Zaman Khan vs Federation of Pakistan* (2017 SCMR 1249)

<sup>44</sup> *Ishtiaq Ahmed vs Competent Authority* (2016 SCMR 943)

his choice", but it did not stipulate that, if the accused could not afford the service of such legal practitioner, the public or State shall bear the professional fee of such legal practitioner. Trial Court shall provide to the accused the services of a counsel at the State's expense where he does not have sufficient funds to engage any of them. However, this did not mean that an intransigent accused could be allowed to hold the criminal adjudication system hostage or create irregularities in the trial with a view to earn a future benefit. If such benefit was permitted then every accused would either not engage a counsel or not permit the counsel appointed by the State to do his job and disrupt the trial with a view to induce an irregularity to gain a subsequent benefit.<sup>45</sup>

#### 4.1.2 Civil Cases

The right of hearing of a party to a lis is one of the fundamental principles of jurisprudence as guaranteed by Article 10-A of the Constitution, which is the assurance of a "fair trial and due process of law" to a litigant.<sup>46</sup> In the process of administration of justice, the litigants should not be knocked out on technical grounds, however, certain provisions of the law are of vital procedural significance and if they are not followed in letter and spirit, there would be little possibility of a conclusive trial of a civil case and the process might suffer on account of an unbridled exercise of discretionary empowerment of the courts. Such circumstances could stall the fair trial of the matter, and against the very purpose and object of law (especially procedural law)-Adherence to such provisions in letter and spirit and the mandate of law to be followed could hardly be termed as mere 'technicalities' on account of which it might ultimately be held that no one should be knocked out for such technical reasons.<sup>47</sup>

### 4.2 Basic Criterion for Fair Trial & Due Process

What is the basic criterion of fair trial and due process is now an accepted phenomenon. Some of the ingredients of fair trial and due process are given below.

#### 4.2.1 Pre-Trial Rights

- i. The prohibition on arbitrary arrest and detention.
- ii. The right to know the reasons for arrest.
- iii. The right to be defended by a legal counsel.

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<sup>45</sup> *Zafar Iqbal vs The State (PLD 2015 SC 307)*

<sup>46</sup> *Altaf Ibrahim Qureshi vs Aam Log Ittihaad (PLD 2019 SC 745)*

<sup>47</sup> *Muhammad Asghar vs Hussain Ahmed (PLD 2014 SC 89)*

- iv. The right to a prompt appearance before a judge to challenge the lawfulness of arrest and detention.
- v. The prohibition of torture and the right to humane conditions during pretrial detention.
- vi. The prohibition on incommunicado detention

#### **4.2.2 The Hearing**

- i. Equal access to, and equality before, the court.
- ii. The right to a fair hearing.
- iii. The right to a public hearing.
- iv. The right to a competent, independent, and impartial tribunal established by law.
- v. The right to a presumption of innocence.
- vi. The right to prompt notice of the nature and cause of criminal charges.
- vii. The right to adequate time and facilities for the preparation of a defense.
  - i. The right to a trial without undue delay.
  - ii. The right to defend oneself in person or through legal counsel.
  - iii. The right to examine witnesses.
  - iv. The right to an interpreter.
  - v. The prohibition on self- incrimination.
  - vi. The prohibition on retroactive application of criminal laws.
  - vii. The prohibition on double jeopardy.

#### **4.2.3 Post-Trial Right**

- i. The right to appeal.
- ii. The right to compensation for miscarriage of justice.

### **4.3 Commitment to International Instruments**

Pakistani Courts can draw on international law without the legislative instrument. It is held that nations must march with the international community and the municipal law must respect rules of international law, even as nations respect international opinion. The comity of nations requires that rules of the international law must be accommodated in the municipal law even without a legislative sanction.<sup>48</sup> Therefore, we are obliged to honour our international commitments in this regard. The following provisions in International Covenant

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<sup>48</sup> *PLD 1 993 Karachi 93*

on Civil and Political Rights (*ICCPR*) to which Pakistan is a signatory shall give the idea of our responsibility.

- It is guaranteed under Article 14 of the International Covenant on Civil and Political Rights (*ICCPR*), which provides that “*everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.*”
- Article 9(1) of the *ICCPR* provides that “*everyone has the right to liberty and security of person.*”
- Article 9(2) of the *ICCPR* provides that “*Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*”
- Article 9(3) of *ICCPR* refers specifically to the rights of a person arrested or detained on a criminal charge, who “*shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.*”
- Article 9(4) of *ICCPR* provides for the right to habeas corpus, that is, the right of anyone deprived of liberty by arrest or detention to “*take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*”

## Chapter V: Civil Courts

### 5.1 Introduction

Civil Courts have jurisdiction to try all suits of a civil nature unless expressly barred. The Court of District Judge is the principal court of original jurisdiction in civil cases. The District Judge is assisted by Additional District Judge(s) of co-ordinate jurisdiction working under his administrative control. The Senior Civil Judge exercises the delegated powers of the District Judge for entertaining institution of civil suits, for distributing them amongst the Civil Judges either by general order or a special order. The Senior Civil Judge is also in-charge of the Process Serving Agency.

### 5.2 Establishment

The establishment of civil court flow from the words contained in Article 175(1) of the Constitution “such other courts as may be established by law”. These courts are classified by section 3 of the Civil Courts Ordinance, 1962 as follows:-

- a. The Court of the District Judge;
- b. The Court of the Additional District Judge; and
- c. The Court of the Civil Judge.

Further placed into classes in terms of pecuniary jurisdiction.<sup>49</sup>

### 5.3 Jurisdiction

Section 9 of CPC, 1908 empowers civil courts to try all suits of civil nature excepting suits of which their cognizance is either expressly or impliedly barred. Provisions of the Civil Courts Ordinance, 1962 apart from constituting classes of courts also authorize Provincial Governments u/s 4 to determine civil district and headquarters but the local limits of the jurisdiction of a Civil Judge are to be defined by the High Court u/s 10 of the Ordinance *ibid*. The jurisdiction to be exercised in original civil suits as regards the value by a Civil Judge shall be determined by the High Court under section 9 of the West Pakistan Civil Courts Ordinance, 1962, and for this purposes civil judges are classified into three classes’ namely:-

- a. Civil Judge 1<sup>st</sup> Class,
- b. Civil Judge 2<sup>nd</sup> Class’ and
- c. Civil Judge 3<sup>rd</sup> Class.

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<sup>49</sup> Section 9 of the Civil Courts Ordinance, 1962 (JEC 2 page 266)

### 5.3.1 Pecuniary Jurisdiction

Hon'ble the Peshawar High Court, Peshawar has fixed the pecuniary jurisdiction of Civil Judges in original civil suits and proceedings as follows<sup>50</sup>:

- (a) Civil Judge 1<sup>st</sup> Class To exercise jurisdiction in original Civil suits or proceedings where the amount or value of the subject matter of the suit is below rupees fifty million.<sup>51</sup>
- (b) Civil Judge 2<sup>nd</sup> Class To exercise jurisdiction in original Civil Suits or proceedings wherein the subject matter in amount or value does not exceed Rs. 500,000/-
- (c) Civil Judge 3<sup>rd</sup> Class To exercise jurisdiction in original Civil Suits or proceedings wherein the subject matter in amount or value does not exceed Rs. 100,000/-.

Under section 24 of the West Pakistan Civil Courts Ordinance, 1962, only the civil court of unlimited jurisdiction can entertain suits by or against the Government and its servants in their official capacity.

However, the Khyber Pakhtunkhwa Provincial Assembly vide Act # XLIX of 2020 inter-alia amended the Code of Civil Procedure, 1908 by substituting section 6 according to which all civil suits shall be filed in the following manner, namely:

- (a) where the amount or value of the subject matter of the suit is below rupees fifty million, the suit shall be filed in the court of Civil Judge, as may be prescribed by the High Court; and
- (b) where the amount or value of the subject matter of the suit is above rupees fifty million, the suit shall be filed in the court of District Judge, as may be prescribed by the High Court.

### 5.3.2 Original jurisdiction

Section 7 of the Civil Courts Ordinance, 1962, empowers the District Judge to have jurisdiction in original civil suits without limit as regards the value.

<sup>50</sup> PHC Notification No. 1(a) 67-VII/2002/42-J Dated Peshawar, the 5th June, 2002.

<sup>51</sup> Section 6(a) of the Khyber Pakhtunkhwa Code of Civil Procedure (Amendment) Act No. XLIX, 2020

## 5.4 Civil Trial

The challenge for civil courts is to ensure basic principles of fair trial on one hand and expeditious justice on the other. This really is a daunting task but it can be overcome provided the courts follow the basic scheme of case management. The case management shall be discussed in another separate chapter. Here we are to see that how a civil case is tried and what procedural steps are required for the courts to follow.

Every suit shall be instituted by the presentation of a plaint, it shall be the duty of the court to prima facie, satisfy itself of jurisdiction, cause of action, and question of limitation. In determining the jurisdiction the court is to know its jurisdictional bounds as to territory, subject matter, and pecuniary. If the case falls beyond such bounds, the court shall return the plaint for presentation before the proper forum.<sup>52</sup>

### 5.4.1 Summary Rejection

The second important stage is the summary rejection of plaint at initial stage in order to avoid the protracted proceedings in cases liable for summary rejection on technical grounds. These grounds can be non disclosure of cause of action, under valuation of suit, and legal bar.<sup>53</sup>

For the purpose of procedure for receiving plaint, appeals and conduct of proceedings etc see Section I & II, Vol II, KPDCR.

### 5.4.2 Parties and their appearance

The court is then to see whether all necessary parties have been joined in the plaint in order to enable it effectually and completely, to adjudicate upon and settle all the questions involved in the suit. If it is so then the court should take steps at initial stages to correct the defect by adding or striking out parties or by ordering separate trials.<sup>54</sup> While, issuing processes for the appearance of the parties care must be taken that in civil litigation the parties can appear through their authorized agents or pleaders.<sup>55</sup>

### 5.4.3 Issuance of Processes

The provisions regarding the service of summons of the parties, contained in Sections 27, 27-A, 28 and 143, Order V, Rules 9 to 30, Order XXVII, Rule 4, Order XXIX, Rule 2, Order

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<sup>52</sup> Section 26 CPC as amended by the Khyber Pakhtunkhwa Code of Civil Procedure (Amendment) Act No. XLIX, 2020 read with Order VII, Rule 10 CPC

<sup>53</sup> Order VII, Rule 11 CPC

<sup>54</sup> Order I CPC

<sup>55</sup> Order III CPC

XLVIII, Rules 1, 2 and 3, Order III, Rules 3, 5 and 6, Order XXVIII, Rule 3, Order XXX, Rule 3, and Order XLI, Rule 14 of the Civil Procedure Code as amended by the High Court should be strictly observed, as neglect of them may often render the service ineffective, especially when personal service cannot be made.<sup>56</sup> Summons shall be sent simultaneously, unless otherwise ordered by the Court, to the defendant, through its Process Serving Agency and by registered post acknowledgement due, and if so desired by the Court, another copy of the summons may be sent by courier service signed and sealed in the prescribed manner, or as the Court may determine, by urgent mail service of Pakistan Post or any other courier service, at the cost of the plaintiff.<sup>57</sup> Before issuance of processes in civil cases the order for deposit of process fee is must save those cases exempt from court fee under the law for the time being in force.<sup>58</sup> In case of non-deposit of process fee and diet money of witnesses required by defendant to be summoned through Court, the Trial Court in such circumstances would have no option, but to close evidence of defendant.<sup>59</sup>

The Court, before issuing the processes, is required to see whether summons is to be issued for final disposal of case or for framing of issues only.<sup>60</sup> Another question which needs to be addressed before proceeding further is why there are no provisions summoning the defendant to be present physically or to file a written statement. It is also hard to understand how summons for the settlement of issues can be issued without first requiring the defendant to file a written statement. The key to resolve these confusions lie in rule 7 & Form No. 2 of Appendix-B of First Schedule of CPC. The language employed in the summons is simple enough to understand that under the scheme of the Code, on or before the date mentioned in the summons for settlement of issues, the defendant is bound to submit a written statement, produce all the documents in his possession upon which he bases his defence, claims, set-off or counter claim.

#### *5.4.3.1 Vigilant Supervision of the Service of Processes*

Presiding Officer of the Court should keep vigilant eye on issuance and service of the processes. Forms of processes are found in Appendix-B to Schedule-I of the Code of Civil Procedure. In the case of persons of distinction a letter may be substituted for a summons if

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<sup>56</sup> *High Court Rules & Orders Vol. II Chapter 7 Part-A, Rule-1*

<sup>57</sup> *27-A of The CPC (Amendment) Act, 2020*

<sup>58</sup> *Khyber Pakhtunkhwa Court Fee (Abolition) Ordinance, 1978 read with The Khyber Pakhtunkhwa Ordinance No XVII of 1980; Shahzullah vs Shahab-ud-din (PLD 1979 Peshawar 33); Akram Khan vs The State (1988 SCMR 1660)*

<sup>59</sup> *Ahmad vs Adtl: District Judge (2008 SCMR 1330)*

<sup>60</sup> *Rule 5 of Order V CPC-Section XXV of Vol-I, Section VIII, Vol-II of KPDCR and Section XIII of KPDCR*

the Court thinks fit.<sup>61</sup> Rules 9 to 16 deal with the manner in which the service of summons may be made. Rule 9 states that summons should be served by the proper officer or his subordinate. Rule 10 prescribes the mode of service viz. by delivering or tendering of duly signed and sealed summons. As per Rule 10-A, at the time of issuing the summons under Rule No. 9, another copy of the summons shall be sent to the defendant through registered post, acknowledgement due. This provision is also not being complied with in almost all the cases as in practice only summons are sent through registered post but acknowledgement due cards do not accompany the post and due to this defect the whole exercise of service through registered post loses its legal value. Sub-rule (2) of rule 10-A has categorically mentioned that only the signature of defendant on the acknowledgement or endorsement thereon by the postman regarding refusal of defendant to take the summons shall be prima facie proof of service and not otherwise. So summons which have been sent through registered post but remain without acknowledgement would not carry presumption of service to defendant. When processes are transmitted by post, they should be sent under service covers, and should ordinarily be registered.<sup>62</sup>

At the same time the summons shall contain an order to defendant to produce all documents in his power or possession.<sup>63</sup> Each summons shall be accompanied by a copy of plaint or concise statement.<sup>64</sup>

Every attempt should be made to effect personal service in the first issuance and failing that service on an agent or a member of the family. The process-server should go again and again for this purpose if there is time before the date fixed for scrutiny of service. In other words service in any of the ways enumerated in Order 5, Rules 12 to 16 of the Code of Civil Procedure, should be insisted upon and service by affixation as provided in Order V, Rule 17, Civil Procedure Code, should not be allowed till after the day fixed for scrutiny. When summons returned under Rule 17, the court shall examine him on oath, if no affidavit is there, and may examine him on oath, if affidavit is there and may conduct further inquiry and accept it as valid service or not. No such examination in substituted service under Rule 20. Under Rule 16, the serving officer is bound to require the person to whom the summons are served, to sign the original summons as acknowledgement of receipt of delivery. As per Rule 18, the serving officer who has served the summons would make an endorsement on the

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<sup>61</sup> Order V, Rule 30 of CPC

<sup>62</sup> Section 143, Civil Procedure Code

<sup>63</sup> Rule 7 of Order V CPC

<sup>64</sup> Rule 2 of Order V CPC

summons regarding the manner of service and then, under Rule 9 (3) would return the summons to the court. If the service is affected under Rule 16, there is no legal requirement of further service of summons, but in practice usually the courts, in some cases, repeat the process of service or order for substituted service which is done by pasting the summons on the walls of the defendant's house or by publishing them in the local newspaper, an exercise which is unnecessary and unjustified.

In case of failure to serve the summons personally or through agent substituted service may be made by process server himself (*Rule 17 of Order V CPC*) or court may order for substituted service (*Rule 20 of Order V CPC*). Order V, Rule 20(1), of the Code of Civil Procedure, provides that when the Court is satisfied that the defendant is keeping out of the way for the purposes of avoiding service, or that, for any other sufficient reason that summons cannot be served in the ordinary way, service may be effected by affixing a copy of the summons in some conspicuous place in the Court house, and also in some conspicuous place of the house, if any, in which the defendant is known to have last resided, or carried on business, or personally worked for gain, or in such other manner as the Court thinks fit.

Location of the bailiff or Process Server serving the summons shall be monitored by modern devices in the prescribed manner, and a photograph shall be taken of the defendant or the premises or the person accepting summons on behalf of the defendant and be made part of the record as a proof of delivery.<sup>65</sup>

#### *5.4.3.2 Substituted Service through Publication in Newspaper*

Rule 20 of Order V CPC has mentioned number of modes of substituted service but usually the courts orders substituted service through a publication in a newspaper. If we go through Rule 20 (1) (e) then it would become clear that law requires the publication of summons in the newspaper as prescribed under Rule 5. Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order for service of the summons by-

- a. Affixing a copy of the summons at some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain; or

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<sup>65</sup> Section 27-A (5) of the CPC (Amendment) Act No XLIX, 2020

- b. any electronic device of communication which may include telegram, phonogram, telex, fax, radio, television “short message service, electronic mail etc.”<sup>66</sup>; or
- c. urgent mail service or public courier services; or
- d. beat of drum in the locality where the defendant resides; or
- e. publication in press or publication on the official website of the Court<sup>67</sup>; or
- f. any other manner or mode as it may think fit:

Provided that the Court may order the use of all or any of the aforesaid manners and modes of service simultaneously.

Generally, service by publication is allowed only by leave of the court, which usually grants permission only when the plaintiff can show that no other method of service can be affected. Usually the legal notice must be published in at least one newspaper of general circulation where the defendant is likely to be found or where the court is located, or in both places. Such publication should be made in a newspaper approved by the High Court. A list of approved newspapers is circulated to subordinate Courts periodically. Selection of paper should be made by the Presiding Officer and not by a Clerk of his office. Preference should be taken that such notices are published as far as possible in vernacular papers, vernacular being the language of the subordinate Courts. They should only be published in papers printed in English if there is good reason to suppose that the person concerned read English papers and is more likely, to be reached in that way. Preference should be given to such papers as are printed in the District where the person notified resides; or if no newspaper is printed in that District, to those printed in the District nearest to it, provided such papers have a good circulation and are likely to be read by the defendant or the class to which he belongs. Publication fee should also be mentioned by the presiding officer in order sheet in order to ensure transparency.

The court may also instead of summons issue letter to defendant in certain cases. (*Rule 30 of Order V CPC*). Service on sailors, soldiers or airman shall be made through commanding officer (*Rule 28 of Order V CPC*). Service on civil public officer or on a servant of Railway company or local authority shall be made as mentioned in Rule 26A of Order V CPC. Service in foreign territory can be made as mentioned in Rule 26 of Order V CPC. Appearance of

<sup>66</sup> Notification No. 15-J/2018 Peshawar, dated:23.01.2018 of Peshawar High Court

<sup>67</sup> Notification No. 15-J/2018 Peshawar, dated:23.01.2018 of Peshawar High Court

parties and consequences of non-appearances when the case is fixed for hearing are dealt with Order IX CPC.

Under Order-IX, the court in case of willful non-appearance of a party may proceed ex parte or pass ex parte decree. On sufficient cause shown and within limitation the ex parte proceedings and decree can be set aside.

#### **5.4.4 Written Statement**

The defendant shall file written statement not later than thirty days from the date of his first appearance in the court.<sup>68</sup>

- Provided that if the defendant fails to file written statement on the date fixed, the Court may grant an opportunity to file the same not later than fifteen days, subject to payment of reasonable adjournment costs:
- Provided further that if the defendant fails to file written statement after the opportunity given under the first proviso, a final opportunity may be given by the Court to file written statement not later than fifteen days, subject to payment of reasonable adjournment costs, after which the defendant shall lose the right to file written statement:
- Provided also that the written statement may be allowed to be filed by the Court upon payment of costs to be determined by it, if the defendant through an application supported by an affidavit within thirty days satisfies the Court that he had just and sufficient cause and the Court record reasons for it.

The defendant shall, at the time of filing of written statement, submit two sets of written statements and other accompanying documents. He may further be required to submit as many additional sets of written statement, as may be determined by the Court.

#### **5.4.5 Case Management and Scheduling Conference (Order IX-A)**

The Court shall, under its own supervision, in each and every case, after receiving a plaint, petition or appeal, as the case may be, and having regard to the provisions of the Code and these rules, start case management and scheduling conference.<sup>69</sup> For the purpose of these rules case management and scheduling conference means and includes: (i) expeditious

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<sup>68</sup> Section 26-A of KP Civil Procedure Code (Amendment), Act No XLIX, 2020

<sup>69</sup> O-IX-A, Rule 1 of the Rules, 2018

disposal of the cases; (ii) establishing an early and continuing control of the Court over the case, so that it cannot be protracted because of lack of management; (iii) discouraging wasteful pre-trial activities; (iv) improving the quality of trial through more thorough preparation of the case by the parties and their counsel; (v) encouraging the parties to cooperate with each other in conducting the Court proceedings; (vi) fixing time tables or otherwise controlling progress of the case; (vii) giving directions to ensure that the trial of a case proceeds quickly and efficiently; and (viii) for facilitation of the parties, if so required, seeking consultation of the parties or their counsel in the case management and scheduling conference through telephone, mail or other modern technologies: Provided that in case the Court does not call for such conference, it shall be bound to record reasons for not doing so.

At any conference under the Rule (1), the Court may take appropriate action and pass a scheduling order with respect to:<sup>70</sup> (i) the formulation and simplification of issues, including elimination of frivolous claims and defenses; (ii) the necessity or desirability of amendments in the pleadings; (iii) the necessity or desirability of joining other parties; (iv) the necessity or desirability of any local inspection through commission; (v) obtaining proposed exhibits from the parties and scrutinizing them within the mandate of Order-XIII, and identifying witnesses; (vi) determining the appropriateness and timing of summary judgment under Order-XV; (vii) control of discovery through discovery management; (viii) disposal of pending miscellaneous applications; (ix) conducting trial management for a speedy trial; and (x) facilitating the just, speedy and inexpensive disposal of cases. Seven days prior to conducting any case management and scheduling conference for hearing of the applications, discovery, settlement or trial, the Court shall serve the agenda items of the conference to the parties or their counsel through proformas, as specified in the Fifth Schedule.<sup>71</sup>

#### ***5.4.5.1 Management and disposal of miscellaneous applications***

Rule 2 (1) of the O.IX-A prescribed the procedure to manage the miscellaneous applications, arising out of the suits or proceedings, in the following manner. The Court, after consultation with the parties and or their counsel, shall fix the following three dates:<sup>72</sup> (i) a date by which the parties shall file any of the applications under this Court, required for completion of

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<sup>70</sup> O. IX-A, Rule 1(2) of the CPC Rules, 2018

<sup>71</sup> O. IX-A, Rule 1(3) of the CPC Rules, 2018

<sup>72</sup> O. IX-A Rule 4 of the CPC Rules, 2018

pleadings, or any other equity based applications, and shall provide copies of such applications to the other party or parties, as the case may be; (ii) another date by which the parties shall file written replies to such applications, and shall give copies of written replies to the opposite parties; and (iii) a third date by which unless the hearing is adjourned, the applications shall be disposed of: Provided that the whole proceedings, under this clause, shall be completed within a maximum period of sixty (60) days, commencing from the date of attendance of the parties; (b) no opportunity shall be provided to any party for making any such applications, if he opts not to file such applications or reply thereto, after exhausting the opportunity provided under clause (a); (c) any order made under this rule shall not be appealable or revisable except in an appeal or revision, as the case may be, in the main case; and (d) if it is not convenient to decide all the applications collectively, the Court may decide them separately by making a fixed schedule for their disposal, subject to the provisions of clause (a).

However, the Khyber Pakhtunkhwa Provincial Assembly vide Act # XLIX of 2020 inter-alia amended the Code of Civil Procedure, 1908 by substituting section 141 which provides the following procedure regarding disposal of application for injunctions and other miscellaneous application and issues:

1. The procedure provided in this Code with regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.
2. The Court in which the main case is pending shall maintain separate files each for the main case as well as for interlocutory applications respectively and shall proceed with both of them separately.
3. At all material times, the Court shall keep both the files, updated and tallied with each other in duplicate and identically including the respective orders and diary sheets.
4. The Court shall proceed collaterally with the main suit and interlocutory applications respectively according to the timelines prescribed in this Code and the rules or by any order of the Court.
5. All applications in the main case for addition, deletion and substitution of parties, amendments to pleadings, modification or alteration of issues, rejection of plaint and stay of suits including miscellaneous or interlocutory applications, shall be heard and adjudicated by the Court hearing the main case.

6. The filing of any application, including an application for the rejection of the plaint or a dismissal of suit, shall be no ground to dispense with or waive the requirement of filing a written statement within the timelines prescribed in this Code.
7. This section shall have effect notwithstanding any other provision in this Code or any other law for the time being in force.

For case management and scheduling conferences, a new sub-section (3) is added to section 128 CPC, according to which “the High Court may make rules, not inconsistent with the provisions of this Code, for case management and scheduling conferences, binding the parties to follow the schedules and timelines prescribed therein.” (*Rules under sub-section 3 ibid are in the process of making.*)

#### **5.4.5.2 Discovery management and scheduling orders**

After completion of pleadings, in accordance with the nature of the litigation, the Court shall fix a time schedule, which shall not exceed thirty (30) days, in any case, for (a) developing consultation with the parties or their counsel, as the case may be, a factual and legal statement of controversy; (b) employing all or any modes of litigant conducted investigation, as specified in Orders-X, XI and XII of the Code; and (c) requiring parties or their counsel, as the case may be, to submit their proposed exhibits along with proforma-E, as specified in Fifth Schedule, and conducting their scrutiny in accordance with the mandate of Order-XIII of the Code.<sup>73</sup>

#### **5.4.5.3 Trial management and scheduling orders**

Before or after framing of the issues, if the case is not summarily decided and is fixed for trial, then the Court in consultation with the parties or their counsel, as the case may be, shall, within seven days, establish a time schedule for-

- (a) presenting and exchanging the list of witnesses, which the parties intend to produce in the Court either to give evidence or produce documents, on the proformas-F1 and F2, as specified in the Fifth Schedule;
- (b) procuring the certificates of readiness from the parties to produce their witnesses and documentary evidence in the Court on proforma-G, as specified in the Fifth Schedule; and

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<sup>73</sup> O.IX-A of the CPC, Rule, 2018

(c) proceeding with the trial in accordance within the time schedule, within which, the parties shall be bound to present their evidence and cross examine each other's witnesses. All efforts shall be made by the Court to hold *de die in diem* trials: Provided that the Court shall conduct the trial within a period of one (01) year.

#### ***5.4.5.4 Settlement conference and scheduling order***

At any stage during the proceedings of a case, the Court in consultation with the parties, may employ any of the modes of settlement of dispute for expeditious disposal of the case. Where the case is due for trial, the order should contain a detailed comprehensive schedule for plaintiff's evidence and following that for the defendants' evidence as the case may be. Law provides that all efforts should be made to hold day-to-day proceedings.

#### ***5.4.5.5 Framing of issues, Filing of List of Witnesses, and Recording of Evidence***<sup>74</sup>

##### **Framing of issues**

- The Court shall, within seven days of filing of the written statement, frame issues.
- The parties may, within seven days of framing of issues, raise objections on such issues.

##### **Filing of list of witnesses**

- After finalizing the issues, the Court shall order the parties to file list of witnesses not later than fifteen days.
- If any party fails to comply with the orders of the Court in sub-section (3), a final opportunity may be given by the Court to file list of witnesses not later than fifteen days, subject to payment of adjournment costs.

##### **Recording of evidence**

- Upon framing of issues and filing of the list of witnesses, the Court shall proceed to record evidence itself or may order the recording of evidence through Commission in the prescribed manner.
- For the purpose of sub-section (5) of section 26B, the Court shall appoint a Commission from a list of approved panel, comprising advocates and retired judges,

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<sup>74</sup> Section 26A and 26B of CPC (Amendment) Act No XLIX ,2020

maintained by the District Judge concerned in the prescribed manner, on such fee and terms and conditions as may be determined by the Court.

- The Court may, in appropriate cases, require the parties to file affidavits of their respective oral witnesses before the Court or the Commission, as the case may be, which shall be construed to be examination-in-chief.
- On the affidavits so filed in evidence, the witnesses shall be subjected to cross examination and if necessary, just and expedient, shall be subjected to re-examination followed by cross-examination.
- The Court or the Commission, as the case may be, shall record the evidence and proceedings thereof in written and audio and video recording.
- The Court or the Commission, as the case may be, may ordinarily finalize the recording of evidence, within six months of the order, under sub-section (5), and, in case of Commission, it shall submit a report in this regard to the Court along with the complete written, audio and video record of the proceedings conducted under sub-section (9).
- The High Court may frame rules for the purposes of recording of evidence through Commission, inter alia, empowering the Commission to regulate the Commission's proceedings including but not limited to allowing or disallowing questions, documents, choosing sides, extension of Commission and passing such ancillary or other orders which are necessary to carry out the functions of the Commission.

#### **5.4.6 Disposal of Case at First Hearing**

If the case is fixed for final settlement the case can be decided on first hearing if either party fails to produce evidence (*Rule 4 of Order XV CPC*). The case can be decided on first hearing though not fixed for final hearing if parties are not at issue (*Rule 1 of Order XV CPC*).

#### **5.4.7 Spot Checks & Local Commission**

Occasions can be there when the evidence on record does not furnish a clear picture and certain ambiguities become apparent on record. The Court, in such circumstances, is empowered to issue local commission so as to elucidate, clarify or explain the matter in question.<sup>75</sup> Local commission may be appointed for the purposes:<sup>76</sup>

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<sup>75</sup> *Nazir Ahmed etc vs Muhammad Qasim (2004 SCMR 1292)*

<sup>76</sup> *section 75 CPC*

- (a) To examine any person;
- (b) To make a local investigation;
- (c) To examine or adjust accounts; or
- (d) To make a partition.

Additionally, in any suit, wherein the court considers a local investigation to be necessary the Court may, in its discretion or on the application of any of the parties, at any stage carry out spot checks including inspection of documents and premises in order to ascertain issues of partition, demarcation, possession, state of construction and anything incidental or ancillary thereto.<sup>77</sup> The Court may call for the evidence or record statement of any person or documents at the spot<sup>78</sup>. The spot check is not the inspection through appointment of commission under section 75 of CPC. Any evidence or statement recorded during a spot check shall be subject to the right of objection and cross-examination.<sup>79</sup>

#### 5.4.8 Adjournments

O.XVII of CPC empowers the court to grant an adjournment from time to time, if sufficient cause is shown. Judges, while granting adjournments in the trials, are supposed to exercise reasonable caution. Careless approach may result in unnecessary delays that bring consistent criticism upon the judiciary and the courts. No adjournment should be granted for the benefit of any party unless it is absolutely necessary and as provided for in the Code. Granting an adjournment to accommodate one party, at the expense of another, is manifestly wrong and upset the judicious mandate of the proceedings. Where necessary for the promotion of justice, it should be upon suitable terms as to costs. The failure of any party to produce his evidence, his witnesses or to perform any other act necessary to further progress the suit, without just cause, should not prevent the court from proceeding to decide the suit forthwith. What a court should do if the next date of hearing happens to be a holiday or the presiding officer of the court is absent on that date is dealt with in Rules 4 and Rule 5.

#### 5.4.9 Hearing of final arguments

The Court shall, after submission or closing of evidence, as the case may be, fix a date not later than thirty days, for hearing of final arguments by the parties. The Court may require the

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<sup>77</sup> Section 75-A of the CPC (Amendment) Act, 2020

<sup>78</sup> Sub-section (2) of Section 75-A of the CPC (Amendment) Act, 2020

<sup>79</sup> Sub-section (3) of Section 75-A of the CPC (Amendment) Act, 2020

parties to file their written arguments in addition to oral arguments and the written arguments so filed shall be made part of the record.<sup>80</sup>

#### 5.4.10 Judgment and decrees

After hearing of final arguments within a date not exceeding fifteen (15) days, the court shall pronounce judgment in open court either at once or on some future day not exceeding thirty days.<sup>81</sup> At the time of pronouncing the judgment, the same should be dated and signed.<sup>82</sup> Where a law provides for writing, announcing and signing a judgment, all that must be done in a way to give validity to the judgment.<sup>83</sup> Announcement of Judgment without writing is an irregularity and not illegality rendering the judgment void.<sup>84</sup> The court is to give decision on each issue separately with reasons if issues are framed.<sup>85</sup> However, a judgment which deals with all points raised, fulfils the requirements of law even though it may not have discussed each issue separately cannot be termed as 'illegal or *ab initio void*'.<sup>86</sup> Where certain issues were inextricably linked with each other and those were considered together, such consideration was not at all violative of the mandate contained to O. XX, R. 5 of C.P.C.<sup>87</sup>

Important ingredient of judgment is that it should be a speaking order consisting of a concise statement of the case, decision thereon and reasons for such decision and conforms to the requirements of O. XX, R. 5, C.P.C. Similarly, a judgment delivered by the first court of appeal and final court of fact would not be a judgment if it did not conform to the requirements of O. XLI, R. 31, C.P.C. Where arguments of the counsel for the parties are reproduced in the judgment but as to whose arguments merited acceptance and whose arguments merited rejection had not been mentioned. Such judgment could not be said to have been rendered in substantial compliance with O. XLI, R. 31, C.P.C.<sup>88</sup> Wisdom behind R.5 of O.XX, C.P.C. is that the trial court and the first appellate court should record finding on all the points, and non-recording of finding on each and every issue would not be fatal to the judgment on the strength of O.XX, R.5, C.P.C.<sup>89</sup>

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<sup>80</sup> Section 26-C of the CPC (Amendment) Act, 2020

<sup>81</sup> O. XX, R. 1 & 2 of CPC

<sup>82</sup> O. XX, Rules 1 & 3 of CPC

<sup>83</sup> *Humayon Sarfaraz Khan vs Noor Muhammad* (2007 SCMR 307)

<sup>84</sup> *Zohra Begum vs Muhammad Ismail* (2008 SCMR 143)

<sup>85</sup> Order XX, R. 5 of CPC

<sup>86</sup> *Muhammad Aamir vs Muhammad Sher* (2006 SCMR 185)

<sup>87</sup> *Aziz-ullah Khan vs Gul Muhammad Khan* (2000 SCMR 1647)

<sup>88</sup> *Pakistan Refinery vs Barrett Hodgson Pakistan* (2019 SCMR 1726)

<sup>89</sup> *Qadir Bakhsh vs Allah Dewaya* (2011 SCMR 1162)

## 5.5 Execution

The sections of CPC dealing with the subject are from section 36 to 74 and Order XXI. The detailed rules framed by the High Court on the subject can be found in Section V, Vol I & Section XXI, Vol II of KPDCR. All questions pertaining to execution shall be determined by the executing court and no separate suit lies ( *Section 47 CPC*). The definition of court which passed the decree is Court of first instance and if abolished the court having jurisdiction currently in the decided matter. The transferee court is also included in this definition. The provisions of CPC applicable to execution of decrees also apply to orders (*Section 37 CPC*). The following are the modes of execution of decree as delineated by section 51 CPC;-

- by delivery of any property specifically decreed [(*Order 21 Rule 31 (Movable) Rules 35, 36 (Immovable) Rules 95, 96 of CPC (Auction Purchaser)*)]
- by attachment and sale or by the sale without attachment of any property; [*Section 60-67 Rules 41-94 of Order XXI CPC*]
- by arrest and detention in prison; [*Sections 55-58 Rules 30, 31, 32, 33 & 37-40, 98 of Order XXI CPC*]
- by appointing a receiver; [*Order XL CPC*] or
- in such other manner as the nature of the relief granted may require.

The other manners can be;-

- Partition of the property ( *Section 54 of CPC* )
- Execution of decree by collector (*Sections 68 to 72 CPC* )
- Compensation in lieu of delivery of movable property (*Order XX Rule 10 CPC* )
- Specific performance of agreement (*Rule 32 of Order XXI CPC* )
- Restitution of conjugal rights (*Rule 33 of Order XXI CPC* )
- Execution of documents (*Rule 34 of Order XXI CPC* )
- Attachment of a decree (*Rule 53 of Order XXI CPC* )

Limitation for application of execution is three years and six years (*Article 182 of Limitation Act & Section 48 CPC*). Sections 49 & 50 - 52 CPC deals with liability of successors and transferee of decree. The following provisions of CPC deal with arrest and detention in execution of decrees;-

- ▶ Order XXI Rule 30. Detention in money decree apart from attachment & sale.
- ▶ Order XXI Rule 31. Detention in decree for specific movable property apart from attachment, sale & seizure of specifics.
- ▶ Order XXI Rule 32. Detention in decree for specific performance & injunction apart from attachment & sale.

- ▶ Order XXI Rule 33. In case of conjugal rights against husband & periodical payment in execution –the same as money decree
- ▶ Order XXI Rule 98. Resistance/obstruction by JD or on his behalf.

The following procedure is to be observed in arrest and detention of judgment debtor under Section 55 and different rules of Order XXI CPC;-

- ▶ The JD may be arrested any time after sunrise and before sunset (*Section 55*).
- ▶ Maximum imprisonment up to one year (*Section 55*).
- ▶ No outer door is to be broken unless refuses access thereto (*Section 55*).
- ▶ Room door may be broken in which Judgment Debtor is suspected (*Section 55*).
- ▶ Room in occupancy of women (*pardanasheen*) who is not Judgment Debtor can be broken in to after notice & facility of withdrawing (*Section 55*).
- ▶ If arrest is made in money-decree then Judgment Debtor is to be released the moment he pays the decretal amount (*Section 55*).
- ▶ In money decree application for execution through arrest & detention show cause notice is must. Exception of notice is on the satisfaction of court as to abscondence or leaving the jurisdiction (*Rule 37*).
- ▶ On appearance first inquiry is conducted and then order of committal or release (*Rule 40*).
- ▶ Non discharge of liability due to imprisonment-but no re-arrest (*Section 55*).
- ▶ Non arrest of woman in execution of money decree (*Section 56 CPC*).

A judgment debtor may be released on following grounds;-

- Payment of decretal amount (*Section 58 CPC*).
- Satisfaction of decree (*Section 58 CPC*).
- On the request of decree holder (*Section 58 CPC*).
- Pending inquiry JD may be released on furnishing security (*Rule 40 Order XXI CPC*)

The following are the guidelines for arrest and detention in execution of decrees under Sections 55 & 62 CPC;-

- No person executing any warrant of arrest or process of execution directing or authorizing seizure of movable property shall enter any dwelling house after sunset and before sunrise.
- No outer-door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment debtor and he refuses or in any way prevents access

thereto, but when the person executing any such process has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe any such property to be.

- Where a room in a dwelling-house is in the actual occupancy of a woman who, according to the customs of the country does not appear in public, the person executing the process shall give notice to such woman that she is at liberty to withdraw ; and, after allowing reasonable time for her to withdraw and giving her reasonable facility for withdrawing, he may enter such room for the purpose, of seizing the property or arrest, using at the same time every precaution, consistent with these provisions, to prevent its clandestine removal.
- No Judge, Magistrate or other judicial officer shall be liable to arrest under civil process while going to, presiding in, or returning from, his Court (*Section 135(1) CPC*).
- Where any matter pending before a tribunal having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties thereto, their pleaders, mukhtars, revenue agents and recognized agents, and their witnesses acting in obedience to a summons, shall be exempt from arrest under civil process other than process issued by such tribunal for contempt of Court while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal (*Section 135(2) CPC*)
- No person shall be liable to arrest or detention in prison under civil process: -
  - a. If he is member of Legislature during the continuance of any meeting of such Legislature.
  - b. If he is member of any committee of such, during the continuance of any meeting of such committee; and during the fourteen days before and after such meeting of sitting (*Section 135 A (1)*).
- In case of decree against Government or public officer in his official capacity a time shall be specified in decree in which it shall be satisfied and if the decree is not satisfied within that period then the matter shall be reported for the order of the Government. It shall not be executed unless it remains unsatisfied for three months from such report (*Section 82 CPC*).
- No arrest or attachment of property of officer against whom decree is passed in official capacity (*Section 81 CPC*)

## 5.6 Withdrawal, Payment in court, Security & Commission

The plaintiff may at any stage withdraw from suit or abandon part of claim against all or any of the defendants. The plaintiff may also withdraw suit with permission of the court to file fresh suit in case there are some formal defects (*Rule 1 Order XXIII CPC*). The suit or any part may be decreed on the basis of a lawful compromise (*Rule 3 Order XXIII CPC*). The defendant may also deposit any sum in a suit to recover damages or debt which he considers as full satisfaction of claim. The court shall give notice of such deposit to plaintiff and plaintiff shall not be entitled for any interest after this notice (*Rules 1-4 Order XXIV CPC*). The court may ask plaintiff to deposit security for costs under certain circumstances (*Rule 1 Order XXV CPC*). The court may issue commission for examination of witnesses, spot inspection, for examining accounts and making partitions (*Section 75 & Order XXVI CPC*).

## 5.7 Suits in Particular Cases

### 5.7.1 Suit involving Government

In suit by or against Federal Government or Provincial Government the name of concerned Government is to be used (*Section 79 CPC*). Requirement of notice of two months to concerned Secretary of Government or Collector of the district is mandatory. Non service of such notice shall disentitle the plaintiff to costs and court shall allow three months time for filing of written statement (*Section 80 CPC*). Suits against the State and its servants in their official capacity are to be instituted, heard, and decided by the Civil Courts at district headquarters having unlimited jurisdiction as regard value.<sup>90</sup> Reasonable time shall be allowed to Government for communication (*Rule 5 Order XXVII CPC*). No suit can be instituted against Provincial Government without impleading the Province as a party and the procedural pre-condition is mandatory in nature and no relief can be sought without its strict compliance. Due to non-compliance of mandatory provisions of Section 79 of C.P.C. and Article 174 of the Constitution, a suit against the functionary only is not maintainable.<sup>91</sup> Judgment would be nullity on account, of non-observance of mandatory requirement of O.XXVII Rule 1 of C.P.C.<sup>92</sup>

<sup>90</sup> Section 24 of West Pakistan Civil Courts Ordinance

<sup>91</sup> *Government of Balouchistan vs Mir Tariq Hussain Khan (2010 SCMR 115)*

<sup>92</sup> *Federation of Pakistan vs Aftab Ahmed Khan (PLD 1992 SC 723); Government of Khyber Pakhtunkhwa vs Haji Sharifullah (2018 MLD 35 Peshawar)*

### 5.7.2 Suits involving Military, Corporations, Firms & Trustees etc

Any person subject to military law can authorize another person for his representation and appointment of pleader.<sup>93</sup> In case of a suit involving a corporation the pleadings can be signed or verified by secretary/ director or any principal office. Service on corporation can also be made through these persons.<sup>94</sup> Any two or more partners may sue or be sued in the name of firm. In such suit the names of the partners shall be disclosed on demand of defendants. Service can be made upon any partner or at the principal seat of business. In case of death of any partner the right to sue survives and no need of impleading LRs.<sup>95</sup> No execution of decrees between co-partner shall be issued without the leave of the court.<sup>96</sup> In suits regarding property vested in trustee, executor or administrator the trustee, executor or administrator can sue and court can order for joining all other trustees etc as party.<sup>97</sup>

### 5.7.3 Suits involving Minors or persons of unsound mind

Suit by minor can be instituted through next friend. The minor defendant can be sued through guardian *ad litem*. The plaint is to be taken off the file if suit is brought without next friend. The persons qualified to act as next friend or Guardian of minor can be those having no conflict of interest with minor.<sup>98</sup> Any agreement or compromise in suit can be made by next friend or guardian with leave of the court.<sup>99</sup> The retirement, removal and substitution of next friend or guardian can be made as per procedure given in *Rules 8-11 Order XXXII CPC*. On attaining majority the minor can adopt any course mentioned in Rules 12-14 of Order XXXII CPC. The same rules apply to suits of persons of unsound mind.

### 5.7.4 Pauper suits

A pauper can bring a suit as such after fulfilling the requirements given in Rules 2-4 of Order XXXIII CPC. The application shall either be rejected or accepted.<sup>100</sup> The success, failure or dispaupering of pauper is dealt with qua costs, court fee etc in accordance with *Rules 9-16 Order XXXIII CPC*.

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<sup>93</sup> *Order XXVIII CPC-Section VII of Vol II KPDCR*

<sup>94</sup> *Order XXIX CPC*

<sup>95</sup> *O.XXX Rule 4 CPC*

<sup>96</sup> *Order XXX CPC*

<sup>97</sup> *Order XXXI CPC*

<sup>98</sup> *Rules 1-4 Order XXXII CPC*

<sup>99</sup> *Rules 6-7 Order XXXII CPC*

<sup>100</sup> *Rules 5-8 Order XXXIII CPC*

### 5.7.5 Suit relating to Mortgages of Immovable Property

In any suit relating to mortgage, all persons interested in mortgage are to be made parties. In case of foreclosure decree, a preliminary decree shall be passed before a final decree (*Rules 1-3 Order XXXIV CPC*). In suit for sale also a preliminary decree shall be passed before final decree (*Rules 4-6 Order XXXIV CPC*). In suit for redemption also a preliminary decree shall be passed before final decree (*Rules 8-8A Order XXXIV CPC*). Other matters of interest, sale and application of proceeds are dealt with by Rules 11-14 of Order XXXV CPC.

### 5.7.6 Inter-pleader suits

An inter-pleader action originates when the plaintiff holds property on behalf of another, but does not know to whom the property should be transferred. In this suit, it is must that there is no clash between interest of plaintiff and defendant. Where the subject is capable of payment or deposit the plaintiff may be asked to pay or deposit in court. Where defendant sues the plaintiff the suit shall be stayed. Agents and tenants may not institute such suit.<sup>101</sup> Certain pre-requisites must be satisfied before an inter-pleader suit could be competently instituted; first, there must be rival claimants; second, the same debt, sum of money or other property, moveable or immovable, must be claimed by two or more claimants; and third, the person from whom such debt, sum of money etc. was being claimed must claim no interest in the same.<sup>102</sup>

### 5.7.7 Special case

The parties may agree to refer a case for opinion of the court. After entering in to agreement the same shall be filed in the court stating the value of property of dispute. The court shall then hear the case and decide it and a decree shall follow.<sup>103</sup>

## 5.8 Summary procedure on Negotiable Instruments

The summary procedure is applicable to High Court and District Court and to any other court notified by the High Court. The summary suit on negotiable instruments can be filed by presenting plaint in the Form prescribed. The summons in such suits is also prescribed. The defendant cannot appear and defend unless leave of the court is obtained. In default of such

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<sup>101</sup> *Rules 1- 5 Order XXV of CPC*

<sup>102</sup> *Al Meezan Investment Management Company Ltd vs WAPDA (PLD 2017 SC 1)*

<sup>103</sup> *Rules 1-5 Order XXXVI CPC*

leave the allegations in plaint shall be presumed to be correct and a decree shall be passed.<sup>104</sup> If leave to defend is granted then procedure given in Rule 3 of Order XXXVII is applicable.

## 5.9 Arrest and Attachment before Judgment

In certain circumstances the court may order the arrest of defendant and attachment before judgment (*Rules 1 -13 Order XXXV IIICPC*).

## 5.10 Temporary injunctions and interlocutory orders

The court may in a pending suit grant temporary injunctions when the property in dispute is in danger of being wasted, damaged or alienated or wrongfully sold in execution of decree or when the defendant with a view to defraud his creditors intend to remove or dispose of his property.<sup>105</sup> The court may also grant temporary injunction for restraining the defendant from committing breach of contract or other injury of any kind.<sup>106</sup> In case of disobedience of order the court may attach the property or detain the defaulter in prison.<sup>107</sup> An interim injunctions passed in absence of defendant shall not ordinarily exceed 15 days.<sup>108</sup> An order passed after hearing the parties shall cease to have effect on expiration of six months unless extended by court after hearing the parties and report submitted to High Court.<sup>109</sup> Before granting injunctions, notice to opposite party is mandatory except in the case of sale of goods for default in payment at the stipulated time of a debt in respect of which the goods were pledged with any bank, or where the injunction is to be granted against Government or a Government servant as such or any statutory authority, board or corporation set up or established by Government in any case not involving the ejection of any person from or the demolition of, any premises, the Court may where it appears that the object of granting injunction would be defeated by the delay, dispense with such notice: Provided further that the period of notice under this rule to Government or a Government servant as such or any statutory authority, board or corporation set up or established by Government shall not be less than two days nor exceed seven days.<sup>110</sup>

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<sup>104</sup> *Rules 1-2 Order XXXVII CPC*

<sup>105</sup> *Rule 1 Order XXXIX of CPC*

<sup>106</sup> *Rule 2 Order XXXIX of CPC*

<sup>107</sup> *Rule 2(3) Order XXXIX of CPC*

<sup>108</sup> *Rule 2-A Order XXXIX of CPC*

<sup>109</sup> *Rule 2-B Order XXXIX CPC*

<sup>110</sup> *Rule 3 Order XXXIX of CPC*

## 5.11 Appointment of receiver

In fit cases the court may appoint receiver of any property before or after decree by removing any person in possession of such property for purposes of bringing or defending suit and for the realization, management, protection, preservation and improvement of the property the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has or such of those powers as the Court thinks fit. The remuneration and duties of receiver are also mentioned. In some cases collector may also be appointed as receiver.<sup>111</sup>

## 5.12 Appeals from final judgment or decrees

An appeal shall lie to the District Court from the final judgment and decree passed by the Civil Court, while an appeal shall lie to the High Court from the final judgment and decree of the District Court while exercising original jurisdiction on any question of law or fact erroneously determined by the original court.<sup>112</sup>

## 5.13 Appeal against Orders

Appeals against order, passed under this Code, shall lie to the Court, directly from its subordinate court exercising original jurisdiction adjudicating the suit, in the prescribed manner.<sup>113</sup>

## 5.14 Reference, Review and Revision

In a case not subject to appeal or execution a *res integra* arises that can be referred to High Court drawing up the statement of the facts of the case and point for determination. The court may pass decree contingent upon decision in reference. On receipt of decision from High Court the decision shall be made accordingly (*Order XLVI CPC*).

### 5.14.1 Review

Any aggrieved person may file a review against decree or order from which an appeal is allowed, but from which no appeal has been preferred or from a decree or order from which no appeal is allowed, or from a decision on a reference from a Court of Small Claim. Section

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<sup>111</sup> Rules 1-5 Order XL of CPC

<sup>112</sup> Section 11 of the Khyber Pakhtunkhwa Code of Civil Procedure (Amendment) Act No. XLIX, 2020

<sup>113</sup> Section 106 CPC as amended by the Khyber Pakhtunkhwa Code of Civil Procedure (Amendment) Act No. XLIX, 2020

114 and Order 47 CPC provides for review of judgment. The grounds on which review lies are contained in Order XLVII R. 1 CPC, as following:-

- (a) Discovery of new and important evidence which was not available earlier;
- (b) On account of error apparent on the face of record; and
- (c) any other sufficient reason.

Application for review shall be made to the same court, which has passed the judgment or order. The provisions as to forms for appeal apply mutatis mutandis. The order of rejection is not appealable.<sup>114</sup> Law provides that there shall be no review against review.<sup>115</sup> Instances of errors meriting review.<sup>116</sup>

#### 5.14.2 Revision

The High Court or District Court (*subject to pecuniary jurisdiction*) may call for the record of any case which, has been decided by any Court subordinate to such High Court or District Court and in which no appeal lies thereto, and if such subordinate Court appears

- o to have exercised a jurisdiction not vested in it by law,<sup>117</sup> or
- o to have failed to exercise a jurisdiction so vested,<sup>118</sup> or
- o to have acted in the exercise of its jurisdiction illegally or with material irregularity,<sup>119</sup>
- o the Revisional Court may make such order in the case as it thinks fit.

In order to exercise the revisional domain, the impugned order should be by a court subordinate to the revisional court. Section 3 defines subordination of courts. If a revision application is made by a person he can do it within a period of ninety days and he shall also attach attested copies of relevant documents.<sup>120</sup> The District court can exercise the revisional power as well. If any person makes an application under this section the entire record of the case is to be appended. Revision lie against case decided.<sup>121</sup> Jurisdiction under section 115

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<sup>114</sup> Order 47 R. 7 of CPC

<sup>115</sup> Order 47 R. 9 of CPC

<sup>116</sup> (PLD 1991 SC 105; PLD 2003 SC 724; PLD 1979 SC 741)

<sup>117</sup> 1999 YLR 2423; 1984 CLC 948; 1999 CLC 707

<sup>118</sup> PLD 1975 LAH 425; PLD 1967 SC 402; PLD 1975 SC 186

<sup>119</sup> 1989 SCMR 34, 2001 SCMR 1700, 2001 SCMR 67, PLD 1994 SC 162

<sup>120</sup> Section 115 of CPC

<sup>121</sup> PLD 1993 SC 109

CPC is supervisory and is discretionary. The Court in revision may pass any order as it thinks fit.<sup>122</sup>

### 5.15 Costs

The courts do not take the issue of costs seriously. The result of which is tendency of increase in frivolous litigation on one hand and non compensation of successful party on the other. The normal costs allowed under the law are also sufficient if proper attention is given to the issue. The compensatory costs under section 35 A CPC will add to the normal costs. The following abstract taken from Para 5 of Section XV of Vol II of KPDCR should be taken in to account for deciding the costs in a cause.

What are Costs.-The Code of Civil Procedure is silent as to what expenses are to be considered as included in the term “Costs.” Such expenses ordinarily fall under the following heads:-

- a. Court fee stamps on all necessary petitions.
  - b. Process fees.
  - c. Expense of proving and filing copies of necessary documents.
  - d. Pleaders’ fees.
  - e. Charges incurred in procuring the attendance of witnesses, whether such witnesses were summoned through the Court or not.
  - f. Expenses of Arbitrators and Commissioners.
- Pleaders’ fees are regulated by the rules contained in Volume. I, Rules and Orders, No. XXX”.
  - Apart from compensatory costs under Section 35-A CPC, the court must pay attention to punitive court fee in case of frivolous litigation in suits of value of less than Rs 25000.<sup>123</sup>

### 5.16 Limitation

The application of law of limitation to suits, appeals etc is a very complicated and important activity. The court should have command over application of law of limitation while deciding the question. Broadly no suit, appeal or application received after period of limitation prescribed under First Schedule of Limitation Act, 1908 can be entertained. The period so fixed is subject to determination by sections 4 to 25 of the Act (*Section 3 of the Limitation*

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<sup>122</sup> 1999 SCMR 971

<sup>123</sup> The Khyber Pakhtunkhwa Court Fee (Abolition)(Amendment) Ordinance No. XVII of 1980

Act, 1908). The courts should bear in mind that *terminus ad quem* (the finishing point) can be determined only when *terminus ad quo* (the starting point) is properly applied to a cause which in some cases become a question of fact. The important sections from 4-25 of the Act are discussed here. Under section 5, limitation can be condoned in appeals or application for a revision or review of judgment or for leave to appeal and only those applications to which this section is made applicable by any law on the grounds mentioned in section 5 of the Act. It means section 5 is not extended to suits. However legal disability (Section 6), of time in legal proceedings (Section 12), defendant absence from Pakistan etc (Section 13), pursuing case in wrong jurisdiction under *bonafide* (Section 14), time during which proceedings are suspended (Section 15, 16), death before right to sue accrues (Section 17), fraud (Section 18), acknowledgment (Section 19) provide ample grounds for extension of time of limitation in suit and other applications.

### 5.17 Court Fee and Suit valuation

The determination of valuation of suit for the purpose of court fee is an important step both for determining the required court fee to be affixed as well as pecuniary jurisdiction. Both these laws are interdependent. For the purpose of understanding the law on court fee the court must understand the difference between fixed fee and *ad volerem* fee. There are two schedules in the Court Fees Act, 1870. Schedule I deals with *ad valorem* (according to value) fee and Schedule II with fixed fee regardless of value of suit. The second Schedule is easy to understand. But Schedule I is dependent on valuation of suit. This valuation is highly technical to calculate. Section 7 of the Act gives different types of suit and for each suit there is a separate formula for evaluation. Once this evaluation is made then the court fee is affixed according to that valuation as given in Schedule I. No court fee is charged on suit of value less than Rs 25000/.<sup>124</sup> The court, however, must pay attention to punitive court fee in case of frivolous litigation in suits of value of less than Rs 25000/.<sup>125</sup> The valuation of suit for the purpose of jurisdiction is the subject of Suit Valuation Act, 1887. In majority of suit the valuation for the purpose of court fee and jurisdiction is the same but it may differ in some cases (Section 8 of Suit Valuation Act). In all those suits in which valuation of suit for the purpose of jurisdiction is different Sections 3, 4 & 9 and rules framed there under should be consulted. For rules under these sections see Section XXXII, XXXIII of Vol I KPDCR. For reduction and remission of court fee under section 35 of the Court Fee Act see Section

<sup>124</sup> The Khyber Pakhtunkhwa Abolition of Court Fees Ordinance, 1978

<sup>125</sup> The Khyber Pakhtunkhwa Court Fee (Abolition)(Amendment) Ordinance No. XVII of 1980

XXXIV of Vol I KPDCR. For cancellation of Court Fee stamps see Part C, Section XXXIV of Vol I KPDCR. A burning issue has always been the fixing of valuation of appeal for the purpose of jurisdiction. The rules on the subject can be found in Section VIII of Vol I KPDCR.

## Chapter VI: Case & Court Management

### 6.1 Introduction

In terms of Article 37 (d) of the Constitution, the state that includes the courts are to ensure inexpensive and expeditious justice. Regrettably both these imperatives are not ensured. However, efforts are made within the parameters of law to fulfill the duty through effective case management. Case management as understood today is not something new but is already present in the centuries-old laws. The lawmakers while visualizing these eventualities had interwoven the techniques of case management in the law. Some of these managerial techniques are highlighted below:

- Writing of order sheets by presiding officer himself.
- Attention to primary scrutiny of cases and appeals at the time of institution.
- Return of plaint, complaint, memorandum of appeals, etc at the initial stage for removing technical defects.
- Use of checklists at the time of receiving causes and during proceedings. (*Some Model Checklists are given at the end as Annex-C*).
- If any cause is not supported by required documentation then a proper order be passed.
- If plaint or memorandum of appeal is not properly valued or not affixed with required court fee then pass proper order at the initial stage.
- Fix dates of hearing with due attention of the presiding officer.
- Fix case as nearly as possible.
- When PO is on planned leave he should not fix the case on that day
- Adjourn cases under the supervision of PO one day before unexpected leave or holiday.
- Put cases on the fast track which are to be given priority and a separate portion in the daily cause list be reserved for fast track cases.
- Follow up of consignment of decided files.
- Regular periodical inspection of own court.
- Regular & surprise inspections by District & Sessions Judge of all courts in his district.
- Effective control over ministerial staff.
- Preparation of chronological and stage-wise lists of cases.

## 6.2 Civil Case Management

Apart from 'Case Management and Scheduling Conference', the following steps are required for proper civil case management:

- Proper follow-up of court processes including a copy of statement annexed to summons (Order V CPC).
- Summons for final disposal (Order V Rule 5 CPC).
- A further and better statement, or particulars in the pleading (Order VI Rule 5 CPC).
- Return of plaint at early stages (Order VII Rule 10 CPC).
- Rejection of plaint (Order VII Rule 11 CPC).
- Examination of parties (Order X CPC).
- Discovery, inspection, interrogatories, and mode of proof (Order XI CPC).
- Admissions (Order XII CPC).
- Production of the document at first hearing (Order XIII CPC).
- Issues of law only (Order XIV CPC).
- Disposal of the suit at first hearing (Order XV CPC).
- Disposal of appeal in *limine* (Order XLI Rule 11 CPC ).
- Remand of cases should be avoided to the maximum.
- Avoiding the issuance of interim injunctions mechanically.

## 6.3 Criminal Case Management

The following steps are required for proper case management:

- Proper follow-up of court processes.
- Ensuring that a copy of FIR is timely supplied to the court.
- To ensure that investigation is completed within the shortest possible time.
- To ensure that complete report is submitted in court within time.
- To ensure that case property is produced in court as per law.
- To ensure that bonds for the appearance of witnesses are duly obtained.
- To ensure that proceedings u/s 87 & 88 CrPC are duly undertaken within time with follow-up.
- To ensure that proclamations u/s 523/524 CrPC are issued within time.

## 6.4 Alternative Dispute Resolution (ADR)

The Provincial Assembly of Khyber Pakhtunkhwa has passed ‘The Khyber Pakhtunkhwa Alternative Dispute Resolution Act No. XLVIII, 2020’ on 28<sup>th</sup> December 2020, however, it is enforced only in Newly Merged Districts (NMDs) of Khyber Pakhtunkhwa. The Act has repealed section 89-A CPC along with rules, if any, made thereunder.

However, the court may, where it considers necessary, having regard to facts and circumstances of the case with the object of securing expeditious disposal of the case, in or in relation to a suit, adopt with the consent of parties Alternative Dispute Resolution (ADR) method.<sup>126</sup> The dispute may be referred for settlement to:

- a. Arbitration;
- b. Conciliation; or
- c. Mediation

In arbitration/conciliation proceedings, provisions of the rules drawn up by the Khyber Pakhtunkhwa Judicial Academy shall apply after approval by the High Court.

### 6.4.1 Guidelines for ADR

The following Judicial Guidelines shall help Presiding Officers in dealing with the procedure of cases put on the ADR track. These Guidelines are not inconsistent with law and can be resorted to under Rule 1-A of Order X CPC.

**Guideline No 1:-** Every court is to see whether its jurisdiction in a case is dependant upon exhaustion of any precondition of Alternate Dispute Resolution. If any such precondition exists the court should refer the plaintiff or petitioner to such forum of Alternate Dispute Resolution.

**Guideline No 2:-** In each case, the court is to see that at which stage the court is to intervene for Alternate Dispute Resolution. If any law fixes a stage for such intervention then the court must invite the parties at that stage for amicable settlement. If no such stage is fixed by law then the court should invite the parties at any appropriate stage when the chances of such settlement appear to be higher. Normally the pre-issue stage is considered to be the right time.

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<sup>126</sup> Section 89-A CPC

**Guideline No 3:-** As the first step of intervention before referral for amicable settlement the court may arrange for an orientation session of the parties by an expert who can convince the parties for amicable settlement by explaining the advantages of an amicable settlement.

**Guideline No 4:-** The court may then explain the details of different options of settlement *fora* including an accredited, registered, or recognized mediator, a forum created by any law, a customary forum, or any other person agreed by the parties for amicable settlement.

**Guideline No 5:-** The court may summon the parties in person when the circumstances so warrant at the stage of such intervention.

**Guideline No 6:-** In case the parties agree to such referral the court may reduce the agreement into black and white by obtaining the signatures of the parties or their recognized agents as may be present.

**Guideline No 7:-** The court while referring the matter for amicable settlement may frame a short summary of the case in non technical language for the understanding of the settlement forum.

**Guideline No 8:-** The court in which a family cause has been instituted is to give consideration both at pre and post-trial stage to the possibility of a reconciliation of the parties and if at any time it appears to the judge constituting the court, either from the nature of the case, or the evidence in the proceedings or the attitude of the parties, or of either of them or of counsel, that there is a reasonable possibility of such a reconciliation, the judge may do all or any of the following, that is to say, he may –

- a. adjourn the proceedings to afford the parties an opportunity of becoming reconciled or to enable anything to be done in accordance with either of the two succeeding paragraphs;
- b. with the consent of the parties, interview them in chambers, with or without counsel, as the judge thinks proper, with a view to effecting a reconciliation;
- c. nominate a person with experience or training in marriage conciliation, or in special circumstances, some other suitable persons including family members of the parties, to endeavour to effect a reconciliation.

**Guideline No 9:-** The court may fix a reasonable time, if not fixed by law, for the disposal by the settlement forum by giving the date of appearance before the forum to the parties. The court may subject to law stay the proceedings of the case in the meantime.

**Guideline No 10:-** Subject to law the court may allow such further reasonable time at the request of the settlement forum or parties.

**Guideline No 11:-** On receipt of the decision of settlement the court may pass judgment subject to all legal, just, and equitable exceptions.

**Guideline No 12:-** If the settlement involves any subject matter not in issue before the court, the same may be allowed to be made part of the pleadings subject to fulfillment of all legal requirements.

**Guideline No 13:-** Subject to law the court may fix the fee of the forum of settlement to be borne by the parties as may be fixed by the court.

## Chapter VII: Family Courts

### 7.1 Introduction

The West Pakistan Family Courts Act (FCA) was promulgated in 1964. Before this Act, family disputes used to be decided by civil courts being courts of general jurisdictions. In Pakistan, the Family Courts have been established under the West Pakistan Family Courts Act, 1964, which has changed the forum, altered the method of trial, and empowered the court to grant better remedies. As per the preamble of the FCA, the Family Courts have been established for the expeditious settlement and disposal of disputes relating to marriage & family affairs and for matters connected therewith. The Constitution of the Islamic Republic of Pakistan, under Article 35 provides that the state shall protect the marriage, the family, the mother, and the child. The Supreme Court of Pakistan, in the case titled Mst. Fazal Jan verses Roshan Din reported as PLD 1990 SC 661, has defined the term “state” to include judicial officers.

### 7.2 Nikah or Marriage

According to Hidayatullah by Charles Hamilton, Nikah or Marriage implies a particular contract used for the purpose of legalizing generation. However, Bailli states, on authority from Kifayah that marriage is also instituted for the “solace of life” and is one of the prime or original necessities of man. Therefore, marriage remains lawful even in extreme old age even after the hope of offspring has ceased. Islam is our religion. It forbids sexual relationships outside marriage bonds and considers it a grave offence against society. Marriage establishes a firm bond of love, confidence, affection, and mutual trust. Both spouses buildup matrimonial life on the basis of mutual trust and understanding. The Holy Quran describes the relationship between the spouses as raiment worn to cover the body and in Surah Al-Baqara verse 187, says

هُنَّ لِبَاسٌ لَكُمْ وَأَنْتُمْ لِبَاسٌ لَهُنَّ ط

Translation: ‘That women are your garments and you are their apparel’ which would mean husband and wife are like garments to cover each other. The said verse of the Holy Quran signifies the close relationship of the two sexes in the spiritual sense, further, it refers that they should protect each other’s privacy and cover each other’s shortcomings and secrets. Islam condemns all acts of mistrust, allegations, and disobedience between the spouses.

Righteous woman guard the sanctity of the bond of marriage and protects her husband's chastity and virtues, guards her honour for him, and remains faithful to him which also include, guarding the secret of husband because being in close contact, she learns the most private and concealed facts of his life, which if brought to the public will disgrace and ruin his life. In nutshell, Muslim family law attaches great importance to the sanctity of marriage, it enjoins the Muslims to strengthen their relationship and make marriage a success. (2009 CLC 1210 Peshawar)

### 7.3 The Family

The Family is the nucleus of the society i.e. it is the most basic social unit upon which society is built. The family is generally regarded as a major and the most ancient social institution and a locus of much of a person's social activity. It is a social unit created by blood, marriage, or adoption, and can be described as a **nuclear family** (parents and children) or **extended family** (encompassing other relatives). It is, therefore, the legal, moral, and religious duty of all and sundry including the authorities to protect it at all cost.

### 7.4 Conciliation

According to section 10(3) of the FCA at the pre-trial stage, the court shall ascertain the points at issue between the parties and attempt to effect a compromise or reconciliation between the parties, if this is possible. Further section 12 which deals with the conclusion of the trial envisages that after the close of evidence of both sides, the family court shall make another effort to effect a compromise or reconciliation between the parties within a period not exceeding fifteen days. The objective responsibility to effect a compromise between parties to family suits before and after the recording of evidence cannot be dispensed arbitrarily by the family court. Further, the role of the family court is not to become a post office for declaring conciliation efforts as failed without objective efforts on its part. The provision of conciliation before and after the recording of evidence implies that in fact, the purpose of the courts is not to treat family suits like civil suits. Rather, the court should make every effort to assist the parties to reach a compromise and save the family from further disintegration. It was observed by the Law & Justice Commission of Pakistan that "the system of conciliation envisaged by the Family Court Act, 1964, also has not delivered the desired results". It has been suggested that at the very least, on every hearing date for reconciliation efforts, a half an hour face to face meeting between the spouses in family court should be compulsory. Conciliatory literature should be provided to the spouses by the court outlying the advantages

and disadvantages of separation. The Glorious Quran also describes a mode for effecting reconciliation and it says in Surah An-Nisa verse 35:

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِّنْ أَهْلِهِ وَحَكَمًا مِّنْ أَهْلِهَا إِن يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ بَيْنَهُمَا  
إِنَّ اللَّهَ كَانَ عَلِيمًا خَبِيرًا ﴿٣٥﴾

### Translation

(4:35) If you fear a breach between the two, appoint an arbitrator from his people and an arbitrator from her people. If they both want to set things right, Allah will bring about reconciliation between them. Allah knows all, is well aware of everything.

A proviso has been added to Section 10(4) of the FCA by an amending Ordinance # LV of 2002 that the Family Court in a suit for dissolution of marriage if reconciliation fails, shall pass a decree for dissolution of marriage forthwith and shall also restore to the husband the *haq mehr* received by the wife in consideration of marriage at the time of marriage”. The obligations of the family court judges while exercising powers under the Family Courts Act, 1964 in general and under the said proviso to section 10(4) of the FCA, in particular, have now been increased manifold. The Family Courts shall have to make out all efforts to conduct the proceedings in a professional investigative manner while probing the subject matter and shall strive to discover the truth as to who amongst the spouses is at fault and that meaningful attempt must be made to preserve the marriage. In an Islamic welfare state, a ‘family’ is a primary unit. Any disturbance therein, or its frequent breakup would impact the stability of the state as a whole. The peaceful and happy union between spouses would serve as a linchpin for a peaceful and healthy society as a whole. In view of radical changes introduced through the proviso the reconciliation efforts now to be conducted must bear fruits. Careless dispensation and casual approach on the part of the family court judges in this regard would increase the incidents of dissolution of marriages on the basis of *khula* which would be counterproductive and detrimental to the society at large and any evil would surge out therefrom.<sup>127</sup>

<sup>127</sup> [PLD 2009 Peshawar 92]

After the promulgation of the FCA, it is the Family Court to decide the family matters. The family court has exclusive jurisdiction to entertain, hear, and adjudicate upon matters specified in Part I of the Schedule (drawn up under Section 5 of the Act)

### **Part I**

1. Dissolution of marriage (including Khula)
2. Dower
3. Maintenance
4. Restitution of conjugal rights
5. Custody of children (and visitation right of parent to meet them)
6. Guardianship
7. Jactitation of marriage
8. Dowry
9. Personal property and belongings of a wife

Domestic violence became a subject for family courts when the *FCA* was amended in 2002. Before this, cases relating to domestic violence were heard by the ordinary criminal courts in the traditional administration of criminal justice. Domestic violence until the promulgation of the Khyber Pakhtunkhwa Domestic Violence Act 2021, has not been defined in any statute relating to criminal law or family law. However, under the *Dissolution of Muslim Marriages Act, 1939*, a wife was given a right to seek dissolution of her marriage if her husband treated her with cruelty (ie habitually assaulted her or made her life miserable through cruel conduct, even if such conduct did not amount to physical ill-treatment.)

As said before that the term domestic violence has not been defined by any statute, therefore, it is also necessary to formulate a comprehensive definition of domestic violence so that all the matters relating to it can be brought under the jurisdiction of family courts. Section 5 of the *FCA* was amended in 2002 and a new sub-section (2) was added which reads:

Notwithstanding anything contained in the *Code of Criminal Procedure, 1898* (Act V of 1898), the Family Courts shall have jurisdiction to try the offences specified in *Part II of the Schedule*, (emphasis added) where one of the spouses is victim of an offence committed by the other.

The schedule drawn up under section 5 has been amended and Part II is annexed thereto:

## Part II

Offences and aid and abetment thereof under Sections 337 A(i), 337 F(i), 341 to 346, 352 and 509 of the *Pakistan Penal Code* (Act XLV of 1860).

These provisions bring into the jurisdiction of the family courts some of the criminal offences that may be called domestic violence (ie where the offences are between the spouses in their capacity as husband or wife.)

In each district one or more Family Courts are to be established with appointment of a judge. At least one Family Court in each district is to be presided by a woman judge. In terms of Section 3 of the Act, the Government may appoint one woman Judge to be a Family Judge of more than one District. The qualification of a Family Judge is to be or has been a District Judge, Additional District Judge, a Civil Judge or a Qazi appointed under the Dastur-ul-Aml Diwani, Riasat Kalat.<sup>128</sup> All these courts have been declared as Family Courts under Rule 3 of West Pakistan Family Courts Rules, 1965. Under Section 17 of the Act, the application of Qanoon-e-Shahadat Order, 1984 and CPC (*except sections 10 and 11*) is barred. For regulating the procedure of Family Courts the West Pakistan Family Court Rules 1965 have been framed. In certain matters, the Act has itself given the procedure. The procedure of institution of suit and service on the defendant, written statement, reconciliation, recording of evidence, summoning of witnesses, interim order for maintenance, issuance of commission, appearance through an agent, court fee, etc have been given from Section 7 to 12-A, 15, 17-A, 17-B, 18 to 20 of the Act. Section 21 makes the applicability of Muslim Family Laws Ordinance, 1961 or the rules framed thereunder applicable to the proceedings of dissolution of marriage, maintenance, or dower by Family Court. Sub-section 2 of Section 21 makes it mandatory to send a copy of decree by registered post within seven days of the passing of decree to concerned local council as referred to in Section 7 of the Muslim Family Laws Ordinance, 1961. The decree shall not be effective until the expiration of a period of ninety days from the day of sending the copy or if reconciliation has been made in accordance with the provisions of the Muslim Family Law Ordinance, 1961. Though Family Court cannot issue injunctions or stay any proceedings under Section 22 of the FCA, it can issue such orders in certain circumstances under Section 21-A of the FCA.

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<sup>128</sup> Section 4 of the Act

Family Court is to inform the concerned local council of the fact of non-registration of marriage under Muslim Family Laws Ordinance, 1961.<sup>129</sup> Under Part I of Schedule read with Section 5 of the Act the matters of Guardianships are within the exclusive domain of Family Courts. The Act has allowed the Family Court to follow the procedure of Guardian and Ward Act, 1890 and the Family Courts shall be deemed to be District Court for the purpose.<sup>130</sup> The forums of appeal are given in Section 14 of the FCA and are as under:

- High Court if judgment is passed by District or Additional District Judge
- District Court in other cases.

There are certain restrictions on appeal in matters mentioned in sub-section 2 of Section 14. No appeal or revision lies against an interim order of the Family Court.<sup>131</sup> Though CPC is not applicable to Family Courts, the execution proceedings shall be carried out by Family Court in accordance with the provisions of CPC.<sup>132</sup> The decree of the Family Court can be executed by a civil court if District Judge transfers it to civil court.<sup>133</sup> A fixed court fee of Rs: 15/- is charged on any plaint or memorandum of appeal.<sup>134</sup>

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<sup>129</sup> Section 24 of the Act

<sup>130</sup> Section 25 of the Act- Document C.No.4(4-1) JEC2

<sup>131</sup> Sub Section 3 of Section 14 of the FCA

<sup>132</sup> PLD 1989 K 82

<sup>133</sup> Section 13(4) of the FCA

<sup>134</sup> Section 19 of the FCA

## Chapter VIII: Rent Controller (Urban)

### 8.1 Introduction

The Rent Controller is basically a **Civil Judge** but functions as *persona designata* and is required to decide the cases expeditiously and un-hampered by the laws relating to evidence or procedure.

### 8.2 The West Pakistan Urban Rent Restriction Ordinance, 1959

The West Pakistan Urban Rent Restriction Ordinance, 1959 is promulgated to regulate the relationship of landlord and tenant. Additionally, the status of the Rent Controller, the manner in which evidence is to be recorded and the importance of the process etc to be issued to secure the presence of the witnesses and/or documentary evidence has been specifically dealt with in the Ordinance with a view to shortening the litigation.

The Ordinance extends only to Urban Areas in the Province.<sup>135</sup> The urban area is defined in Section 2(j) of the Ordinance which means any area administered by a Municipal Corporation, A Municipality, a Municipal Committee, a Town Committee, or a notified area committee. Under Section 4 of the Ordinance, the Rent Controller is to determine fair rent. A landlord cannot claim anything in excess of fair rent.<sup>136</sup> Rent that should not have been paid may be recovered.<sup>137</sup> Section 9 lays down the reasons on the basis of which rent can be increased. A landlord cannot interfere with the amenities enjoyed by the tenant.<sup>138</sup> No person can convert a residential building into a non-residential building except with the permission of the Rent Controller.<sup>139</sup> If necessary repairs are not made by the landlord the Rent Controller can make proper order.<sup>140</sup> A landlord desirous of evicting a tenant from a residential or non-residential building can evict him by moving an application to RC on the grounds mentioned in the Ordinance.<sup>141</sup> The tenant is to be informed in case of a change in ownership.<sup>142</sup> For making the decision *res judicata*, Section 14 has been added. Appeal from an order passed under Sections 4, 10, 12 & 13 of Rent Controller lies to District Judge. No appeal lies in cases of approximate determination of rent or any interlocutory order passed by

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<sup>135</sup> Section 1(2) of the *West Pakistan Urban Rent Restriction Ordinance, 1959*

<sup>136</sup> Section 6 and 7 of the *West Pakistan Urban Rent Restriction Ordinance, 1959*

<sup>137</sup> Section 8 of the *West Pakistan Urban Rent Restriction Ordinance, 1959*

<sup>138</sup> Section 10 of the *West Pakistan Urban Rent Restriction Ordinance, 1959*

<sup>139</sup> Section 11 of the *West Pakistan Urban Rent Restriction Ordinance, 1959*

<sup>140</sup> Section 12 of the *West Pakistan Urban Rent Restriction Ordinance, 1959*

<sup>141</sup> Section 13 & 13-B of the *West Pakistan Urban Rent Restriction Ordinance, 1959*

<sup>142</sup> Section 13-A of the the *West Pakistan Urban Rent Restriction Ordinance, 1959*

Rent Controller.<sup>143</sup> The orders passed by Rent Controller or appellate court shall be executed by the civil court.<sup>144</sup>

The proceedings before the Rent Controller are not in the strict sense Judicial that evidence should be recorded in the same manner as in a civil suit, whereas, the rent controller being persona designate is required to satisfy himself about the grounds in the ejection petition and pass an order in consonance with justice.

### 8.3 Guidelines for expeditious disposal

To advance the cause of rent laws the august Supreme Court of Pakistan has been pleased to state the following guidelines for expeditious disposal of rent cases:<sup>145</sup>

1. Affidavits of not more than two witnesses in support of the ejection application shall be filed in the Court in addition to the affidavit of the petitioner himself in support of the contents of the ejection petition.
2. While replying to the ejection application the respondent shall be similarly required to submit his own affidavit and affidavit of two other witnesses in support of his affidavit on the date fixed in the notice served upon him.
3. The parties shall be bound to produce their witnesses for purpose of their respective cross-examination on the day fixed by the Court.
4. A party obtaining the affidavits of the witnesses in support of his petition/reply would be bound to produce them in the Court for cross-examination and in case of its failure to do so their evidence shall be excluded from consideration.
5. Appeals against the interim order of the Rent Controller and resort to Constitutional jurisdiction, against orders at intermediate stages arising out of the ejection proceedings, should be discouraged.
6. The Court should take serious view of the situation when witnesses for cross-examination in support of their affidavits deliberately avoid/evade appearance in Court.
7. Adjournment of ejection petition should not be allowed except under unavoidable circumstances on an application moved by a party supported by affidavit. In such cases also adjournment should not be made for a period exceeding three days.

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<sup>143</sup> Section 15 of the *West Pakistan Urban Rent Restriction Ordinance, 1959*

<sup>144</sup> Section 17 of the *West Pakistan Urban Rent Restriction Ordinance, 1959*

<sup>145</sup> [2000 SCMR 556]

Following the above procedure in ejectment matters appears to be necessary to achieve the goal of expeditious disposal of a case with a period of three months particularly in respect of residential tenements having regard to the decisions unanimously taken in the Chief Justices' Committee Meeting held on 26-2-2000.

These guidelines have attained the status of law and procedure in the rent cases in terms of Article 189 of the Constitution.

## Chapter IX: Criminal Trial

### 9.1 General Law of Criminal Procedure

Under the Criminal Administration of Justice, the Code of Criminal Procedure, 1898 is the general law regulating the proceedings in ordinary courts of criminal jurisdiction. The Code envisages different classes of criminal courts.<sup>146</sup> The general jurisdiction of criminal courts is mentioned in section 28 of CrPC. According to this section, all offences under PPC may be tried by the High Court or by the Court of Sessions or by any other Court by which such offence is shown in the eighth column of the second schedule to be triable. At trial stage there are two types of courts apart from High Court i.e. the Court of Magistrates and Court of Sessions.<sup>147</sup> The Magistrates are further divided in three classes i.e. First, Second and Third class. All the offences under PPC have been specifically mentioned in Schedule-II with competent court. The offences against other laws are generally mentioned group wise in terms of limits of punishments in this Schedule with competent court if not mentioned in special law.<sup>148</sup> Any offence under any other law shall when any court is mentioned in this behalf in such law, be tried by such court. When no court is so mentioned, it may be tried by the High Court or subject as aforesaid by any court constituted under CrPC by which such offences shown in the eight column in the of the second schedule to be triable.<sup>149</sup> The High Court and Court of Sessions can pass any sentence authorized by law.<sup>150</sup> The different classes of Magistrates can pass sentences up to different level (Sections 32 & 33 CrPC). The Provincial Government may invest any first class Magistrate with power to try all offences not punishable with death.<sup>151</sup> Magistrate empowered under Section 30 CrPC may pass any sentence other than death or imprisonment for a term exceeding seven years (Section 34 CrPC). The ordinary powers of different Magistrates have been specified in the Third Schedule.<sup>152</sup> In addition to the ordinary powers, the Provincial Government may invest any magistrate with any power specify in the Fourth Schedule<sup>153</sup>. For continuance and withdrawal of powers, sections 40 and 41 of CrPC are relevant. Under section 14-A CrPC, the Provincial Government may appoint Special Magistrates with the powers of a Magistrate First Class exclusively for the trial of offences relating to price control, forest, mines and minerals, food

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<sup>146</sup> Section 6 of the CrPC

<sup>147</sup> Section 6 of the CrPC

<sup>148</sup> Section 29 of the CrPC

<sup>149</sup> Section 29 CrPC

<sup>150</sup> Section 31 of CrPC

<sup>151</sup> Section 30 CrP.C.

<sup>152</sup> Section 36 CrPC

<sup>153</sup> Section 37 CrPC

adulteration, food safety, encroachments on public lands, waterways, canal and drainage, motor vehicles, building control and municipal services under any Provincial law or Federal law for the time being in force.<sup>154</sup> All Magistrates are subordinate to the concerned Sessions Judge (Section 17 CrPC).

The criminal justice system stands on the three pillars; Investigation; prosecution; and trial. For effective and smooth functioning of the system, said three pillars should be appropriately balanced within their respective allotted sphere.

Under the provisions contained in Chapter XIV of the Criminal Procedure Code, 1898, the Police would investigate offences. Job of investigation consisted of spot inspection; ascertainment of facts and circumstances touching the offence under investigation; collection of evidence and apprehension of accused as and when sufficient evidence in support of the charge was made available. If, upon an investigation, sufficient evidence is not collected, the police officer concerned shall, if accused is in his custody, release him on his executing a bond with direction to appear, if and when so required by the Magistrate and send a report under section 173 praying for discharge of the accused. The Magistrate may or may not agree with the Police investigation. If the evidence in support of the charge is sufficient, the Investigator would submit a report u/s173 read with S-170 CrPC before the Court. All magistrates of the first class may take cognizance of any offence inter-alia upon a report in writing for such facts made by any police officer.<sup>155</sup> A magistrate taking cognizance under subsection (1) of section 190 CrPC of an offence triable exclusively by a court of sessions shall without recording any evidence send the case to court of sessions for trial.<sup>156</sup> After submission of challan in the court, the prosecutor is required to prosecute cause of the State by producing material falling within the definition of "legal evidence".

## 9.2 Jurisdiction

Every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed (*Section 177 CrPC*). The Provincial Government may direct that any cases or class of cases (in any district sent for trial to a Court of Session) may be tried in any sessions division, provided that such direction is not repugnant to any direction previously issued by the High Court under Section 526 CrPC or any other law for

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<sup>154</sup> *The Code of Criminal Procedure (Khyber Pakhtunkhwa)(Amendment) Act, 2019*

<sup>155</sup> *Section 190(1)(b) CrPC*

<sup>156</sup> *Section 190(2) CrPC*

the time being in force. (*Section 178 CrPC*). The court within the jurisdiction of which offence is committed or result ensues has the jurisdiction (*Section 179 CrPC*). When an act is an offence by reason of its relation to any other act, which is also an offence or which would be an offence if the doer were capable of committing an offence, a charge of the first-mentioned offence may be inquired into or tried by a Court within the local limits of whose jurisdiction either act was done. (*Section 180 CrPC*). The offence of being a thug, of being a thug and committing murder, of dacoity with murder, of having belonged to gang of dacoits, or of having escaped from custody, may be inquired into or tried by a Court within the local limits of whose jurisdiction the person charged is (*Section 181 CrPC*). Similarly, offence of criminal misappropriation or criminal breach of trust, theft, kidnapping & abduction can be tried by any of the courts within whose jurisdiction offence was committed or any part of property was received, retained or possessed or person was kidnapped, abducted, conveyed or concealed or detained (*Section 181 CrPC*). When it is uncertain in which of several local areas an offence was committed, or where an offence is committed partly in one local area and partly in another, or where an offence is a continuing one, and continues to be committed in more local areas than one, or where it consists of several acts done in different local areas. It may be inquired into or tried by a Court having jurisdiction over any of such local areas. (*Section 182 CrPC*). Whenever a question arisen as to which of two or more Courts subordinate to the Same High Court ought to inquire into or try any offence, it shall be decided by that High Court. (*Section 185 CrPC*). Power to issue summons or warrant for offence committed beyond local jurisdiction is dealt with under section 186 CrPC. When a citizen of Pakistan commits an offence at any place without and beyond the limits of Pakistan, in the circumstances mentioned in section 188 CrPC, he may be dealt with in respect of such offence, as if it had been committed at any place within Pakistan at which he may be found.

### **9.3 Appointment of Magistrates**

When a Magistrate is appointed for a certain area, the appointment is duly notified. The notification not only mentions the territorial limits of the Magistrate's authority but also the powers, which he can exercise. The Magistrate is required to abide by the restrictions on his authority as provided by the notification. It is important to note that jurisdiction must always be kept to the fore whether it is in relation to jurisdiction to hear the case or the powers of sentence available.

## 9.4 Offences

### 9.4.1 Cognizable & Non-cognizable offences

The CrPC has classified all the offences into cognizable and non-cognizable. The second Schedule in column 3 mentions each and every offence to be either cognizable or non-cognizable. The definition clause i.e. section 4 (1) (f) & (n) defines the former to be one where police can arrest without warrant and the latter where police cannot arrest without warrant. Apart from column 3 of Second Schedule a special law can declare an offence to be cognizable or otherwise. If any offence of the former category is committed the same can be reported to police and an FIR is then chalked out (Section 154 of CrPC). But if it falls in second category then no FIR shall be chalked out and after reducing the information to be entered in a book the informer shall be referred to the Magistrate (Section 155 of CrPC). The police shall then proceed with the investigation of the case under section 156 onward.

### 9.4.2 Bailable & non-bailable offences

Another categorization of offences is bailable & non-bailable as per column 5 of the second schedule of CrPC. Any special law may have a mechanism in this regard. This categorization is for the purpose of releasing the accused on bail as of right or otherwise. In the former category the accused shall be released on bail (Section 496 CrPC), but in latter he shall not as of right but under certain circumstances (Section 497 CrPC).

### 9.4.3 Compoundable & non-compoundable offences

Yet another division of offences is made by CrPC as compoundable and non-compoundable offences (Section 345 read with Column 6 of Schedule-II, CrPC). Section 345 further explains as to who can compound the offences which are compoundable with or without permission of the court.

## 9.5 Pre-trial Proceedings

The pre-trial proceedings are those where police needs orders from Magistrate before submission of complete challan under section 173 CrPC and even after submission of challan till the case is sent by Magistrate to Court of Sessions under section 190 (2) CrPC or till charge is framed by Magistrate in cases triable by himself. The reason is that pre-trial means proceedings before commencement of trial and trial begins with the framing of charge. In the pre-trial proceedings the Magistrate is not to send case to Court of Sessions without any

proceedings but he is to ensure attendance of accused and witnesses. In all cases including those exclusively triable by Court of Sessions, the Magistrate is required to issue processes under section 204 CrPC and then shall proceed under section 87 and 88 CrPC. The Magistrate shall then record evidence under section 512 CrPC in absence of accused if accused is absconder. In cases in which some of the accused are present and some are absconder then the Magistrate shall send the case to Court of Session after completion of proceedings under section 87 & 88 CrPC.<sup>157</sup>

### 9.5.1 Information regarding Registration of the Case in Cognizable Offences

Cognizable offences are either reported to the police or other law enforcement agencies or anti-corruption bodies, depending on the relevant jurisdiction. First Information Report is the technical description of a report made under section 154 CrPC. It provides first information of a cognizable offence and is registered to set the criminal law into motion. It is generally made by the complainant or someone on his behalf. However, it is well-settled law that any person may set law into motion by making a report with police under section 154 CrPC. Provision of section 154 CrPC makes possible that any person aware of the commission of any cognizable offence may give information to the police and may, thereby set the criminal law in motion. Such information is to be given to the officer-in-charge of the police station having jurisdiction to investigate the offence. The information so received shall be recorded in such form and manner as provided in section 154 CrPC. According to this section every information relating to the commission of a cognizable offence if given orally to an officer in charge of a police-station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the [Provincial Government] may prescribe in this behalf.

[Provided that if the information is given by the woman against whom an offence under section 336B, section 354, section 354A, section 376 or section 509 of the Pakistan Penal Code, 1860 (Act XLV of 1860) is alleged to have been committed or attempted, than such information shall be recorded by an investigating officer in presence of a

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<sup>157</sup> *Muhammad Ramazan vs Rahib (PLD 2010 SC 585)*

female police officer or a female family member or any other person with consent of the complainant, as the case may be.

Provided further that if the information, given by the woman against whom an offence under section 336B, section 354, section 354A, section 376 or section 509 of the Pakistan Penal Code, 1860 (Act XLV of 1860) is alleged to have been committed or attempted, is distressed such information shall be recorded by an investigating officer at residence of the complainant or at a convenient place of the complainant's choice in presence of a police officer or family member or any other person with consent of the complainant, as the case may be].

### 9.5.2 Recording of FIR in cognizable case, Mandatory

Principally, the FIR shall be recorded at the Police Station. The practice of recording of FIR at the spot has been deprecated by the High Court. Such practice, however, would not have the effect of throwing out of consideration entire prosecution case.<sup>158</sup> In such like case, the report is presumed to have been recorded after preliminary investigation, which makes its authenticity doubtful.<sup>159</sup> Such a presumption is, however not of universal application. Depending upon the facts of the case, no adverse inference can be raised against genuine FIR.<sup>160</sup> If the telephonic message has been given to Officer-in-Charge of a police station, the person giving the message is an ascertained one or is capable of being ascertained the information has been reduced into writing as required under S.154 of CrPC and it is faithful record of such information and the information discloses commission of a cognizable offence and is not cryptic one or incomplete in essential details, it would constitute FIR.<sup>161</sup> No preliminary inquiry is permissible before registration of FIR. Legal machinery is set in motion only after registration of FIR. Refusal or negligence by a police officer to register FIR attracts Section 118 of Khyber Pakhtunkhwa Police Act, No II of 2017.

### 9.5.3 Investigation, General

Term "investigation" has been defined by section 4(1)(l) of the Code of Criminal Procedure, 1898. Combined analysis of the Code of Criminal Procedure, 1898, Khyber Pakhtunkhwa Police Act, 2017 and Police Rules, 1934, however, makes it manifest that investigation consists of spot inspection, collection of evidence, ascertainment of facts in the, light of

<sup>158</sup> *Aziz Ahmed 1974 P.Cr.LJ Note 105 (DB)*

<sup>159</sup> *Muhammad Ashraf PLJ 1989 Cr.C. 429*

<sup>160</sup> *Habibur Rehman' Case (NLR 1989 Cr. 705)*

<sup>161</sup> *Tohal Singh vs State of Rajasthan (1989 CriLJ 1350 (Raj HC)*

collected evidence and attending circumstances of the case and apprehension of accused provided the collected evidence is sufficient to connect him with the charge.<sup>162</sup>

#### 9.5.4 Arrest

Technically, arrest means, “to apprehend by legal authority: to seize by warrant: to take in security.”<sup>163</sup> The term ‘taken into custody’ is generally used to denote ‘arrest’. It is in fact meant to deprive a person of his liberty by legal authority. Arrest of an offender may be affected by police, Magistrate or even a private person subject to certain conditions. Intentionally offering resistance or causing illegal obstruction to the lawful arrest is punishable under Section 224 P.P.C. A person who rescues or attempts to rescue any other person from any lawful arrest or custody shall be guilty of an offence punishable under Section 225 P.P.C. There is no difference between ‘detention’ by the police and ‘formal arrest’. When a person is detained by the police, he is arrested. It is not necessary that in order to make the arrest legal he should further be handcuffed or put in the police or judicial lock-up.<sup>164</sup> In making arrest, the police officer making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action. (Sec. 46 CrPC.) No force more than what is necessary to the effect, is to be used in making arrest; the conduct of the person to be apprehended is of importance. Where a person is arrested, he shall not be subjected to more restraint than is necessary to prevent his escape. (Sec. 50 CrPC). Where an accused was unarmed and did not evade or resist the arrest and still he is beaten is illegal.<sup>165</sup> The Police Rules, 1934<sup>166</sup> further postulates that if the fact upon a particular person has been kept secret, and there is no risk of his absconding, the police shall defer making arrest until the investigation is sufficiently complete; but if an interference with the liberty of the accused person is necessary to prevent him from absconding, and the facts justify arrest, the police shall arrest him and shall not interfere with his liberty until they arrest him. Generally, in all the cases in which persons are nominated in the F.I.R., the police arrest them which is contrary to the spirit of Section 157, CrPC. The words used in the said section, are that the Incharge of Police Station must have reasons to suspect the commission of offence for which he is empowered under section 156, CrPC, to

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<sup>162</sup> *Irshad Muhammad vs The State (2009 PCrLJ 1458 Lahore)*

<sup>163</sup> *Chamber's Twentieth Century Dictionary*

<sup>164</sup> *Fazlur Rahman v. The State (PLD 1960 Peshawar 74)*

<sup>165</sup> *1967 CrLJ 331*

<sup>166</sup> *Rule 26.2, Police Rules, 1934*

investigate. In other words, before a person is arrested, there must be tangible material against such person with the police officer to connect him with the alleged offence.<sup>167</sup>

#### *9.5.4.1 Arrest of Accused*

During the investigation, a person nominated for commission of the offence can be arrested if tangible evidence comes on record against him; though, it is not a mandatory requirement. Law requires that where an accused person is arrested, he must be produced before a Magistrate within twenty-four hours; beyond such period, police cannot detain a person on their own authority and are bound to seek permission from Magistrate under section 167 CrPC for remand for a period of not more than fifteen days in whole, if investigation is not completed by then. This right has been protected under the umbrella of the Constitution of Pakistan, 1973 vide Article 10.

#### *9.5.4.2 Arrest of Juvenile Accused*

The arrested juvenile shall be kept in an observation home and the Officer-in-Charge of the police station shall, as soon as possible,- (a) inform guardian of the juvenile, if he can be found, of such arrest and inform him of the time, date and name of the Juvenile Court before which the juvenile shall be produced; and (b) inform the concerned probation officer to enable him to obtain such information about the juvenile and other material circumstances which may be of assistance to the Juvenile Court for making inquiry.<sup>168</sup> (2) No juvenile shall be arrested under any of the laws dealing with preventive detention or under the provisions of Chapter VIII of the Code. Every juvenile or a child who is victim of an offence shall have the right of legal assistance at expense of the State.<sup>169</sup> A juvenile shall be informed about his rights available under the law by a legal practitioner within twenty four hours of taking him into custody. Notwithstanding anything contained in the Code, a juvenile accused of bailable offence shall, if already not released under section 496 of the Code, be released by the Juvenile Court on bail with or without surety unless it appears that there are reasonable grounds for believing that the release of such juvenile may bring him in association with criminals or expose him to any other danger. In this situation, the juvenile shall be placed under the custody of a suitable person or Juvenile Rehabilitation Centre under the supervision of probation officer. The juvenile shall not under any circumstances be kept in a police

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<sup>167</sup> *Syed Kamil Shah vs ASJ, Hyderabad (2007 YLR 794 Karachi)*

<sup>168</sup> *Section 5 of the Juvenile Justice System Act, 2018*

<sup>169</sup> *Section 3 of the Juvenile Justice System Act, 2018*

station under police custody or jail in such cases.<sup>170</sup> The Juvenile Court shall, in a case where a juvenile is not released under subsection (1), direct the police for tracing guardian of such juvenile and where guardian of such juvenile is traced out, the Juvenile Court may immediately handover custody of the juvenile to his guardian. A child accused of an offence that is bailable, shall be immediately released on bail with or without sureties. The law makes it mandatory for the authorities that in no case shall a child accused of such offences, be kept in a police station or jail. It also provides for the release of juvenile offenders on probation in case of conviction. In juvenile cases, the juvenile accused shall be interrogated by a police officer not below the rank of Sub-Inspector under supervision of Superintendent of Police or SDPO. The investigating officer designated under sub-section (1) shall be assisted by a probation officer or by a Social Welfare officer notified by the Government to prepare social investigation report to be annexed with the report prepared under section 173 of the Code.<sup>171</sup>

#### **9.5.5 Production of Accused before Magistrate**

After making arrest, local police is legally bound to produce accused before a Magistrate within twenty-four hours under all circumstances of his arrest. Section 61, CrPC. limits the powers of police with regard to detention of an accused even for one single hour; excluding the time for journey from the place of arrest to the Magistrate; in absence of special order of a Magistrate under section 167 CrPC. If a person arrested or taken into custody is not produced within twenty four hours before a Magistrate, his custody is deemed to be illegal and without lawful authority. The time of twenty-four hours for production of accused is to be computed from the time of arrest (by taking the person into custody or by restraining his movement through words) which is apparent from memo of arrest prepared by police at the time of arrest.

#### **9.5.6 Right to representation by counsel**

The Constitution of Pakistan, 1973 guarantees the right to the accused to be defended/represented by a counsel and to have an access to his relatives.<sup>172</sup> When a Magistrate hears application for grant of remand of an accused, he performs judicial functions and the accused through his counsel, friend or relative may raise an objection to passing an order of remand.

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<sup>170</sup> Section 6 of the Juvenile Justice System Act, 2018

<sup>171</sup> Section 7 of the Juvenile Justice System Act, 2018

<sup>172</sup> Article 10 of the Constitution

### 9.5.7 Physical Remand or Police Custody

Section 167 of CrPC authorizes the detention of any person by the police beyond 24 hours up to maximum of 15 days subject to the orders of a Magistrate in cases where police is unable to complete the investigation within 24 hours of the arrest. If it appears that investigation of a case is not completed within twenty four hours as stipulated in sect. 61, CrPC and the investigating officer is of opinion that the custody of the arrested accused is required for the purpose of investigation, he may seek police custody/remand of the accused for as long as up-to fifteen days in total.<sup>173</sup> To obtain physical remand, an application has to be filed by police officials before a Magistrate. This application is called '*parcha*' remand. The objective of remand is recovery of some article or evidence from the accused to establish the case of prosecution; if it is not required, the purpose is defeated and further police custody/ remand shall not be given. It must be kept in mind that the detention in police custody is generally dis-favoured by law.

While granting police remand, Judicial Magistrate is required to take utmost effort and satisfy himself about existence of reasonable and justifiable grounds for handing over the accused back to the police. The Magistrate has to see that he can remand an accused to police custody for 15 days at most yet such provision of 'fifteen days' has not to be used liberally else the objective of the words "from time to time" in the section 167(2), CrPC. shall be shattered; and, hence, he should grant remand as minimum as possible. Each time a Magistrate is requested for remand, he should go through the diaries of the case with reference to its progress and necessity of further remand. If no progress is seen on police file, he should decline the request for police custody/remand. In all cases, no remand can be given after expiry of fifteen days of remand. If an application is moved by police after expiry of fifteen days of remand, such application shall be treated as an application for adjournment under section 344, CrPC.

### 9.5.8 Court competent to grant Police Remand

A Judicial Magistrate 1<sup>st</sup> Class and a Magistrate empowered under section 30 CrPC, can pass an order of remand. The Judicial Magistrate 2<sup>nd</sup> Class, and 3<sup>rd</sup> Class are not authorized to pass an order of remand. A Second-Class Magistrate can give the order of remand if authorized by the provincial government.

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<sup>173</sup> Sec.167 CrPC.

### 9.5.9 When accused cannot be produced

The Magistrate shall not grant police custody/remand in absence of accused. However, when accused is too ill to travel; as is generally seen in cases where accused is injured and is thus hospitalised, and the doctor certifies his inability to move; or when an accused is a woman who has recently given birth to a child, and cannot be taken before a Magistrate without personal suffering or risk to health, they should not be removed until they are in a proper condition to travel. In such cases, Magistrate may grant sanction for their detention at their homes or in hospital or dispensaries, as the case may be.<sup>174</sup> The police shall take all measures to ensure safety of the injured arrested person and Magistrate may be requested to record his statement at the place where he is lying.<sup>175</sup>

### 9.5.10 Remand in Sessions Trial

A Judicial Magistrate 1<sup>st</sup> Class is empowered to grant remand in a case triable by Court of Sessions. It is so because he applies his mind as to whether the case should be sent up to the Court of Sessions, it may be termed as inquiry and he may postpone such inquiry under section 344 CrPC.

### 9.5.11 Police Remand of Accused already in Judicial Custody

Normally, when an accused once sent to judicial custody cannot be remanded to police on physical remand. However, if a remand of such accused is required for purpose of investigation in some other case, police may obtain permission from the Magistrate who sent him to jail for his production before the Court concerned.

### 9.5.12 Remand of Female Accused

Considering the status, a woman cannot be remanded to police custody except when she is involved in cases of qatal or dacoity.<sup>176</sup> In other non-bailable offences, she has to be sent to judicial custody; subject to provisions of bail; and, investigating officer may, if needed, interrogate her in prison and that too, in presence of an officer of jail and a lady police officer.

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<sup>174</sup> Chapter VI, Part -A, Federal Capital and Sindh Courts Criminal Circulars)

<sup>175</sup> Rule 26.25, Police Rules, 1934.

<sup>176</sup> Section 167(5), CrPC.

### 9.5.13 Remand of Juvenile Accused

Section 6 (3) of the Juvenile Justice System Act, 2018 provides that when a child under fifteen years of age is arrested or detained for an offence which is punishable for less than ten years, he shall be treated as if he were accused of commission of a bailable offence. And in cases, where he has not to be released on bail, he may not be given to police custody.

### 9.5.14 Grant/Refusal of Police Custody

Need for remand is a controversial issue, however it is generally understood that remand becomes necessary on the following grounds: first, when the original purpose of remand is to obtain custody of a person in order to ensure that the accused attends a court hearing as required; second, for effecting recovery of incriminating articles; and third, for the final disposition of matters for which the accused has been remanded in custody. The Magistrate must give the reasons for sending accused to police custody, in his order; such reasons should be cogent and appealing to ordinary prudent mind. The Magistrate shall forward copy of the remand order to the Sessions Judge concerned who may revise the same, if he finds it improper; this is mandatory requirement under section 167(4), CrPC.

### 9.5.15 Transit Custody

Sometimes, an accused, indicted in a criminal case registered at Place-A, is arrested at Place-B. The police arresting the accused shall produce him before the nearest Magistrate at Place-B within twenty-four hours. The Magistrate then has to grant transit police custody remand. Such remand would be for the purpose of production before the Magistrate having jurisdiction at Place-A. The provision for transit remand is laid down in sections 85 read with 86 of CrPC.<sup>177</sup>

### 9.5.16 Judicial Remand

Under section 344 CrPC, if, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefore, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody. Provided no Magistrate shall remand an accused person to custody under this section for a term exceeding

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<sup>177</sup> *Fazal e Subhan Vs The State (PLD 2006 Peshawar 1); Zareef vs Session Judge, Peshawar (PLD 1995 Peshawar 118).*

fifteen days at a time. Every order made under this section by a Court other than a High Court shall be in writing signed by the presiding Judge or Magistrate.<sup>178</sup>

### **9.5.17 Recording of statements by Police**

Section 160 of C.PC empowers a police officer to require attendance before himself of any person within the limits of his own or adjoining police station, who appears to be acquainted with the circumstances of a particular case. The notice of such summoning should be in writing. Section 161, CrPC further empowers any investigating officer to examine any person who appears to be acquainted with the facts and circumstances of a particular case, and such recording of statements shall be reduced to writing but shall not be signed by the person giving statement. The person required by investigating officer shall be bound to answer all such questions excepting those which may expose the person to a criminal charge or to a penalty or forfeiture. The statements can be used for contradicting a witness or persons giving such statements enumerated in Article 140 of Qanoon-e-Shahadat Order, 1984. Supplementary statement of the complainant is essentially a statement under section 161, CPC. It cannot be equated with F.I.R. nor can be read in extension thereof.<sup>179</sup> Tendency of police is to add something in the form of supplementary statement entered into a book maintained at the police station and thumb marked or signed by the first informant, while the supplementary statement recorded u/s. 161 CrPC is not signed.<sup>180</sup>

### **9.5.18 Power to record statements and confessions**

#### **9.5.18.1 Statement of Witness**

Section 164, CrPC, empowers a Magistrate to record statements of witnesses during course of investigation. Any such statement may be recorded in the presence of the accused and the accused shall be given an opportunity to cross-examine the witness making the statement; it is not necessary that the Magistrate receiving or recording confessional statement should be a Magistrate having jurisdiction in the case. The statement shall contain a certificate to the effect at the end of the statement and more so over, as a matter of caution, the Magistrates should affix the copy of CNIC or the photograph of the witness. The statement shall be signed by the witness as well as the Magistrate. Statement of witness can be recorded by Magistrate at instance of police, at the request of the complainant, accused, aggrieved person, or the witness himself; such powers are discretionary in nature.

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<sup>178</sup> Section 344 CrPC

<sup>179</sup> 2019 YLR Note 6; 2007 YLR 1471

<sup>180</sup> PLD 2002 Lah 110, PLD 2002 Kar, 4027

### 9.5.18.2 *Victim of rape*

Statement of victim should be recorded u/s 164 CrPC preferably by a female Magistrate inasmuch as such victim cannot express their agony appropriately before a male Officer.<sup>181</sup>

### 9.5.19 Recording of Confessional Statements of Accused

Confession, not defined in the Qanoon-e-Shahadat Order, 1984 is an admission of certain facts by a person which constitute commission of an offence. It is a voluntary and true statement made by a person charged with the commission of a crime or misdemeanor, communicated to another person, wherein he acknowledges himself to be guilty of the offence charged, and discloses the circumstances of the act or the share and participation which he had in it.<sup>182</sup> Under section 164 CrPC, Any Magistrate of the First Class and any Magistrate of the Second Class specially empowered in this behalf by the Provincial Government may, if he is not a police officer, record any statement or confession made to him in the course of an investigation or at any time afterwards before the commencement of the inquiry or trial. Any such statement may be recorded by such Magistrate in the presence of the accused, and the accused given an opportunity of cross-examining the witness making the statement. Such statements shall be recorded in such of the manners prescribed for recording evidence as is, in his opinion, best fitted for the circumstances of the case: Such confessions shall be recorded and signed in the manner provided in Section 364 CrPC, and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried. A Magistrate shall, before recording any such confessions explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him and no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and when he records any confession, he shall make a memorandum at the foot of such record to the following effect:

*“I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains full and true account of the statement made by him.*

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<sup>181</sup> *Salman Akram Raja vs Govt: of Punjab (PLJ 2013 SC 107)*

<sup>182</sup> *Black, Henry Campbell, M.A. Black's Law Dictionary, 296 (6<sup>th</sup> Edition)*

(Signed) A.B.,

Magistrate ”

Section 364 of Code of Criminal Procedure (V of 1898) lays down the mode of examination of accused. Since the recording of a confessional statement of an accused is also an examination of the accused, the provisions of this section will apply to the recording of the confession of the accused. The provisions of this section provide that,

- i. The whole examination of the accused shall be recorded by Magistrate or Judge in full in the language in which he is examined or if that is not practicable, in the language of the Court or in English.
- ii. Such record shall be shown or read over to the accused and if he does not understand in the language it is written, it shall be interpreted to him accordingly.
- iii. If the examination is not recorded by the Magistrate or Judge himself, he shall be bound to make a memorandum thereof. And if he is unable to make such memorandum, he shall record the reason of such inability. The section does not require that the memorandum should be written by the Magistrate himself in his own hand. It is enough if it is signed by him.
- iv. If a person is willing to make a voluntary statement under section 164 Code of Criminal Procedure (V of 1898) before a Magistrate, the Magistrate has no jurisdiction to refuse the same.

#### **9.5.19.1**      *Formalities to be observed for recording judicial confession*

In recording confession, and when accused is brought before the Court for the said purpose, following formalities have to be observed by a Magistrate:

1. He should remove the accused from the custody of the police who bring him for the purpose.
2. He should get removed the handcuffs of the accused, if he is in handcuffs.
3. He should satisfy himself that no policeman concerned with investigation of the relevant case, is present in the Court or the place where proceeding could be heard or seen.
4. He should inform the accused that he is no longer in police custody and, that he is appearing before a Magistrate who has no concern with the police.

5. He should explain to the accused that he is not bound to make a confession and, if he does so, it will be taken down in writing and may be thereafter used as evidence against him.
6. He should then give at least one to two hours time to the accused for reflection; and, during this time, the investigating police shall not be allowed to have access to him.
7. In order to satisfy himself as to whether the confession is voluntarily made or not, the Magistrate is duty bound to put following questions to the accused, prior to recording of such confession;
  - i. Hereafter, you will not be kept in the custody of police, do you understand?
  - ii. Even if you refuse to make a statement you will not be kept in police custody, have you understood this?
  - iii. When were you arrested and since when are you in the custody of police?
  - iv. Have the police or any other person threatened you to make a statement?
  - v. Have the police or any other person given you any allurement or inducement to make statement?
  - vi. When did it first occur to you that you should make a confession and why did it occur to you?
  - vii. Why are you making a confession?
  - viii. Are you willing to make a statement voluntarily and of your own free will?
8. The memorandum set forth in section 164(3) of Code of Criminal Procedure (V of 1898) must be appended at the foot of the record of the confession.

#### **9.5.19.2**      *Non-compliance of provisions under 164 read with 364, CrPC*

Where the provisions of the sections 164 and 364 CrPC are not duly complied with while recording a confession or statement under section 164 CrPC, the statutory provision of section 533 CrPC gets attracted; according to which, any Court before which a confession or other statement of an accused person recorded under section 164 or section 364 is tendered or has been received in evidence, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded, and, such statement shall be admitted if the error has not injured the accused as to his defence on the merits. The section provides a mode for the rectification of an error arising from non-compliance with any of the provisions of S. 164 or S. 364 CrPC. The object is to prevent justice being frustrated by reasons of such non-compliance.

### 9.5.19.3 *Judicial Confession on Oath*

Confessional Statement should not be on oath. Law does not compel accused to make confession and he is under no obligation to speak the truth. Administration of oath to accused is an illegality and is violation of section 5 of the Oath Act, 1873.<sup>183</sup> However, a judicial confession containing true statement of facts and voluntary deposition may not lose status of evidence merely because of adopting the procedure for recording the confession. Such procedural illegality would assume the character of irregularity which may not render the confession inadmissible.<sup>184</sup>

### 9.5.20 *Medical Examination of Witness/Accused*

Under Rule 25.19, Chapter XXV, Volume III, Police Rules 1934, When a medical opinion is required in police cases, the persons to be examined shall be produced before the highest medical authority available on the medical staff of the district. Persons requiring examination at the head quarters of a district shall be taken to the Civil Hospital and not to a branch dispensary; similarly in rural areas, where a hospital is accessible, medico-legal cases shall be sent there and not to a rural dispensary.

Similarly, Under Rule 25.20 of the said Rules, when a complaint or a witness of importance in an impotent case is seriously ill or is wounded, but does not appear to be dying, the police officer making the investigation shall prepare a charge sheet in accordance with rule. if this has not already been done and shall either.

- a) With such persons consent send him or her, for medical treatment to the station of the magistrate having jurisdiction and invite such magistrate to take such persons deposition in the presence of the accused person or,
- b) If such complaint or witness cannot be moved, or refuses to be sent, such officer shall apply for an order of detention in respect of the accused person if he is in custody and such order is necessary, and invite the magistrarate having jurisdiction to record the deposition of such complaint or witness in the presence of the accused person at the place where the former is lying.

However, Law provides special mechanism for medical examination of both the rape accused<sup>185</sup> as well as the rape victim,<sup>186</sup> immediately upon the registration of FIR in rape

<sup>183</sup> Nazeer alias Wazir vs The State (PLD 2007 SC 202)

<sup>184</sup> *Taj Wali Shah vs State (2014 PCrLJ 323 Peshawar); Bakht Saba vs The State (2014 MLD 942 Peshawar)*

<sup>185</sup> Section 53-A CrPC

cases in order to determine the truthfulness as well as veracity of some sexual contact having taken place between the parties to the case.

Under section 164A CrPC, where an offence of committing rape, unnatural offence or sexual abuse or attempt to commit rape, unnatural offence or sexual abuse under section 376, section 377 or section 377B respectively of the Pakistan Penal Code, 1860 (Act XLV of 1860) is under investigation, the victim shall be examined by a registered medical practitioner, in the case of female victim by a female registered medical practitioner, immediately after commission of such offence:

Provided that in all cases, where possible, the female victim shall be escorted by a female police officer or a family member from a place of her convenience to the place of medical examination.

The registered medical practitioner to whom such victim is sent shall, without delay, examine the victim and prepare a report of examination giving the following particulars, namely:

- a) name and address of the victim and of the person by whom she was escorted;
- b) age of the victim;
- c) description of material taken from body of the victim for DNA profiling;
- d) marks of injury, if any, on body of the victim;
- e) general mental condition of the victim; and
- f) other material particulars in reasonable detail.

The report of examination shall state precisely the reasons for each conclusion arrived at. The report shall specifically record that consent of the victim or of his or her natural or legal guardian to such examination had been obtained. The exact time of commencement and completion of the examination shall also be noted in the report. The registered medical practitioner shall, without delay, forward the report to the investigation officer who shall forward it to the Magistrate along with other requirements as specified under clause (a) of subsection (1) of section 173 CrPC. Consent of victim or his natural or legal guardian is essential pre-requisite for examination.

Likewise under section 164B CrPC, where an offence under section 376, section 377 or section 377B of the Pakistan Penal Code, 1860 (XLV of 1860) is committed or

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<sup>186</sup> Section 164-A CrPC

attempted to have been committed or is alleged to have been committed, Deoxyribo Nucleic Acid (DNA) samples, where practicable, shall be collected from the victim with his or her consent or with the consent of his or her natural or legal guardian and the accused during the medical examination conducted under section 164A within optimal time period of receiving information relating to commission of such offence. The DNA sample collected shall at the earliest be sent for investigation to a forensic laboratory where these shall be properly examined and preserved: Provided that confidentiality of such examination shall at all times be observed.

#### **9.5.21 Determination of Age of Accused**

In criminal cases, ascertainment of age of accused or victim is significant, because, firstly, it affects inapplicability of certain penal sections to the offence in question; and secondly, it brings the application of certain legal provisions regarding treatment/dealing to the accused as well. This pivotal point brings the criminal liability of a child within the competency of a juvenile court. If this issue is not resolved at proper time by the concerned authorities with due care and diligence, a juvenile offender will run the risk of ending up in formal judicial system after arrest. Right to fair trial is a fundamental right of every person guaranteed under Article 10-A of the Constitution of Pakistan. The Criminal Procedure Code does not prescribe any procedure for determination of age of an accused person. However, the Juvenile Justice System Act, 2018, enacted for children in conflict with law under Section 8 provides:

*(1) Where a person alleged to have Criminal committed an offence physically appears or claims to be a juvenile for the purpose of this Act, the officer-in-charge of the police station or the investigation officer shall make an inquiry to determine the age of such person on the basis of his birth certificate, educational certificates or any other pertinent documents. In absence of such documents, age of such accused person may be determined on the basis of a medical examination report by a medical officer.*

*(2) When an accused person who physically appears to be a juvenile for the purpose of this Act is brought before a Court under section 167 of the Code, the Court before granting further detention shall record its findings regarding age on the basis of available record including the report submitted by the police or medical examination report by a medical officer.*

### 9.5.21.1 Record of NADRA

The National Identity Card is usually presented for ascertainment of the age. The National Identity Card and the entries in the NADRA Database do carry weight and hold the field unless, they are rebutted. The CNIC has its probative value because it is prepared under the National Database and Registration Authority Ordinance, 2001.<sup>187</sup>

All Magistrates and trial courts must pay special attention to the age of the accused person before them and must record his age in the relevant record, charge-sheets and final judgments as the matter of age is important to issues pertaining to the forum of trial, sentence and custody etc. Soon after the arrest of a young person on a criminal accusation, the arresting police officer must make a tentative assessment. Police investigator shall collect or consult all possible material. Such material may include the record of hospital, the record pertaining to entry of birth maintained at the relevant Union Council, the record of educational institution, the record maintained by the National Database Registering Authority (NADRA), Electoral Roll and of the marriage (Nikah) Registrar and a medical opinion about his/her age, if necessary. The police report under Section 173 CrPC must mention the plea of juvenility if set up by the young accused person and the material collected for the tentative assessment of age. On receipt of a report under Section 173 CrPC, a Magistrate must examine the entire record of the investigation, make his/her own assessment“ of the material relevant to the question of juvenility and if the Magistrate finds the record deficient, then he/she may hold an inquiry of his/her own to assess the age of the young accused person.<sup>188</sup>

### 9.5.22 Identification Parade

Where the complainant/witness does not already know the accused by face, identification has to be arranged under the Magistrate's supervision mostly in jail where the detainee is kept.<sup>189</sup> There is no express provision providing for conducting test of identification parade in Code of Criminal Procedure, 1898 or the Qanoon-e-Shahadat Order, 1984. However, it derives its inference from Article 22 of the Qanoon-e-Shahadat Order, 1984. It reads, “Facts necessary to explain or introduce a fact-in-issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of anything or person whose identity is relevant, or fix the time or place at which any fact-in-issue, or

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<sup>187</sup> *Abdul Ghani and others vs. Mst. Yasmeen Khan and others* (2011 SCMR 837)

<sup>188</sup> *PLD 2007 Lahore 650*

<sup>189</sup> *1974 SCMR 175*

relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.<sup>190</sup>

Regulating Law: Article 22 of QSO; Chapter 26 Rule 32, the Police Rules, 1934

#### **9.5.22.1 Procedure and guidelines for Identification Parade**

Rules 26.7 and 26.32 of Police Rules, 1934 contain relevant provisions. Precisely, following guidelines should be observed prior to conducting identification parade:

- i. The identification parade should be conducted in presence of a Magistrate and two respectable witnesses having no interest in the case. An identification parade conducted without the supervision of the magistrate is of no value.<sup>191</sup>
- ii. Prior to the identification proceedings, arrangements should be made to ensure that the identifying witnesses is kept separate from each other at such a distance from the place of identification so that it shall render it impossible for them to see the suspects or any of the persons concerned in the proceedings until they are called up to make their identification.
- iii. Effort should be made that the proceedings should be conducted as soon as possible after the arrest of the suspect.
- iv. The Magistrate has to ensure that the person sought to be identified is not conspicuous in the group either by his attire or by his physical appearance and social status. They should be of similar height, built, structure and colour. The proportion of dummies mixed with the under-trials shall be eight or nine to one.
- v. Each identifying person should be brought up separately to attempt the identification.
- vi. Care should be taken so that the remaining witnesses are still kept out of sight and hearing and that no opportunity be permitted for communication to pass between witnesses who have been called up and those remain to be called or not been called.
- vii. The identification must be related to an event, which the witness must describe and the Magistrate should note with precision and accuracy the connection of the event and the identification.
- viii. At the end of proceedings, the Magistrate and other witness/witnesses should sign the form of recording of test and certify that the test has been carried out correctly and that no collusion between the police or witnesses or among the witnesses was

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<sup>190</sup> Article 22 Qanoon-e-Shahadat Order, 1984

<sup>191</sup> PLD 1958 DC 1

possible. It is advisable that whenever possible, an independent reliable person should be present throughout the proceedings at the place where the witnesses are kept and should be required to devote his attention entirely to the prevention of collusion.

- ix. It is important that once the arrangements for the proceedings have been undertaken, the Officer, investigating the case and any Police Officer assisting him in the investigation, should have no access whatsoever either to suspect or the witnesses.
- x. The supervising Magistrate must verify the period, if any for which the accused persons have remained in police custody after their arrest and before the test identification and must incorporate this fact in his report about the proceedings.
- xi. In case, there are more accused persons (suspects) than one who have to be subjected to test identification; then the rule of prudence laid down by the Superior Court is that separate identification parade should ordinarily be held in respect of each accused person.
- xii. The Magistrate is required to prepare a list of all the persons (dummies) who form part of the line-up at the parade along with their parentage, occupation and addresses.
- xiii. The Magistrate must faithfully record all the objections and statements, if any, made either by the accused persons or by the identifying witnesses before, during or after the proceedings.
- xiv. Where a witness correctly identifies an accused person the Magistrate must ask the witness about the connection in which the witness has identified that person i.e. as a friend, as a foe or as a culprit of an offence etc., and then incorporate this statement in his report.
- xv. And where a witness identifies a person wrongly, the Magistrate must so record in his report and should also state the number of persons wrongly picked by the witness.
- xvi. The Magistrate should ensure that the identification is free from any irregularity on the part of the police who has sought the identification or on the part of custodian of the accused where the identification parade is arranged in jail.
- xvii. The Magistrate is required to record in his report all the precautions taken by him for a fair conduct of the proceedings; and,
- xviii. The Magistrate has to give a certificate at the end of his report.

### **9.5.23 Exhumation Proceedings**

Disinterment or exhumation of corpse is often required during investigation. The commonest reason for exhumation globally is medico-legal, i.e., if an individual dies in suspicious

circumstances, the police may request exhumation in order to determine the cause of death. This is also done for identification purposes required in some civil and criminal cases with some definite objectives under the order of appropriate authority:<sup>192</sup> firstly, identification, i.e., confirming the individuality for any criminal or civil purpose arising after the burial; and secondly, cause of death: when any foul play is suspected, exhumation may be ordered depending upon the public demand or request by the relatives, to determine the cause of death; and second autopsy, when the first autopsy report is being challenged or is ambiguous.<sup>193</sup> With the permission or direction of Magistrate, a medical board is constituted who in the presence of a magistrate and police squad carries exhumation process.

Exhumation consists of following steps:<sup>194</sup>

1. General precautions:

Exhumation of corpse or human remains usually happens to be very emotive and sensitive issue, particularly for the relatives and friends of the deceased, it is necessary to ensure the safety and security of those engaged in conducting the exhumation proceedings.

2. Constitution of Medical Board
3. Identification of the grave, opening it, collection of sample of earth
4. Identification of the coffin and collection of samples;
5. Identification of body by magistrate or coroner;
6. Autopsy:

#### **9.5.23.1**      *Death in Mysterious Circumstances (S. 176 CrPC)*

Exhumation without any justification is considered as sin. Any order for disinterment must be based on detailed reasoning, logic and fairness.<sup>195</sup> It can be done in pursuance of a judicial intervention and there was no legal bar on the same.<sup>196</sup> For exhumation, however mere suspicion was sufficient to ascertain the actual cause of death. Magistrate is required to examine the information/accusations judiciously and if he was not satisfied with the averments of such application or was of the opinion that cause of death was already

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<sup>192</sup> Knight BP, *Exhumation*. In: *Knight's Forensic Pathology 3<sup>rd</sup> Edition*. London: Arnold Company Ltd; 2004. p. 37.

<sup>193</sup> *Muhammad Hanif vs ASJ, Pakpattan (2016 PCrLJ 756)*

<sup>194</sup> *Exhumation*. In: *Parikh Ck (Editor) Text Book of Forensic Medicine and Toxicology. 7th edition, New Delhi: C and B Publishers; 1989.p. 2.90–2.91.*

<sup>195</sup> *Yar Muhammad vs State (2017 PCrLJ 694 Peshawar)*

<sup>196</sup> *Mst Iqbal Bibi vs ADJ (PLD 2017 435 Lahore)*

ascertained properly, then he can decline the application.<sup>197</sup> However, it cannot be conducted merely on whims of a person/applicant where the cause of death was unequivocally established.<sup>198</sup> Registration of the case is not *sine qua non* to launch a probe into cause of a suspicious death.<sup>199</sup> Similarly, existence of some positive proof was not required as relevant provision of law is meant to attend the situation where cause of death was inferred other than being natural.<sup>200</sup> The process of discovering the real cause of death cannot be left in the middle, and the same must have been taken to its logical end.<sup>201</sup>

Question of exhumation has to be decided only keeping in view the circumstances relevant to Clause (1) or (b), or (c) of sub-section (1) of Section 174 CrPC. There should be either an indication that the information related to the commission of suicide or unnatural death or by an accident. Scope of intent of section 176 is to discover the actual cause of death of the deceased. Sub-section 176 (1) made provision for conducting an inquiry into the cause of death, either instead of or in addition to the investigation held by the Police.<sup>202</sup>

#### **9.5.23.2 Who can request for Exhumation**

Section 176 (2) of CrPC does not put clog of locus standi to approach a Magistrate for exhumation of dead body. Such order could be made by the Magistrate on his own or on the request or information even of a stranger with the sole purpose to know the actual cause of death.<sup>203</sup>

#### **9.5.23.3 Consent of LRs in exhumation**

Mere fact that LRs/Family of deceased is not consenting for disinterment is not a good ground to deny doing justice. Sole purpose is to discover cause of death of the deceased and to unearth whether it was natural death or otherwise (qatl-e-amd).<sup>204</sup>

#### **9.5.23.4 Jurisdiction of Magistrate**

Magistrate in whose jurisdiction the dead body was recovered as well as the Magistrate in whose jurisdiction the dead body was buried are competent to exercise such jurisdiction.<sup>205</sup>

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<sup>197</sup> *Zafar Ali vs Mst Muradan* (2017 PCrLJ 1341 Karachi)

<sup>198</sup> *Mst Manzoor Elahi vs Sessions Judge* (2016 PCrLJ 211 Lahore)

<sup>199</sup> *Mst Shama vs State* (PLD 2017 Lahore 337)

<sup>200</sup> *Mst Shama vs State* (PLD 2017 Lahore 337)

<sup>201</sup> *Muhammad Hanif vs ASJ, Pakpattan* (2016 PCrLJ 756)

<sup>202</sup> *Mst Fozia Shabnam vs ASJ, Multan* (2016 PLD 518 Lahore)

<sup>203</sup> *Begum Mai vs ASJ 2020 PLD 394 Lahore; Mst Shama vs State* (PLD 2017 Lahore 337), *Mst Fozia Shabnam vs ASJ, Multan* (2016 PLD 518 Lahore)

<sup>204</sup> *Begum Mai vs ASJ PLD 2020 Lahore 394*

#### 9.5.23.5 *Limitation for Conducting Exhumation*

No specific period of limitation is provided under the law for initiation of the exhumation proceedings,<sup>206</sup> and it depends upon the attending circumstance of the case.<sup>207</sup> Unreasonable delay may influence the outcome of the proceedings and sometimes it may be inconsequential as the human body is subject to natural decay and putrefaction.

#### 9.5.24 *Discharge of Accused*

A Magistrate is empowered under section 63 read with 167 CrPC to make a special order for discharging an arrested/nominated person by way of bail or bond if it is found that such person was arrested without justification. It is settled proposition of law that mere lodging of FIR does not make a person accused in strict parameters of the criminal law until and unless some tangible evidence connecting the person with the alleged offence is available on record. In absence of such tangible evidence, Magistrate before whom accused is produced at time of remand, can effectively grant relief to such person by passing order under section 63 CrPC. The said provision comes into operation when it is found that the person is arrested or detained without sufficient cause. The police cannot re-arrest a person discharged by Magistrate under the provision without orders of the Magistrate. Besides, order of discharge is not order of acquittal and the person discharged shall not smother investigation and shall be required to cooperate in investigation until final report is submitted.

##### 9.5.24.1 *Release of accused due to deficiency of evidence*

Release of accused is governed u/s 169 CrPC, which was at the conclusion of investigation and on submission of the report under 173 of CrPC.<sup>208</sup> It is a settled principle of law that the police has power to release a person in custody on his executing a bond with or without sureties, for his appearance before a Magistrate, if and when so required, as is provided under Section 169 Cr.P.C. However, there are two limitations: (i) Section 169 CrPC applies only to the accused of a case who have never been forwarded to a Magistrate and are confined to the stage of investigation, and, (ii) the admission to bail under section 169 CrPC, is but a purely provisional arrangement, and if the Magistrate or Trial Court considers that the evidence on record does *prima facie* establish the case of a non-bailable offence against him, such Court

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<sup>205</sup> *Abdul Ghani vs 1<sup>st</sup> JM, Tando Adam (2018 PCrLJ 1455 Karachi.*

<sup>206</sup> *Mst Shama vs State (PLD 2017 Lahore 337*

<sup>207</sup> *Muhammad Hanif vs ASJ, Pakpattan (2016 PCrLJ 756)*

<sup>208</sup> *PLD 2006 SC 316; 2005 MLD 1883 Peshawar*

can by all means issue summons to the accused to face the trial. Powers under S. 169 CrPC can only be exercised by the Police during the course of investigation when accused is in their custody. Once the challan is submitted under S. 173 CrPC the provisions of S. 169 CrPC are not attracted. However, if the Court does not agree with placing of accused in column 2 by the Investigation Officer, there is no embargo on the Court in issuing summons to the accused, despite the fact that Investigation Officer shows him innocent.

Two types of accused are placed in Column No. 2 of challan; firstly those who were not challaned and were found to be innocent as a result of police investigation; secondly, the proclaimed offenders depicted in the challan by police with 'red ink'. Where accused is declared innocent and has been placed in column-2, he is no more an accused person nor can he be treated as such unless, trial court takes cognizance and summons him for trial.

Where Investigation Officer allows bail to accused and places him in column 2 of the challan, the Inquiry Magistrate shall not be competent to cancel bail which had not been allowed by himself. In the case of the accused who is released by police cannot be committed to custody; as apparent from Section 497(5) of CrPC, a High Court or Court of Session and, in the case of a person released by itself, any other Court may cause any person who has been released under this section to be arrested and may commit him to custody. In the cases exclusively triable by the Court of Sessions, once the Magistrate has taken cognizance of the offence, he has to send the case of that Court and it is not open for him to send the case only qua those of the accused who are placed in column 3 of the challan. The wisdom behind it is the celebrated principle, "cognizance is taken of an offence, and, not of an offender."

#### **9.5.25 Submission of Challan or Police Report**

It is misconceived that after abolition of committal proceedings by Law Reforms Ordinance 1972 the job of a Magistrate is just a post office in sending the challan for trial to Court of Session. The correct legal position is that the Magistrate is still to look in to all preliminaries almost the same as were under committal proceedings of ensuring attendance of witnesses, recording of evidence under section 512 CrPC, initiation of proceedings under section 87 & 88 CrPC.<sup>209</sup> Law provides that every investigation has to be completed without unnecessary delay and as soon as it is completed, the officer in charge of a police station shall through public prosecutor forward a report to the Magistrate having jurisdiction to take cognizance of offence on such report; the report should be in a form prescribed by Provincial Government

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<sup>209</sup> *PLD 2010 SC 585*

and should show the names of the parties, the nature of the information, the names of witnesses (persons acquainted with the circumstances of the case), and the fact as to if the accused has been forwarded in custody or has been released on his bond (if so, whether with or without sureties).

The term “challan” does not figure anywhere in the CrPC, however, it has been referred to as such in Police Rules. The CrPC refers to the term “Police Report” in Section 173. A challan or a final report of investigation under S.173 CrPC is one and the same thing. Whatever may be the finding of Investigation Agency about the innocence or otherwise of the accused, the same is to be produced before the Criminal Court by preparing or filing report under S.173 CrPC.

#### **9.5.26 Interim Report**

Where investigation is not completed within a period of fourteen days from the date of recording of the first information report under section 154, the officer in charge of the police station shall, within three days of the expiration of such period, forward to the Magistrate through the Public Prosecutor, an interim report in the form prescribed by the Provincial Government stating therein the result of the investigation made until then and the Court shall commence the trial on the basis of such interim report, unless, for reasons to be recorded, the Court decides that the trial should not so commence.

#### **9.5.27 Duties of Magistrate on receipt of Challan**

Cancellation of the case soon on receipt of the challan is an administrative order while taking cognizance of a case is a judicial act, which cannot be nullified by an administrative act. The administrative order passed by a Magistrate can be challenged under section 561-A CrPC by invoking inherent jurisdiction of the High Court, while judicial order can be challenged under revisional jurisdiction before the competent forum.

#### **9.5.28 Cognizance of offences by Ordinary Criminal Courts**

Section 190 (1) CrPC provides that all Magistrates of the first class, or any other Magistrate specially empowered by the Provincial Government on the recommendation of the High Court, may take cognizance of any offence:

- a) Upon receiving a complaint of facts which constitute such offence;

- b) Upon a report in writing of such facts made by any police officer;
- c) Upon information received from any person other than a police officer, or upon his own knowledge or suspicion

That such offence has been committed which he may try or send to the Court of Sessions for trial.

Section 190 (2) CrPC provides that a Magistrate taking cognizance under sub-section (1) of section 190 CrPC of an offence triable exclusively by a court of session shall without recording any evidence, send the case to court of Sessions for trial. Technically, the Court of Sessions as a Court of original jurisdiction cannot take cognizance of the case under Section 193 CrPC unless the case is duly sent to it by a Magistrate under section 190(2) CrPC.

### **9.5.29 Cognizance of offences by Special Courts**

A special Court constituted otherwise than in the CrPC can take cognizance of the case directly as a Court of original jurisdiction in the same manner as a Magistrate is empowered to take cognizance of a case under Section 190 CrPC. For example, the Anti-Terrorism Court may directly take cognizance of a case triable by such Court without the case being sent to it under section 190 CrPC.

### **9.5.30 Complaint Cases**

#### **9.5.30.1 Examination of complainant**

Complaint is statement of allegation to set the law in motion.<sup>210</sup> Under section 200 CrPC, a Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant, and also by the Magistrate: Provided as follows:

(a) when the complaint is made in writing nothing herein contained shall be deemed to require a Magistrate to examine the complaint before transferring the case under section 192 or sending it to the Court of Sessions.

(aa) when the complaint is made in writing nothing herein contained shall be deemed to require the examination of a complainant in any case in which the complainant has been made by a Court or by a public servant acting or purporting to act in the discharge of his official duties:

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<sup>210</sup> 2014 YLR 1791, 2176

(c) when the case has been transferred under section 192 CrPc and the Magistrate so transferring it has already examined the complainant, the Magistrate to whom it is so transferred shall not be bound to re-examine the complainant.

#### **9.5.30.2**      *Procedure by Magistrate not competent to take cognizance of the case*

(1) If the complaint has been made in writing to a Magistrate who is not competent to take cognizance of the case, he shall return the complaint for presentation to the proper Court with an endorsement to that effect. (2) If the complaint has not been made in writing such Magistrate shall direct the complainant to the proper Court.<sup>211</sup>

#### **9.5.30.3**      *Postponement of issue of process*

Section 202 CrPC deals with postponement of issue of process. Object and scope of this section is twofold to allow free and fair opportunity to the complainant to produce some evidence to make out grounds for issuing process against accused.

Under section 202(1) CrPC, any Court, on receipt of a complaint of an offence of which it is authorized to take cognizance, or which has been sent to it under Section 190, sub-section (3), or transferred to it under Section 191 or Section 192, may, if it thinks fit, for reasons to be recorded postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case itself or direct an inquiry or investigation to be made by any Justice of the Peace or by a police officer or by such other person as it thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint. Provided that, save where the complaint has been made by a Court, no such direction shall be made unless the complainant has been examined on oath under the provisions of Section 200.<sup>212</sup>

Under section 202(2) CrPC, a Court of Session may, instead of directing an investigation under the provisions of sub-section (1), direct the investigation to be made by any Magistrate subordinate to it for the purpose of ascertaining the truth or falsehood of the complaint. Under section 202(3) CrPC, if any inquiry or investigation under this section is made by a person not being a Magistrate or Justice of the Peace or a police-officer, such person shall exercise all the powers conferred by this Code on an officer-in-charge of a police-station, except that he shall not have power to arrest without warrant. Under section 202(4) CrPC, any Court

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<sup>211</sup> Section 201 CrPC

<sup>212</sup> Section 202) (1) CrPC

inquiring into a case under this section may, if it thinks fit, take evidence of witnesses on oath.

#### **9.5.30.4**      *Dismissal of complaint*

The Court before whom a complaint is made or to whom it has been transferred or sent may dismiss the complaint, if, after considering the statement on oath (if any) of the complainant and the result of the investigation or inquiry if any under section 202 there is in his judgment no sufficient ground for proceeding. In such case he shall briefly record his reasons for so doing.<sup>213</sup>

#### **9.5.30.5**      *Complaint in case of Zina*

Under section 203A CrPC, no court shall take cognizance of an offence under section 5 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (VII of 1979), except on a complaint lodged in a Court of competent jurisdiction.

(2) The Presiding Officer of a Court taking cognizance of an offence on a complaint shall at once examine, on oath, the complainant and at least four Muslim, adult male eyewitnesses, about whom the Court is satisfied having regard to the requirement of tazkiyah-al-shahood, that, they are truthful persons and abstain from major sins (kabair), of the act of penetration necessary to the offence: Provided that, if the accused is a non-Muslim, the eye-witnesses may be non-Muslims.

(3) The substance of the examination of the complainant and the eye witnesses shall be reduced to writing and shall be signed by the complainant and the eye witnesses, as the case may be, and also by the Presiding Officer of the Court.

(4) If in the opinion of the Presiding Officer of a Court, there is sufficient ground for proceeding, the Court shall issue summons for the personal attendance of the accused.

(5) The Presiding Officer of a Court before whom a complaint is made or to whom it has been transferred may dismiss the complaint, if, after considering the statements on oath of the complainant and the four or more eyewitnesses there is, in his judgment, no sufficient ground for proceeding and in such case he shall record his reasons for so doing.

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<sup>213</sup> Section 203 CrPC

#### **9.5.30.6** *Complaint in case of Qazf*

Under section 203B CrPC, subject to subsection (2) of section 6 of the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 (VIII of 1979), no Court shall take cognizance of an offence under section 7 of the said Ordinance, except on a complaint lodged in a Court of competent jurisdiction.

(2) The Presiding Officer of a Court taking cognizance of an offence on a complaint shall at once examine on oath the complainant and the witnesses as mentioned in section 6 of the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 (VIII of 1979) of the act of Qazf necessary to the offence.

(3) The substance of the, examination of the complainant and the witnesses shall be reduced to writing and shall be signed by the complainant and the witnesses, as the case may be, and also by the Presiding Officer of the Court.

(4) If in the opinion of the Presiding Officer of a Court, there is sufficient ground for proceeding the Court shall issue summons for the personal attendance of the accused.

(5) The Presiding Officer of a Court before whom a complaint is made or to whom it has been transferred may dismiss the complaint, if, after considering the statements on oath of the complainant and the witnesses there is, in his judgment, no sufficient ground for proceeding and in such case he shall record his reasons for so doing.

#### **9.5.30.7** *Complaint in case of fornication*

Under section 203C, no court shall take cognizance of an offence under section 496A of the Pakistan Penal Code, except on a complaint lodged in a Court of competent Jurisdiction.

(2) The Presiding Officer of a Court taking cognizance of an offence shall at once examine on oath the complainant and at least two eyewitnesses to the act of fornication.

(3) The substance of the examination of the complainant and the eyewitnesses shall be reduced to writing and shall be signed by the complainant and the witnesses, as the case may be, and also by the Presiding Officer of the Court.

(4) If in the opinion of the Presiding Officer of a Court, there is sufficient ground for proceeding the Court shall issue a summons for the personal attendance of the accused:

Provided that the Presiding Officer of a Court shall not require the accused to furnish any security except a personal bond, without sureties, to ensure attendance before the Court in further proceedings.

(5) The Presiding Officer of a Court before whom a complaint is made or to whom it has been transferred may dismiss the complaint, if, after considering the statements on oath of the complainant and the witnesses there is, in his judgment, no sufficient ground for proceeding and in such case he shall record his reasons for so doing.

(6) Notwithstanding the foregoing provisions or anything contained in any other law for the time being in force no complaint under this section shall be entertained against any person who is accused of zina under section 5 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (Ordinance No. VII of 1979) and against whom a complaint under section 203A CrPC is pending or has been dismissed or who has been acquitted or against any person who is a complainant or a victim in a case of rape, under any circumstances whatsoever.

### **9.5.31 Challan Case and Complaint Case: Which is to be tried first**

Where the same party lodges an FIR and after having remained dissatisfied with the investigation carried out by the police, files private complaint in respect of the same allegation, then in such a situation the complaint case is to be tried first and if needed the challan case is to be tried later. Legal position is quite different if the challan case and the compliant case have been filed by different parties containing different versions and are directed against the different set of accused persons then in such a situation, the trial of the complaint case and the challan case are to be held simultaneously and side by side and not one after the other.<sup>214</sup>

## **9.6 Trial**

### **9.6.1 Trial by Magistrates**

The procedure to be followed by Magistrates in trial of cases is given in Chapter XX of CrPC. In all FIR cases, except those tried summarily or punishable with fine or imprisonment not exceeding six (6) months, copies of all relevant material with certain exceptions shall be given to accused not less than seven days before commencement of trial (*Section 241-A*

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<sup>214</sup> 2008 YLR 1144 Lahore

CrPC). The formal trial begins with the framing of charge. After framing of charge accused shall be asked whether he admits the commission of offence or not. (*Section 242 CrPC*). If he admits the charge then conviction may be made. But he shall at the same time be given show cause that why he should not be convicted on the basis of admission. And if he shows no sufficient cause then he may be convicted (*Section 243 CrPC*). If no conviction or admission is made then the Magistrate shall hear the complainant and take all necessary evidence of prosecution and then defence (*Section 244 CrPC*). The statements duly recorded under section 164 CrPC in the presence of accused who was given chance of cross examination may, be treated as evidence in the case under the circumstances (*Section 244-A CrPC*). The Magistrate at any stage may examine the accused without previously warning him by putting such questions as court thinks necessary. But accused shall, after the closure of prosecution evidence, be examined (*Section 342 CrPC*). The accused has a right to be examined on oath in disproof of the charges made against him (*Section 340(2) CrPC*). The Magistrate can then acquit the accused or he may convict him, if not proceeding under section 349 CrPC (*Section 245 CrPC*). The complaint can at any stage be withdrawn with the permission of the Magistrate (*Section 248 CrPC*). The Magistrate can also stop proceedings under certain circumstances (*Section 249 CrPC*). The Magistrate can also acquit accused at any stage of the proceedings (*Section 249-A CrPC*). In case of false and vexatious complaint or information compensation may be awarded and shall be recoverable as arrears of land revenue (*Section 250 CrPC*). While convicting an accused for offences in which death, hurt, injury or mental anguish or psychological damage to any person is caused or damage to or loss or destruction of any property is caused the Magistrate, unless otherwise directs for reasons to be recorded in writings, shall order for compensation to be paid to person or legal heirs. Such compensation shall be recoverable as arrears of land revenue and certain provisions of section 250 shall also apply (*Section 544-A CrPC*).

#### ***9.6.1.1 Separate Trial of Juvenile Accused***

The law requires that juvenile offenders shall be separately tried.<sup>215</sup> However, a juvenile accused may be charged with and tried together with an adult by the Juvenile Court if the Court is satisfied that it is in the interest of justice to hold a joint trial. In case of joint trial, the Juvenile Court may dispense with the physical presence of the juvenile before it without any application in this regard and juvenile may be allowed to join the Court proceedings

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<sup>215</sup> *Section 12 (1) of the JJSA, 2018*

through audio-visual technology link.<sup>216</sup> JJSA, 2018 includes the provision of legal assistance to the juvenile offenders and establishment of separate juvenile courts. It prohibits publication of criminal proceedings against juvenile offenders and bars award of death penalty and handcuffing of juvenile offenders.

#### *9.6.1.2 Disposal of cases through diversion*

Section 9 of the Juvenile Justice System Act, 2018, provides:

(1) With the consent of a juvenile or his guardian, as the case may be, the complaint against a juvenile relating to offences as specified in sub-section (6) shall be referred to the Juvenile Justice Committee for disposal of the same through diversion.

(2) The diversion can be exercised at any stage during the course of investigation by the police and during trial by the prosecution and the Court in the prescribed manner.

(3) Where a case is referred to the Juvenile Justice Committee by & the police, the submission of report of police officer required under section 173 of the Code shall be postponed till the final order of the Committee.

(4) The Juvenile Justice Committee shall dispose of a case, with consent of the person against whom the offence was committed, by resorting to different modes of diversion including-

- a) restitution of movable property
- b) reparation of the damage caused;
- c) written or oral apology;
- d) participation in community service;
- e) payments of fine and costs of the proceedings;
- f) placement in Juvenile Rehabilitation Centre; and
- g) written and oral reprimand.

Provided that where the complainant is a state functionary and the offence has not been committed against a private person, the Juvenile Justice Committee may dispose of the case through diversion with consent of the concerned public prosecutor.

(5) For the purposes of diversion, all offences either minor or major shall be compoundable.

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<sup>216</sup> Section 12 (2), (3) of the JJSA, 2018

(6) Diversion shall be exercised in the prescribed manner in cases-

- a) where a juvenile is accused of commission of minor offences; and
- b) where a juvenile is accused of commission of major offences and the age of the juvenile is not more than sixteen years at the time of commission of offence.

#### **9.6.1.3 Framing of Charge**

Chapter XIX CrPC deals with framing of charge<sup>217</sup> in criminal cases. Charge should contain the specific name of offence which is sufficient to identify it. If the accused having been previously convicted of any offence is liable by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence, the fact, date and place of the previous conviction shall be stated in the charge. If such statement has been omitted, the Court may add it any time before sentence is passed (*Section 221 CrPC*). Particulars as to time, place and person against whom or the thing in respect of which offence is committed be given (*Section 222 of CrPC*). In certain circumstances the manner of commission of offence is also given (*Section 223 CrPC*). The court may alter charge at any stage and may in certain circumstances proceed afresh with the case (*Sections 228-232 CrPC*). Normally separate trial for each separate charge is required but under certain circumstances joint trial can be held (*Sections 233,234,235,236 & 239 CrPC*).

#### **9.6.1.4 Discharge of Accused**

Before the introduction of Law Reforms Ordinance, 1972 the Magistrate could discharge the accused under section 253 of CrPC. Presently, the discharge can only be under section 494 (a) CrPC when the prosecution withdraws the case before framing of charge. The word 'discharge' is also used in section 63 and discharge of bond by Magistrate under section 173 (3) of CrPC with respect to power of Magistrate. Prior to abolition of committal proceedings it was the Magistrate who used to frame charge under Chapter-XXI of the CrPC including offences triable by Court of Session. In all cases where no charge could be framed the Magistrate could discharge the accused under section 253 of CrPC. But after the omission of this Chapter the *pari materia* provision of discharge is missing both from Chapter XX (*Trial*

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<sup>217</sup> Section 4(c) of the Cr.P.C. 1898 provides an inclusive definition of Charge. A charge is the precise formulation of the specific accusation made against a person, who is entitled to know its nature at the earliest stage. (*Reily v. K.E.*, 28 Cal. 434 p. 437)

of cases by Magistrate) and Chapter XXII-A (trial of cases before High Court and Court of Session). The discharge under section 63 or 173(3) is not discharge by the trial court but are discharges during investigation and are administrative orders and not judicial.<sup>218</sup> The provision of discharge during trial is missing like defunct 253 CrPC. But if the acquittal is made at initial stages before framing of charge the accused cannot be tried if some material comes before the court during trial of co accused or otherwise under the doctrine of double jeopardy (Section 403 CrPC) and *Autrefois Acquit*.

The finding of guilt or innocence by the police at the investigation stage is not a finding in trial culminating in conviction or acquittal and therefore the principle of double jeopardy cannot be invoked. However, if an accused is discharged by the Magistrate/Trial Court, the consequence would be that he is discharged from his bond at a stage when his custody is no longer required by the investigating agency. But such an order is only an executive order passed at the investigating stage when the case has yet to go for trial. Nevertheless, the Court still try him if some fresh material is brought before it.<sup>219</sup>

While going through Chapter XX or XXII-A no where it is mentioned that if no charge could be framed then what would court do? The wordings of section 265-D CrPC show that court shall frame charge only if there is ground for proceeding after looking in to various documents placed by prosecution. No such *pari materia* section is available in Chapter XX. The wordings of section 242 CrPC are such which make it incumbent on Magistrate to frame charge. In such situation there is no bar to meet this difficulty by seeking assistance from jurisprudence by concluding that if no charge can be framed then Magistrate or Court shall discharge the accused by seeking help from previous state of law ( defunct section 253 CrPC) at the time of framing charge (*AIR 1925 Cal 34=83 Ind Cas 273 (FB); AIR 1924 All 328 (FB) + AIR 1924 Cal 257 (FB); AIR 1921 Cal 397 (FB) as referred to by Sh. Shaukat Mahmood and Sh.Nadeem Shaukat, p-99 and referred in SM Zaffar, Understanding the Statutes, Brite Books, on page 595*). The very acquittal of accused before framing of charge under section 494 (a) is based on this principle because only discharge can be ordered before framing of charge.

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<sup>218</sup> *Malik Hamid Saeed vs The State (2004 PCrLJ 117); Bahadur etc vs The State (PLD 1985 SC 62)*

<sup>219</sup> *Sher Muhammad Unar and others Versus The State (PLD 2012 SC 179)*

#### *9.6.1.5 Summary Trial*

The CrPC has provided a procedure for summary trial of petty offences. The reason for such type of trial is to cut short the lengthy trial procedure in petty offences. The chapter dealing with summary trial is XXII. The Magistrate First Class specially empowered by Provincial Government or any Bench of Magistrates invested with powers of Magistrate First Class and especially empowered by Provincial Government may try offences summarily. Only those offences can be tried summarily which are mentioned in section 260 & 261 CrPC. The procedure to be followed is the same as of Chapter XX except that when there is no appeal there is no need of recording evidence or framing a formal charge and only particulars as mentioned in section 263 CrPC shall be maintained. In appealable cases only substance of evidence is to be recorded and particulars as mentioned in section 263 and before passing a sentence a judgment shall be recorded. No sentence exceeding three months imprisonment can be passed in summary trial (Section 262 of CrPC).

#### *9.6.1.6 Recording of Evidence*

All evidence is to be recorded in presence of accused or his pleader. Except as otherwise expressly provided, all evidence taken under Chapters XX, XXI, XXII and XXII-A shall be taken in the presence of the accused, or when his personal attendance is dispensed with in presence of his pleader.

The manner of recording evidence is given in sections 354 to 363 of CrPC. The examination of the accused shall be taken in the manner given in section 364 of CrPC. The whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, in the language in which he is examined, or, if that is not practicable, in the language of the Court or in English; and such record shall be shown or read to him or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers. When the whole is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate or Judge of such Court, and such Magistrate or Judge shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused. In a case in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall be bound as the examination proceeds, to make memorandum thereof in the language of the Court or in English, if he is sufficiently acquainted with latter

language; and such memorandum shall be written and signed by the Magistrate or Judge with his own hand and shall be annexed to the record. If the Magistrate or Judge is unable to make a memorandum as above required, he shall record the reason of such inability. Recording of evidence of witness in Court by Reader in absence of Presiding Officer and evidence so recorded not bearing signatures of Presiding Officer would be an illegality vitiating trial.<sup>220</sup>

Chapter XLI of CrPC deals with special rules of evidence. The deposition of medical witness if taken as provided by section 509 then that statement may be given in evidence without calling the witness. The reports of certain experts can be used in evidence without calling him (*Section 510 CrPC*). The previous conviction can be proved by an extract certified under the hand of the officer having the custody of the records of the Court in which such conviction or acquittal was made or a copy of the sentence or order or in case of conviction, either by a certificate signed by the officer in charge of the jail in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered. Evidence may be recorded in absence of accused under section 512 by Magistrate competent to send accused for trial to Court of Sessions or by the court competent to try the accused. This evidence may be taken when the court is satisfied about the abscondence of accused (*Section XXVIII, Vol II KPDCR*). Such statement can be given in evidence against him on the inquiry into, or trial for the offence with which he is charged, if the deponent is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

#### *9.6.1.7 Non-appearance of Prosecution Witnesses*

Non-attendance of witnesses always remains a serious issue; however it aggravates when it is a state case and all witnesses belong to police department but they show reluctance to appear in the Court. Non-production of prosecution witness despite of adoption of coercive measures will give rise to two possibilities: first, that either the case is false and prosecution has not come forward with evidence; and second, accused is influential person and has prevailed upon P.Ws not to depose against him so he may arrange his bail and ultimate acquittal from the Court. In these circumstances, trial court should direct DPO to execute court' order and take responsibility to produce all the officials PWs.<sup>221</sup>

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<sup>220</sup> *Muhammad Rafique vs Muhammad Ramzan (2007 SCMR 540)*

<sup>221</sup> *Talib Hussain vs The State (2010 SCMR 69)*

#### 9.6.1.8 Lunatics

Under the existing law, the Magistrate, Court of Sessions or High Court having reason to believe about the unsoundness of mind of accused can make inquiry by getting the accused examined from the civil surgeon of the district or such other medical officer as the provincial government directs and then can postpone further proceedings (*Sections 464 & 465 CrPC*). Pending such trial the accused may be released on furnishing sufficient security or may be kept in safe custody (*Section 466 CrPC*). At any time the Magistrate or Court can resume proceedings after getting satisfied that now accused is capable of defending himself and if again the position is unchanged than the accused shall be dealt with under Sections 464 & 465 CrPC. When Magistrate or Court sees reason to believe that the accused committed an offence due to unsoundness of his mind, he can be acquitted (*Sections 469 & 470 CrPC*). Such person shall then be kept in safe custody (*Section 471 CrPC*).

Recently, the Hon'ble Supreme Court of Pakistan in a judgment reported as PLD 2021 SC 488, directed that the terms "unsoundness of mind" and "unsound mind" occurring in PPC, CrPC, and the Prison Rules, 1978 should be substituted with term "mental disorder" or "mental illness", and the term "lunatic", wherever it occurred shall be substituted appropriately.

The apex court further directed that the words "Civil Surgeon" and "medical officer" used in Chapter XXXIV, CrPC and the Prisons Rules, 1978 should be substituted by the relevant Legislatures with "Medical Board", and that the Medical Board shall comprise of qualified and experienced psychologists and psychiatrists.

The apex court while examining S. 84 PPC, Ss. 464 & 465 CrPC, Prisons Rules, 1978, Mental Health Laws of the country viz-a-viz Mentally ill prisoners under trial or on death row passed the following directions with respect to establishment of secure Mental Health Facilities, constitution of Medical Boards for examination and evaluation of prisoners:

(i) The Prisons Rules, 1978 shall be appropriately amended so as to bring the Jail Manuals of all the Provinces in harmony;

(ii) The Federal Government (for Islamabad Capital Territory) and all the Provincial Governments shall immediately establish/create High Security Forensic Mental Health Facilities in the teaching and training institutions of mental health for assessment,

treatment and rehabilitation of under trial prisoners and convicts who had developed mental ailments during their incarceration;

(iii) The Federal Government (for Islamabad Capital Territory) and each Provincial Government, shall immediately constitute and notify a Medical Board comprising of three qualified and experienced Psychiatrists and two Psychologists from public sector hospitals for examination and evaluation of the condemned prisoners who were on death row and were suffering from mental illness to ensure that such mentally ill condemned prisoners who no longer had the higher mental functions to appreciate the rationale and reasons behind the sentence of death awarded to them were not executed;

(iv) The Federal Government (for Islamabad Capital Territory) and all the Provincial Governments shall immediately constitute and notify a Medical Board consisting of two qualified and experienced Psychiatrists and one Psychologist from public sector hospitals at Islamabad (in case of Federal Government) and at each Divisional Headquarter of the Provinces for examination, assessment and rehabilitation of the prisoners i.e. under-trial and convicts, if referred by the jail authorities. The said Medical Board shall also be authorized to examine those accused persons who were referred by the trial Court(s) for examination under the provisions of sections 464 and 465, CrPC;

About scope and burden of proof in respect of mental condition of accused at the time of commission of offence, the apex court held that whenever the plea was raised regarding the state of mind of accused at the time of commission of offence, the onus would be on the defence (accused) to prove such a plea as contemplated in Art. 121 of the Qanun-e-Shahadat, 1984 (QSO).

#### **9.6.1.9 Pardon**

In the case of any offence triable exclusively by the High Court or Court of Sessions, or any offence punishable with the imprisonment which may extend to ten years, or any offence punishable under section 211 of the Pakistan Penal Code with imprisonment which may extend to seven years, or any offence under any of the following sections of the Pakistan Penal Code *viz.* sections 216-A, 369, 401, 435 and 477-A, the officer incharge of prosecution in the district may, at any stage of the investigation or inquiry into, or the trial of the offence, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, tender a pardon to such person on condition of

his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether, as principal or abettor, in the commission thereof: No such pardon can be given to person involved in offence relating to hurt or *qatl* without permission of the victim or, as the case may be, of the heirs of the victim (*Section 337 CrPC*). Every person accepting a tender under this section shall be examined, as a witness in the subsequent trial, if any. In every case where a person has accepted a tender of pardon and has been examined the Magistrate before whom the proceedings are pending shall, if he is satisfied that there are reasonable grounds for believing that the accused is guilty of an offence, commit him for trial to the Court of Sessions or High Court, as the case may be. Such powers of pardon can be exercised by High Court or Court of Sessions under section 338. In case, such person does not abide by the terms of pardon in opinion of Public Prosecutor he can be tried for the offence (*Section 339 CrPC*).

## 9.6.2 Trial by Court of Sessions

The procedure to be followed by High Court and Court of Sessions in trial of cases is given in Chapter XXII-A of CrPC.

### 9.6.2.1 Supplies of the Copies

In all FIR cases, copies of all relevant material with certain exceptions shall be given to accused *not less than seven days* before commencement of trial (*Section 265-C*). Accused is entitled, as of right, to get copies of the statements of all witnesses recorded under section 161 of CrPC in terms of section 265-C (1) (c) of CrPC. irrespective of the fact whether they have been cited as witnesses in the calendar attached to the challan or not, seven days before the commencement of the trial.<sup>222</sup> Section 265-C of CrPC, speaks of supplying of statement and documents to accused free of costs before commencement of trial and is mandatory provision.<sup>223</sup>

### 9.6.2.2 Framing of Charge

The trial formally begins with the framing of charge. If, after perusing the police report or, as the case may be, the complaint, and all other documents and statements filed by the prosecution, the Court is of opinion that there is ground for proceeding with the trial

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<sup>222</sup> *Muhammad Riaz vs The State (PLD 2003 Lahore 290)*

<sup>223</sup> *The State through Regional Director ANF, Balochistan V. Abdul Wahab etc (2019 MLD 2048)*

of the accused it shall frame in writing a charge against the accused.<sup>224</sup> After framing of charge, it shall be read and explained to the accused, and he shall be asked whether he is guilty or has any defence to make. If the accused pleads guilty, the Court shall record the plea, and may in its discretion convict him thereon.<sup>225</sup> If no conviction or admission is made then the Court shall hear the complainant and take all necessary evidence of prosecution and then defence.<sup>226</sup>

### **9.6.2.3 Acquittal of Accused**

The Court can acquit accused at any stage of the proceedings if, after hearing the prosecutor and the accused and for reasons to be recorded, it considers that there is no probability of the accused being convicted of any offence.<sup>227</sup>

### **9.6.2.4 Examination of the Accused**

The accused has a right to be examined on oath in disproof of the charges made against him (*Section 340 (2) CrPC*). The provision as contained in section 342 of CrPC is enacted to safeguard the interest of the accused for the same reason that prime object of the section is to enable the accused to explain any circumstance appearing against him in the evidence, the intention of the provision is the furtherance of the ends of justice and to enable the court to decide the question of the guilt of the accused.

The Court at any stage may examine the accused without previously warning him by putting such questions as court thinks necessary. But accused shall, after the closure of prosecution evidence, be examined (*Section 342 CrPC*).

Under section 265H CrPC, if in any case in which a charge has been framed the Court finds the accused not guilty, it shall record an order of acquittal. Similarly, if in any case the Court finds the accused guilty the Court shall, subject to the provisions of section 265I, pass a sentence upon him according to law.

While convicting an accused for offences in which death, hurt, injury or mental anguish or psychological damage to any person is caused or damage to or loss or destruction of any property is caused the Court, unless otherwise directs for reasons to be recorded in writings, shall order for compensation to be paid to person hurt or injured or legal heirs. Such

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<sup>224</sup> *Section 265D CrPC*

<sup>225</sup> *Section 265E CrPC*

<sup>226</sup> *Section 265F CrPC*

<sup>227</sup> *Section 265K CrPC*

compensation shall be recoverable as arrears of land revenue and certain provisions of section 250 shall also apply (*Section 544-A CrPC*).

#### **9.6.2.5 Bails and bonds**

Chapter XXXIX and XLII of the CrPC deal with the subject of bails and bonds. In bailable offence grant of bail is right of accused on recognizance or on furnishing sureties (*Section 496 CrPC*). In non-bailable offences the accused can be released in certain circumstances on furnishing bail bonds (*Section 497 CrPC*). The bail required by police or Magistrate may be reduced by High Court or Court of Sessions (*Section 498 CrPC*). After furnishing of required bail bonds the accused shall be released (*Section 500 CrPC*). Sureties may be discharged under section 502 CrPC. Instead of executing a bond the accused may deposit money or Government promissory notes except in cases of bonds for good behavior (*Section 513 CrPC*). In case bond is forfeited the recovery of sum of bond shall be made in the manner laid down in section 514 CrPC. Such order is appealable/revisable (*Section 515 CrPC*). In case of insolvency or death of surety fresh bond may be taken (*Section 514-A CrPC*). In case bond is taken from minor then only surety is to be accepted (*Section 514-B CrPC*). For further guidance see Section XXXVIII of Vol II of KPDCR.

#### **9.6.2.6 Habeas corpus**

The jurisdiction to issue direction of the nature of habeas corpus lies with the High Court under Chapter XXXVII. This jurisdiction is in addition to one conferred on the High Court under Article 199 of the Constitution. This jurisdiction may be conferred by High Court on a Sessions Judge or Additional Sessions Judge (*Section 491 CrPC*). In exercise of this power the High Court has conferred this jurisdiction on all Sessions Judges and some Additional Sessions Judges in the province (*See Document No 5(2-3) & 8A(2-3) at pages 255 & 258 of JEC2*). While exercising this power the courts are to follow the rules contained in Chapter 4-F, Vol V of PHCR. Under section 491 CrPC, search warrant may be issued to bailiff and expenses thereof to be decided by court in accordance with rule 10 *ibid*.

#### **9.6.2.7 Public Prosecutor**

The Public Prosecutor is appointed by Provincial Government under section 492 CrPC. Now an independent prosecution service has been raised in Khyber Pakhtunkhwa by an Act called The Khyber Pakhtunkhwa Prosecution Service (Constitution, Functions and Powers) Act, 2005. (Khyber Pakhtunkhwa Act No. I of 2005). Some of the powers of prosecutors under

CrPC are to grant pardon (Section 337 CrPC), public prosecutor may appoint any person to be prosecutor (*Section 492(2) CrPC*).

Defamation against state functionaries can be taken cognizance of on complaint of Public Prosecutor (Section 198-A CrPC). Report under Section 173 CrPC can be filed through Public Prosecutor. He can withdraw prosecution under section 494 CrPC.

#### ***9.6.2.8 Irregular Proceedings***

This is an important part of CrPC which guides the court as to whether an irregularity is fatal or not. Chapter XLV deals with the subject. There are some irregularities which do not vitiate the proceedings (*Section 529 CrPC*). There are other irregularities which vitiate proceedings (*Section 530 CrPC*). Proceedings at wrong place itself do not vitiate the proceedings unless failure of justice is caused (*Section 531 CrPC*). Similarly, non compliance with the provisions of section 164 or 364 does not make the defect fatal so long as the error has not injured the accused as to defence on the merit (*Section 533 CrPC*). Omission to frame charge likewise, is not in itself fatal unless failure of justice is caused (*Section 535 CrPC*). Finding or sentence when reversible by reason of error or omission in charge or other proceedings can be seen in section 537 of CrPC.

#### ***9.6.2.9 Case property***

The proper application of laws and rules on the subject by the agencies involved in the process i.e. the police and Magistracy would help come up to the mark. The correct legal position in this regard is given below. The Police seize weapons, articles and property in connection with criminal cases and also, sometimes, take charge of property which may be unclaimed under the following provisions of law.

- a. Sections 51, 523 and 550 CrPC.
- b. Section 53 CrPC
- c. Sections 165, 166, 153 and 170 CrPC
- d. Chapter IX of the Khyber Pakhtunkhwa Police Act, 2017.
- e. Local and Special Laws.

As to (a): - Regarding seizure of property, the police is bound to report forthwith to concerned Magistrate who shall pass appropriate orders under Sections 523 to 525 CrPC for the disposal or delivery thereof.

As to (b): - The offensive weapons shall be delivered to the Court and the Court shall pass appropriate orders.

As to (c): - All the properties, weapons and other articles seized under sections 165,166,153 and 170 CrPC shall be sent to the concerned Magistrate at the time of forwarding the accused person to a Magistrate under Section 170 CrPC. unless already dealt with by the Magistrate. The Magistrate is empowered under Section 516A CrPC for making such orders as it thinks fit for the proper custody of such property pending the conclusion of inquiry or trial. If the property is Motor Vehicle then the police are bound to produce before a Magistrate after rapid investigation or by means of incomplete challans (Police Rules).

As to (d): - Unclaimed properties taken into possession under Chapter IX of the Khyber Pakhtunkhwa Police Act, 2017 have got no concern with the Courts.

As to (e): - The weapons, articles and properties seized under the local and special laws shall be dealt with under the Code of Criminal Procedure if the Code is made applicable to the extent. In case of Control of Narcotic Substances Act 1997, the Code is made applicable to the extent of searches and arrest in so far as not inconsistent with the provisions of Sections 20, 21, 22 and 23 of the Act. Sections 47 of the Act has made the Code applicable to trials and appeals before a Special Court except otherwise provided in the Act. The Code “is, therefore, applicable in dealing with the articles, properties etc seized under the CNSA, 1997. The applicability to the extent is further confirmed by including a proviso to Section 74 of the Act. This proviso puts certain restrictions on the powers of the court to give custody of the material to certain persons mentioned therein. In short, if no special procedure for dealing with case properties is given in special enactments, then, the Code shall be followed, however under Section 26 of the Khyber Pakhtunkhwa Control of Narcotics Substances Act, 2019 the Code has been made applicable to all proceeding under the Act *ibid*.

#### **9.6.2.10**      *Judgment*

Chapter XXVI of CrPC deals with the subject. The judgment is to be pronounced in open court either immediately after the termination of trial or on some future date of which due notice to parties shall be given. The judgment shall be in the language of the court or in some

other language which the accused or his pleader understands (*Section 366 CrPC*). The judgment is to be written by Presiding Officer himself or under his dictation in court language or in English. The judgment should contain the points for determination, the decision and reasons for decision. It shall be signed and dated by Presiding Officer in open court at the time of announcement and when the judgment is not in the handwriting of Presiding Officer then every page shall be signed by him (*Section 367 CrPC*). Judgment shall be passed in alternative if there exists doubt as to under which of the provisions of PPC the offence falls (*Section 367(3) CrPC*). In judgment of acquittal the offence shall be mentioned and direction be issued that accused be set at liberty (*Section 367(4) Cr PC*). If the accused is sentenced for offence punishable with death and court awards no death penalty then reason for not doing so shall be mentioned (*Section 367(5) CrPC*). If the sentence is of death then the sentence shall direct that he be hanged by the neck till he is dead (*Section 368 CrPC*). The judgment once signed cannot be altered except clerical mistake (*Section 369 CrPC*). At the time of conviction the copy of judgment shall be supplied free of cost to accused. If accused desires then translation of judgment in his own language, if practicable, or in language of the court shall be given to him. This is not applicable in summary trial conviction (*Sections 371 & 372 CrPC*). The court of session shall forward a copy of its finding and judgment to officer incharge of prosecution (*Section 373 CrPC*).

#### **9.6.2.11**      *Submission of sentence for confirmation*

In case of sentence of death passed by Court of Session it shall not be executed unless confirmed by the High Court (*Section 374 CrPC*). The High Court may confirm the sentence or alter it or annul the conviction and convict the accused for some other offence or acquit him. No order for confirmation shall be made until the period allowed for appeal has expired or appeal is disposed of (*Section 376 CrPC*). The copy of confirmation of sentence shall be sent to concerned court (*Section 379 CrPC*).

#### **9.6.2.12**      *Execution*

After the confirmation of sentence by High Court the concerned court shall cause such order to be carried in to effect by issuing a warrant or such other step as may be necessary. But no such sentence of death shall be carried in to effect if legal heirs of deceased have entered in to compromise (*Section 381 CrPC*).

#### **9.6.2.13**      *Postponement of capital sentence on pregnant woman*

If a pregnant woman is sentenced to death, her execution may be stayed by the High Court or sentence may be converted in to life imprisonment (*Section 382 CrPC*). The execution of certain sentences may be postponed by the Court under section 382A CrPC.

#### **9.6.2.14**      *Benefit of Section 382B of CrPC*

Where a Court decides to pass a sentence of imprisonment on an accused for an offence, it shall take into consideration the period, if any, during which such accused was detained in custody for such offence. While awarding sentence of imprisonment period of detention shall be taken in to account (*Section 382-B CrPC*).

#### **9.6.2.15**      *Scandalous or false and frivolous pleas to be considered in passing sentence*

In passing a sentence on an accused for any offence, a Court may take into consideration any scandalous or false and frivolous plea taken in defence by him or on his behalf.<sup>228</sup> In cases other than section 381 or section 382-A the court passing the sentence forthwith forward a warrant to the jail along with convict if not already in jail (*Section 383 CrPC*). Warrant for levy of fines shall be issued by the court by issuing warrant of attachment or sale of any movable property of offender or warrant to concerned revenue authority for realization of fine by the process of execution against property of movable or immovable or both of the offender. And if the offender has undergone the whole of sentence of imprisonment passed in the alternative to non- payment of fine then no such warrant shall be issued. The concerned revenue authority to whom warrant as aforesaid is issued shall become decree holder for the purpose of getting it executed through civil court (*Section 386 CrPC*). If the sentence is of fine only the court may suspend the sentence and order for payment in installments by releasing accused on bond. And if no payment is made in installment then sentence may be executed (*Section 388 CrPC*). The execution of sentence of escaped convict is to be made according to section 396 CrPC. The sentence of offender already undergoing sentence of imprisonment shall run consecutively unless court direct otherwise for concurrent running of sentence. But the sentence of a person shall run immediately who is already undergoing sentence under section 123 CrPC (*Section 397 CrPC*). A youthful offender imprisoned may be sent to reformatories instead of jail (*Section 399 CrPC*). When a sentence has been fully

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<sup>228</sup> *Section 382-C of CrPC*

executed, the officer executing it shall return it to the court certifying the manner of execution (*Section 400 CrPC*).

## 9.7 Criminal Appeal

Chapter XXXI of CrPC deals with appeal in criminal cases. The appeal is competent only when provided for by law (*Section 404 CrPC*). In following cases appeal lies:

- Appeal from order rejecting application for restoration of attached property;
- Appeal from order requiring security for keeping the peace or for good behavior; and
- Appeal from order refusing to accept or rejecting a surety. (*Sections 405 to 406A*).

No appeal in case of plead guilty (*Section 412 CrPC*). No appeal in petty cases (*Section 413 CrPC*). No appeal in certain summary convictions (*Sections 414 & 414A CrPC*). There is special right of appeal in certain cases (*Section 415A CrPC*). Appeal can be filed by Public Prosecutor in cases of acquittal to High Court on direction of Provincial Government (*Section 417 CrPC*). An aggrieved person may file appeal to High Court. Appeal is admissible on matters of facts and law (*418 CrPC*). Appeal shall be filed by moving a petition with a copy of judgment appealed against (*Section 419 CrPC*). If the appellant is in jail he may forward the appeal through incharge jail (*Section 420 CrPC-Section XVI, Vol I KPDCR*). The court may reject appeal summarily after hearing the appellant (*Section 421 CrPC*). The procedure and powers of appellate court are mentioned in sections 422 & 423 CrPC. Pending appeal the Appellate Court may suspend the sentence (*Section 426 CrPC*). The accused may be arrested in appeal against acquittal (*Section 427 CrPC*). Appellate court may take further evidence or direct it to be taken (*Section 428 CrPC*).

### 9.7.1 Suspension of Sentence

Section 426, CrPC has two parts: one part was relatable to a situation when a petition for suspension is filed along with the appeal and the convict has not surrendered before the police but appeared before the court, in such a situation the court may "order that the execution of the sentence or order appealed against be suspended". Second part of S.426, CrPC is relatable to situation when the convict had already been arrested and for such eventuality S.426, CrPC, stipulated that "and, also if he is in confinement, that he be released on bail or on his own bond" Appearance before the court in a petition under S.426, Cr.P.C, is

equivalent to surrender.<sup>229</sup> Surrender before police not a condition precedent under S.426, CrPC appearance before court amounting to surrender.<sup>230</sup> In absence of any guideline, the principles which govern S.497, CrPC. may guide the exercise of discretion under S.426, CrPC.<sup>231</sup> In case of suspension of sentence, only tentative assessment of available evidence and of judgment is permissible and detailed appraisal of evidence is to be avoided.<sup>232</sup>

## 9.8 Revision

The High Court or any Sessions Judge may call for the record of any subordinate court to satisfy him as to the correctness, legality or propriety of any finding, sentence or order and may suspend the execution of sentence (*Section 435 CrPC*). The High Court or Sessions Judge may order further inquiry in certain cases (*Section 436 CrPC*). The High Court may, in its discretion exercise any of the powers conferred on a Court of Appeal by sections 423, 426, 427 and 428 or on a Court by section 338, and may enhance the sentence; and, when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429 (*Section 439 CrPC*). Sessions judge has the same power of revision as High Court (*Section 439-A CrPC*). Hearing party is optional (*Section 440 CrPC*).

## 9.9 Justice of Peace

All Sessions Judges and on nomination by Sessions Judge, the Additional Sessions Judges are ex-officio justice of peace throughout the district in which they are serving (*Section 25 CrPC*). An ex-officio justice of peace may issue appropriate directions to the police authorities concerned on a complaint regarding: (i) non-registration of a criminal case; (ii) transfer of investigation from one police station to another; (iii) neglect, failure or excess committed by a police authority in relation to its functions and duties. Justice of the Peace is saddled with the administrative duty to redress the grievances of complainant aggrieved by refusal of police officer to register their reports.<sup>233</sup> The powers exercise by ex-officio Justice Peace u/s 22-A, CrPC are neither additional nor has super imposing effect on the power of the executive and judicial authorities which have been expressly conferred upon those authorities regulating particular subject matter. Powers of Justice of Peace are very limited

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<sup>229</sup> *Mazhar Ali vs The State (2012 S C M R 997)*

<sup>230</sup> *Mazhar Ali vs The State (2012 SCMR 997)*

<sup>231</sup> *Mazhar Ali vs The State (2012 SCMR 997)*

<sup>232</sup> *Shamshad Hussain v. Gulraiz Akhtar (PLD 2007 SC 564)*

<sup>233</sup> *2011 P.Cr.L.J. 268*

which have been given to aid assist and authorize the criminal jurisdiction system.<sup>234</sup> Only jurisdiction which can be exercised by an Ex-officio Justice of the Peace under Section 22-A, CrPC is to examine whether the information disclosed by the applicant did or did not constitute a cognizable offence and if it did then to direct the concerned SHO to record an FIR, without going into the veracity of the information in question and no more.<sup>235</sup> The word 'may' used in section 22-A(6)(iii) CrPC, confers discretionary power upon the Ex-Officio Justice of the Peace in this regard. No doubt Ex-Officio Justice of the Peace is obliged to exercise powers vested in him under the law in judicious manner with application of mind taking into consideration the facts and material of the case. Jurisdiction under Ss. 22-A and 22-B CrPC, cannot be exercised mechanically by the ex officio justice of peace by directing registration of FIR.<sup>236</sup> Justice of Peace is competent to examine complaint with full application of legal mind and is not supposed to accept and believe the same as gospel of truth. If Justice of Peace after examination of complaint as such comes to the conclusion that allegations set up by complainant person are ridiculous, or self-contradictory or vague or barred by law or offensive to public policy and accepted standard of morality, he may decline the request for registration of a case.<sup>237</sup> It should contain precise controversy of fact and law and observations thereon with reasons. Sketchy, slipshod and devoid of reasons orders cannot be called a speaking or judicial order within the parameters of law.<sup>238</sup>

### *9.9.1 No hearing of the nominated accused*

At the time of first information report, accused persons named in the complaint, have no right of hearing.<sup>239</sup> Justice of Peace while deciding the petition under sections 22-A and 22-B of CrPC is not required to issue notice to person against whom registration of a case is required but is required to summons the concerned Police Officer so that a direction could be issued to him to register a case.<sup>240</sup> The basic provision provides no hearing of the accused before passing order under section 22-A, CrPC while exercising constitutional jurisdiction in such a case, Court is not obliged to hear the accused.<sup>241</sup>

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<sup>234</sup> *Mst. Bhaitan v. The State and 3 others* (PLD 2005 Kar 621)

<sup>235</sup> *Muhammad Bashir Khan v. Station House Officer, Okara Cantt. etc* (PLD 2007 SC 539)

<sup>236</sup> *Rai Ashraf vs Salim Bhatti etc* (PLD 2010 SC 691)

<sup>237</sup> *Muhammad Mushtaq vs Addl: Sessions Judge* (2008 YLR 2301)

<sup>238</sup> *Nazim Paly Sock Ltd Versus Collector of Customs* (2005 YLR 1019)

<sup>239</sup> 2002 PCrLJ 9

<sup>240</sup> *Safdar Ali vs SHO Bahara Kahu* (2011 PCrLJ 913)

<sup>241</sup> *Muhammad Aslam v. Additional Sessions Judge & others* (2004 PCrLJ 1214 (Lahore))

## 9.10 Punishments

The punishments to which offenders are liable under the provisions of section 53 of the Pakistan Penal Code are:-

- Firstly, Qisas;
- Secondly, Diyat;
- Thirdly, Arsh;
- Fourthly, Daman;
- Fifthly, Ta'zir;
- Sixthly, Death;
- Seventhly, Imprisonment for life;
- Eighthly, Imprisonment which is of two descriptions, namely:--
  - (i) Rigorous, i.e., with hard labour;
  - (ii) Simple;
- Ninthly, Forfeiture of property;
- Tenthly, Fine

### 9.10.1 Forfeiture of property and Fine

The sentence of death can be commuted for any other punishment by Government. If death was awarded for offence of *qatl* no commutation shall be made without the consent of heirs of the victim (*Section 54 PPC*). The sentence of imprisonment for life can be commuted for imprisonment not exceeding fourteen years by Government. If punishment was awarded for offence under Chapter XVI no commutation shall be made without the consent of heirs of the victim (*Section 55 PPC*). In calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty five years (*Section 57 PPC*). Sentence may be (in certain cases of imprisonment) wholly or partly rigorous or simple (*Section 60 PPC*). In case no maximum amount of fine is prescribed it can be unlimited but not excessive (*Section 63 PPC*). The court has power to order for imprisonment of either description in default of fine. The maximum punishment in default of fine should not exceed one fourth of maximum limit of imprisonment expressed for the offence (*Sections 64, 65 & 66 PPC*). In case the offence is punishable for fine only then the punishment in default of fine should not exceed the scale given in section 67 PPC. Imprisonment terminates on payment of proportional part of fine (*Section 69 PPC*). The fine, or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence, and if, under the sentence, the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of the period; and the death of the offender does not discharge from the liability any property which would, after his death be legally liable for

his debts (*Section 70 PPC*). Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such offences, unless it be so expressly provided. Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or where several acts, of which one or more than one would be itself or themselves constitute an offence, constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences (*Section 71 PPC*). In case of doubt of which offence the accused is guilty shall be punished for lesser punishment (*Section 72 PPC*). Solitary confinement and limit of solitary confinement is mentioned in sections 73 & 74 PPC. Whoever, having been convicted by a Court in Pakistan of an offence punishable under Chapter-XII or Chapter-XVII of this Code with imprisonment of either description for a term of three years or upwards, shall be guilty of any offence punishable under either of those Chapters with like imprisonment for the like term, shall be subject for every such subsequent offence to imprisonment for life, or to imprisonment of either description for a term which may extend to ten years (*Section 75 PPC*).

### 9.11 Compromise in offences punishable under Sharia

An offence punishable with *Hadd* under *Sharia* could not be compromised or withdrawn or pardoned, even by the State, after it is brought to the Court for adjudication.<sup>242</sup> Prosecution cannot be withdrawn in respect of an offence punishable with *Hadd* at any stage even by the Government and also in case of *Qisas* except by the heirs of the deceased. Withdrawal is authorised in offences punishable by *Ta'zir* in Public interest by the State.<sup>243</sup> If death sentence is awarded by way of *Hadd* it is not pardonable by the Head of the Islamic State as it relates to *Hudood*. If death sentence as *Qisas* is awarded by Court under the law of *Qisas* and *Diyat*, the commutation of death sentence rests in the hand of the heirs of the deceased or the victim who suffered bodily injuries.<sup>244</sup> Before *Diyat* could be enforced all the *Sharia* heirs of the deceased must agree to forgive the accused.<sup>245</sup> An amnesty declared by the President of Pakistan on 7<sup>th</sup> December 1988 was challenged in a number of cases as unconstitutional and un-Islamic. It was decided that persons who are not convicted under the law of *Hudood*,

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<sup>242</sup> *Ghulam Muhammad vs Mst. Murad Bakhta and 6 others* PLD 1991 FSC 78 at p. 79)

<sup>243</sup> *Habib ul Wahab Al Khairi etc vs Federation of Pakistan* (PLD 1991 FSC 236)

<sup>244</sup> *Habib Wahab Al Khairi etc vs Federation of Pakistan* (PLD 1991 FSC 236) at p. 257

<sup>245</sup> *Muhammad Pervaiz Akhtar vs The State* 1986 PCrLJ 1740 Lahore)

*Qisas, and Diyat*, their sentences can be remitted.<sup>246</sup> The President and the provincial government has the authority to commute the sentence of death awarded in a *Ta'zir* offence for public interest.<sup>247</sup>

An accomplice may be pardoned in a *Ta'zir* offence to acquire evidence for the safe administration of justice. The same is not available in *Qisas* crime.<sup>248</sup> It should follow that the rule of *Qisas* should also be applicable to *Hudood* offences as the nature of the latter crimes are more serious in nature, from an Islamic perspective.

## 9.12 Prosecution for False Complaint

Where the complainant's accusation are proved fabricated and concocted, the conduct of the complainant is illegal, which cannot be left unnoticed. Police may be directed to proceed against the complainant under sections 181 & 182 of PPC, who prima facie had lodged a false complaint.<sup>249</sup>

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<sup>246</sup> *Hakim Khan etc vs Government of Pakistan (PLD 1992 SC 595)*

<sup>247</sup> *Habib ul Wahab Al Khairi etc vs Federation of Pakistan (PLD 1991 FSC 236 at p. 257)*

<sup>248</sup> *Proviso to Section 338 CrPC.*

<sup>249</sup> *Mst Suraya Begum vs IGP, Punjab (2012 SCMR 1069); Muhammad Afzal v. The State (2001 SCMR 1615)*

## Chapter X: Special Laws

Under section 41 of the Pakistan Penal Code, 1860 a ‘Special Law’ is a law applicable to a particular subject. Whenever there is some special (including local law) on a subject the general law gives way to special law (*Generalia specialibus non derogant*). The enactment of a special law does not make the general law or any other special law inoperative by itself in the absence of express repeal. Where both general law and special law are applicable, preference ought to be given to provision of special laws.<sup>250</sup>

The following case law may be of benefit to the courts for proper application of laws:

- In case of conflict between two provisions of law the courts are to follow the principle of harmonious interpretation. Laws should not be left redundant or surplus rather should be interpreted in a way to save both.<sup>251</sup>
- Implied repeal can only be inferred, when later law overrides earlier law and is totally inconsistent with earlier law and the two cannot stand and co-exist together.<sup>252</sup>
- There is presumption against repeal by implication; and the reason of this rule is based on the theory that the Legislature while enacting a law has a complete knowledge of the existing laws on the same subject –matter, and therefore, when it does not provide a repealing provision, the intention is clear not to repeal the exiting legislation. However the repeal is inferred by necessary implication when the provisions of later law are so inconsistent with or repugnant to the provisions of the earlier law that the two cannot stand together.<sup>253</sup>

It should be taken note of that special law even if earlier in time shall prevail over general law in case of conflict under the principle of *Generalia specialibus non derogant*. Whenever there is conflict amongst various special laws then the court can wriggle out of the situation by classifying the special laws into local and special laws in the following way.

- Jurisprudentially local law is one which deals with particular class of people or particular area of state and local law is, therefore, more special law amongst special laws. Normal special laws, in contradictions to local laws, deal with special subjects only and not special class of people or special area.
- When special law dealing with a subject is compared with local law (dealing with

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<sup>250</sup> 2001 YLR 289

<sup>251</sup> PLD 2008 SC 779

<sup>252</sup> PLD 2014 Peshawar 170

<sup>253</sup> AIR 2003 SC 3236

special class of person or area) then former is general law as compared to later. And if there is contradiction between these two, then later being more special law will prevail over the former even earlier in time.<sup>254</sup> And if both are local laws and no reconciliation is possible then naturally the later in time shall prevail.

The list of Special Laws is **Annex-D**.

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<sup>254</sup> AIR 1930 Mad 963, 968 & 969

## Chapter XI: Law of Evidence

### 11.1 The Qanoon-e-Shahadat Order, 1984

The Qanoon-e-Shahadat Order, 1984 (P.O.No.X of 1984) is the law of evidence in vogue in Pakistan. This law applies to all judicial proceedings in or before any court, including a court martial, a tribunal exercising judicial or quasi-judicial powers or jurisdiction but does not apply to proceedings before an arbitrator (*Article 1(2) QSO*). The scheme of the law is to lay down the criteria for relevant, admissible, inadmissible and cogency of fact and other material. The procedure to testify a fact is laid down in Chapter-X of the Qanoon-e-Shahadat Order on the examination of witnesses. Under proviso number 3 to Article 3 of QSO, the Court shall determine the competence of a witness in accordance with the qualifications prescribed by the injunctions of Islam as laid down in the Holy Quran and Sunnah for a witness, and, where such witness is not forthcoming, the Court may take the evidence of a witness who may be available. In terms of Article 17 of QSO, the competence of a person to testify, and the number of witnesses required in any case shall be determined in accordance with the injunctions of Islam as laid down in the Holy Quran and Sunnah. Unless otherwise provided in any law relating to the enforcement of Hudood or any other special law:

- (a) in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men, or one man and two women, so that one may remind the other, if necessary, and evidence shall be led accordingly ; and
- (b) in all other matters, the Court may accept, or act on, the testimony of one man or one woman or such other evidence as the circumstances of the case may warrant.

Since *QSO* is highly technical law, it is deemed proper to give an overall scheme of the law instead of discussing each and every provision of law. Only that evidence can be looked into by the courts which pertains to fact in issue or relevant. But all relevant evidence is not to be looked in to which is not admissible. The admissible evidence is one which is sufficiently relevant to an issue. All that is irrelevant or insufficiently relevant is not admissible. There are following four Exceptions to Rule of Admissibility & Relevancy.

## 11.2 Hearsay

Hearsay evidence is based on what the person testifying has not seen or heard himself. It is not based on personal knowledge or observation. As a general rule, hearsay evidence is inadmissible. Hearsay evidence can never be admitted to prove any fact. The exceptions to this general rule of exclusion are:

- 1 Dying declarations
- 2 Declarations against interest, pecuniary or moral
- 3 Act or declaration about pedigree
- 4 Family reputation or tradition regarding pedigree
- 5 Common reputation
- 6 Part of res gestae (Latin: things done)
- 7 Entries in the course of business
- 8 Entries in official records
- 9 Commercial lists and the like
- 10 Treaties
- 11 Testimony at a former trial, and
- 12 Shahada ala al-shahada.

**Opinion:** Opinion of witness is not allowed except expert opinion.

**Character:** Character/reputation of accused is in-admissible evidence of his guilt.

(Chapter III of QSO)

### 11.2.1 Doctrine of Res gestae

This doctrine is an exception to “Hearsay Rule”. The following are four exceptions:

- i. Statements accompanying and explaining relevant facts.
- ii. Spontaneous statements relating to an event in issue made by participants or observers
- iii. Statements concerning the maker’s contemporaneous state of mind or emotions.
- iv. Statement of contemporaneous physical sensation.

Stephen’s definition of the term ‘relevance’ “any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the present, past, or future

existence or non existence of the other. Degree of relevancy diminishes in proportion to the likelihood of its being manufactured, remote & multiple in issues.

The distinction between relevancy and admissibility can be described as under:

Relevancy is a concept arrived at inductively from experience, and its applicability can be tested deductively by the construction of a syllogism. It is not primarily dependent on rules of law. Admissibility of evidence depends first on the concept of relevancy of a sufficiently high degree and secondly, on the fact that the evidence tendered does not infringe any of the exclusionary rules. Insufficient evidence is the lowest degree of cogency on the basis of which no reasonable man could decide the issue in his favor. Secured degree of cogency is one where a party's evidence is sufficiently weighty for a reasonable man. Presumptive Evidence is one where cogency of evidence is so weighty that a presumption is drawn in favor. Conclusive evidence is one when the court must find that fact to be proved. Then there are certain presumptions; presumption of fact (stolen goods in possession); rebuttable presumption of law (birth of child during marriage); irrebuttable presumption of law (child under 7 years of age).

## **Chapter XII: Administrative Responsibilities of the District Judiciary**

### **12.1 Oversight and inspection of their own courts**

The presiding officers of the courts, both civil and criminal, are required to function in premises, which are congenial, convenient, dignified, and secure for the judges, the court staff, the lawyers, the litigants, and others concerned or involved in the administration of Justice. In order to slowly achieve the required standards, the judges must constantly pay attention to all that can be done for the time being for improvement.

The presiding officers should closely monitor and supervise court staff and the process serving agencies to ensure that they comply with the requirements of the law, and the directions of the court. Corruption, abuse of the process and inefficient performance of duties should not go unnoticed and unattended. The ultimate responsibility for whatever goes on in the offices of the courts is that of the presiding officer. He is required to take prompt notice, deal effectively, and where he cannot, he should report to the high-ups.

On the first working day in March, June, September, and December, every judge of the District Judiciary is required to carry out a regular inspection of his court and no judicial work is fixed on that day. He is required to inspect in detail the work of the ministerial staff, and the registers, and in particular look through the oldest files pending and see whether unnecessary delay has occurred or wrong orders have been passed. An inspection note on the lines of Inspecting Judge's note has to be written and, in the case of Civil Judge and Magistrates, passed on to the District and Sessions Judge, and in the case of District and Additional District and Sessions judges passed on to the High Court.

### **12.2 The assessment of training and other needs of the District Judiciary**

The presiding officers of the courts should periodically undertake the identification of the training, educational and other professional needs of their own and that of the subordinate staff and suggest ways and means to attend to them. The object should be to go on enhancing on an incremental basis, the efficiency and the performance of the courts.

### **12.3 Key role of the District and Sessions Judges**

As in-charge of the criminal and the civil judiciary of the District and as principal court of original civil jurisdiction, the District and Sessions Judge has a key role to play. He is required to supervise and control all the courts in the District. He is required to coordinate the activities of the police, jail, Bar and the local government institutions in the manner and to the extent as prescribed by law and as directed by the respective High Courts. Besides judicial work, he is the chairman/chairperson of District Bench Bar Liaison Committee, Citizen Courts Liaison Committee, and Criminal Justice Coordination Committee.

### **12.4 Supervision by controlling courts**

District Judges are not responsible merely for the proper distribution of work amongst the courts and the disposal of appeals, they are also required to see that subordinate courts follow prescribed procedures in all their proceedings and are given guidance in matters where it is needed. This is particularly relevant where there are inexperienced or officers in training. The supervision exercised should be both active and continuous in all matters affecting judicial administration. A function of supervision includes the bringing to the notice of the subordinate courts: unnecessary adjournments, undue delay in disposing of cases, omission to hear cases on the days fixed, too harsh a use of the summary procedure allowed by law in cases in which defaults in attendance, in production evidence, failure to examine the parties thoroughly and to arrive at an intelligent appreciation of the points in dispute and similar matters.

### **12.5 Financial management & budget**

The presiding officer of every court is responsible for regular inspection of registers and accounts. Money passing through the court must be duly accounted for and should be verified weekly, if not daily. Special vigilance is called for in supervising money transactions which should be inspected frequently and carefully. Any irregularities must be reported to the District Judge or Sessions Judge.

The judges or the courts where empowered or required must attend to timely preparation of budgets of the courts, control expenditure, periodically inspect, and verify the accounts. This will require foresight, imagination and leadership in taking care of the needs of the courts, planning, and development of the court complexes in the future.

Demands for supply for the ensuing years must be incorporated into budget estimates. Budget forms should be submitted on due dates. Exact details of the type of expenditure to be included under the heads of Ordinary Charges, New Expenditure, Supplementary Schedule of New Expenditure and Lists of Major, and Minor Works are set out in directions and the Budget Manual.

The High Court has set out matters which have come to light and form the basis of common errors. These include failure to distinguish between voted and charged expenditure, failure to submit the names and designations of officers, lack of explanation for variations from year on year.

## **12.6 Judicial buildings**

Judicial buildings include the District and Sessions Judges Courts & Houses, Subordinate Judges Courts & Houses, and all subsidiary buildings attached to them. Inspection reports should include the state of the courthouse, whether it is good, repaired, or properly kept, and provides adequate accommodation. Library facilities must be inspected and the report should cover the catalogue and whether this complies with the minimum prescribed by the High Court.

## **12.7 Facilities for litigants and counsel**

Bar Rooms that are part of the building are included in judicial buildings. Inspections should include arrangements of the Bench and whether the accommodation for the Bar is sufficient, and the separation of its members from the Bench is complete. Budgets will be required for works to be carried out in respect of building and local arrangements will need to be known as to where these should be submitted and in what form. In some cases, they should be submitted first to the High Court for sanction before calling on Public Works Departments.

## **12.8 Interference with judicial discretion or powers**

Sessions Judges and Magistrate should immediately report any attempt made by a person of influence or authority directly or indirectly interfering with the exercise by them of their judicial discretion or power. The report should be made in confidence to the Registrar of the High Court.

## 12.9 Proceedings in Case of Certain Offences Affecting the Administration of Justice

Intentional insult or interruption to public servant sitting in judicial proceedings, such act amounts to gross contempt and falls within the purview of section 228 PPC. It is the discretion of the court to either take cognizance of the offence under section 476 CrPC or to proceed against the offender under sections 480 & 482 CrPC.<sup>255</sup>

### 12.10 Trial in family and rent cases

While trying Family Court cases and Rent cases the presiding officer is not a court in the strict sense. The formalities of law and procedure do not bind him. What is to be addressed is fairness in proceedings and a reasonable opportunity for the parties to present their case. The guidelines provided by The Supreme Court (2000 SCMR 556) have to be kept in view and substantially observed.

### 12.11 Citizen Court Liaison

Resources permitting, appropriate arrangements are made to facilitate prospective litigants and the litigants in seeking and obtaining adequate, accurate and timely information, and guidance with regard to court procedures and requirements. Information Kiosk/Facilitation Centers be situated at the entrances of the Judicial Complex, be conspicuous and equipped with;

- a. A staff member; in case of availability of a female staff, an additional female liaison representative conversant with the local dialect & court processes etc.
- b. A list of cases fixed for hearing before the courts.
- c. Database of cases and orders of the courts situated within the compound.
- d. Necessary first aid kit and basic amenities such as drinking water.
- e. A map of courts situated in the compound; with directions.

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<sup>255</sup> PLD 2003 SC 19

## Annex-A

### **Article 202 of the Constitution:-“Rules of procedure:-**

Subject to constitution and law, a High Court may make rules regulating the practice and procedure of the Courts or of any court subordinate to it”

### **Article 208 of the Constitution:-“ Rules for the appointment of officers and servants of the Court:-**

The Supreme Court and the Federal Shariat Court, with the approval of the President and a High Court, with the approval of the Governor concerned, may make rules providing for the appointment by the Court of officers and servants of the Court and for their terms and conditions of employment.

**Section 122 of CPC :- “Power of certain High Courts to make rules:-** The High Courts may, from time to time after previous publication, may rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendents, and may by such rules annual, alter or add to all or any of the rules in the First Schedule.

**Section 129 of CPC:-** Notwithstanding anything in this Code, any High Court <sup>1\*\*\*</sup> may make such rules not inconsistent with its Letters Patent to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code.

**Section 554 of Cr.PC:- “Power of High Courts to make rules of inspection of records of subordinate Courts (1)** With the previous sanction of the Provincial Government, any High Court may from time to time, make rules for the inspection of the records of subordinate courts.

**(2) Power of High Courts to make rules for other purposes:-** Every High Court may, from time to time, and with the previous sanction of the Provincial Government;-

(a). make rules for keeping all books, entries and accounts to be kept in all Criminal Courts subordinate to it, and for the preparation and transmission of any returns or statements to be prepared and submitted by such Courts:

(b) frame forms for every proceeding in the said Courts for which it thinks that a form should be provided;

(c) make rules regulating its own practice and proceedings and the practice and proceeding of all Criminal Courts subordinate to it; and

(d) make rules for regulating the execution of warrants issued under this Code for the levy of fines;

Provided that the rules and forms made and framed under this section shall not be inconsistent with this Code or any other law in force for the time being.

(3) All rules made under this section shall be published in the official Gazette.”

**Section 14 of the Civil Court Ordinance 1962;- “ Power to frame rules” (1)** The High Court may, with the approval of Government, frame rules for the purposes of carrying in to effect the provisions of this Ordinance.

(2) In particular, and without prejudice to the generality of the foregoing power, the High Court may, with the approval of Government frame rules for all are any of the following purposes, namely;-

- The supervision of all Civil Courts and their visitation and inspections;
- The exercise by the District Judges of the general control vested in them over the Civil Courts in their respective districts;
- The places and times for the holding of Civil Courts;
- The fees to be charged for processes issued by the Civil Courts or by any officer of any such Courts;
- The fees payable in any suit or proceeding in any Civil Court by any party in respect of the fees of the pleader of any other party, and
- The manner in which the proceedings of the Civil Courts shall be kept and recorded, the manner in which the paper books for the hearing of appeals shall be prepared and the granting of copies”.

## Annex-B

### Code of Conduct for Judicial Officers of Khyber Pakhtunkhwa District Judiciary

- Para I A judicial officer should be God fearing, law abiding, abstemious, truthful of tongue, wise in opinion, cautious and forbearing, patient and calm, blameless, untouched by greed, completely detached and balanced, faithful to his words and meticulous in his functions.
- Para II He must not show any fear or favour to any party before him or their lawyers, both in his judgment and conduct.
- Para III He should avoid mixing up with people, roaming in hotels, markets and streets except in dire need.
- Para IV He should avoid rage and should abstain from deciding in rage.
- Para V He should be learned in law and should have command and control over the proceedings in the Court.
- Para VI He must be consistent in his judgments.
- Para VII He should be courteous and polite, but not weak, towards the litigants and their lawyers. He must maintain the decorum of the Court.
- Para VIII He should always endeavor to decide cases expeditiously and should take all necessary measures to ensure speedy justice.
- Para IX He should have effective control over the staff of his court without being rude, rough or humiliating.
- Para X A judicial officer must be punctual while taking or leaving his seat.
- Para XI He must be dressed in prescribed uniform and seated in dignified manner, but not so as to look a proud man.
- Para XII He must avoid hearing cases, receiving guests or his colleagues in the retiring room, besides avoiding frequent use thereof, except in urgent need.
- Para XIII He must avoid hearing one party or his lawyer in the absence

of the other except in the case of ex parte proceedings.

Para XIV He must not hear those cases in which he, his near relatives or close friends have got any interest.

Para XV He should not advise any of the parties so that it becomes a favour to the prejudice of the other party.

Para XVI Judicial officers must avoid discussing particular cases before them save allowed by law or when it is intended to give advice or counselling by a higher forum to lower forum.

Para XVII He should not engage in business with any party to the case before him. If, however, it is unavoidable, he should discontinue the hearing of the case forthwith.

(PHC letter No.10367-10390/Admn: Dated Pesh: the 25<sup>th</sup> November 2005)

## Annex-C

This part contains some of the Model Checklists for the guidance of the Presiding Officers. These checklists should be annexed with the files at the time of institution of case. The checklist can be varied by the courts as per their needs. The Presiding officers are also expected to annex these checklists with the files already instituted. This exercise can be undertaken at the time when the file comes before the Presiding Officer on daily basis. A certificate at the foot of checklist should be given by Presiding officer in the form given in last checklist.

### MODEL CHECKLIST OF CIVIL SUITS (INSTITUTION)

- Complaint
- Whether the suit is made over to the court of District Court/Court of Senior Civil Judge
- Address of the parties
- List of legal heirs
- Whether this court has jurisdiction
  - Pecuniary
  - Territorial
  - Subject matter
- Whether court fee affixed
- Documents on which plaintiff relies
- List of other documents
- Whether suit is prima-facie with in time
- In case of complaint through recognized agent whether power of attorney is annexed
- Whether wakalat nama is annexed
- Whether complaint is properly verified
- Case Management & Scheduling Conference in terms of Order IX-A CPC
- Application for interim relief
- Whether defendants can be sued legally
- In case of suit against Government whether copy of notice U/S 80 of C.P.C annexed in case of suit by or against Government S.79 and Order-27 rules (I) CPC complied with

- If suit is by alien whether maintainable u.s.83 C.P.C
- If suit is by a foreign state where maintainable U/S 84 C.P.C
- In case of suit involving public nuisance whether the provision of S.91 CPC are complied with
- In case of suit of the nature of S.92 whether provision of S.92 are complied with
- In case of representative suit whether provision of Order-I rule 8 CPC complied with
- In case of minor plaintiff or defendant provisions of Order-32 CPC complied with

#### **AFTER INSTIUTION**

- Service
- Written statement
- If set off is claimed whether court fee is affixed
- Whether plea of jurisdiction is taken, if you whether decided
- Whether plea of misjoinder, nonjoinder of causes of action and parties taken, if yes whether decided
- Whether suit can be disposed of on the basis of legal issues only
- Whether suit can be disposed of at the first hearing
- List of witnesses
- Plaintiff's evidence
- Defendant's evidence
- In case of judgment against Government provision of S.82 CPC complied with

#### **MODEL CHECKLIST OF CRIMINAL CASES (INSTITUTION)**

- Whether complete Challan is annexed
- Whether the case is made over to the court by sessions court
- Whether FIR is annexed
- Whether original Murasila is annexed
- Site Plan Recovery Memos
- Statements U/S 164 Cr.P.C, if any
- Confessional Statements U/S 364 Cr.P.C, if any
- Original Reports
  - Report of Arms expert

- Report of Chemical Examiner
- Report of serologist
- Medical/post mortem, report
- Injury sheet/inquest report
- Opinion of currency officer
- Finger/Hand-writing expert report
- Proceedings U/S 87 and 88 Cr.P.C & warrant U/S 204 Cr.P.C, if any
- Complete Police file
- Copies for accused
- The detail of case property
- Whether list of witnesses in Challan is correct
- If accused is on bail whether his bail bonds on file
- In case of previous convict whether the copy of previous order/judgment annexed
- In case of murder/attempt to commit murder, the list of legal heirs
- Whether case has been sent by magistrate U/S 190 (2) Cr.P.C
- Whether any of accused is minor
- Jurisdiction
  - Territorial
  - Subject matter

#### **DURING TRIAL**

- Service
- Whether copies given to accused
- Whether charge is framed
- Prosecution evidence
- Statement of accused
- Defence evidence, if any
- Statement of accused on oath, if any
- Arguments
- Decision

#### **MODEL CHECKLIST OF CIVIL REVISION**

- Application for revision

- Whether the petition is made over to the court by Sessions Court
- Whether certified copies of the following annexed
  - Pleadings
  - Documents
  - Order of Subordinate Court
- Wakalat Nama
- Power of Attorney
- Jurisdiction
  - Pecuniary
  - Territorial
  - Subject matter
- Court fee
- Whether application is within time?
- Incase of time barred application whether application U.S 5 Limitation Act, is submitted
- Whether respondents can legally be sued or are subject to the jurisdiction of the court
- Undertaking/affidavits that no such application has been filed or decided by court
- Incase of fresh applications under the directions of the court whether the directions is complied with

#### **MODEL CHECKLIST OF CIVIL APPEALS**

- Memorandum of Appeal
- Whether the Appeal is made over to the court by Sessions Court
- Copy of Decree Sheet appealed against
- Copy of Judgment/Order appealed against
- Addresses of the parties
- Wakalat Nama
- Power of Attorney
- Jurisdiction
  - Pecuniary
  - Territorial
  - Subject matter

- Whether proper court fee affixed
- Whether Appeal is within time
- In case of time barred appeal, whether application U.S 5 Limitation Act, is submitted
- Verification of Memorandum of Appeal
- Whether respondents can legally be sued or are subject to the jurisdiction of the court
- Whether order for security is to be made under rule-10 of order-41 CPC
- In case of appeal from order, whether the same is appealable under order-43 CPC
- Undertaking/affidavit that no such appeal has been filed or decided by court
- In case of fresh memorandum filed under the directions of the court whether the directions is complied with

### **MODEL CHECKLIST OF CRIMINAL APPEALS**

- Petition of Appeal
- Whether copy of Judgment/Order appealed against annexed
- Whether Appeal is made over to the court by Sessions Court
- If not made over as such whether Provincial Government, has by general or special order directed to here the appeal
- Whether appeal is against the order of conviction on the basis of plead guilty.
- Whether the order appealed against is appealable

### **Check the following**

- No appeal in plead guilty cases except to the extent legality of sentence (S.412 Cr.P.C) Fine of Rs. 50/- and below.
- No appeal in summary conviction in case of fine of Rs. 200/- and below (S.414 Cr.P.C)
- In case the appellant is in jail whether the petition is forwarded to the court by the officer-in-charge of the jail.
- Whether the appeal is within time?
- Jurisdiction.

**Certificate:** - Certified that I personally checked the case per checklist.

**Presiding officer**

## Annex-D

### Provincial Special Laws

1. The Land Acquisition Act, 1894
2. The Prisoners Act, 1900
3. The Khyber Pakhtunkhwa (Validation Of Orders And Actions Of The Court Of Wards) Act, 1975
4. The Khyber Pakhtunkhwa Pre-Emption Act, 1987
5. The West Pakistan Family Courts Act, 1964
6. The Khyber Pakhtunkhwa Tenancy Act, 1950
7. The West Pakistan Muslim Personal Law (Shariat) Act, 1962
8. The West Pakistan Land Revenue Act, 1967
9. The West Pakistan Departmental Inquiries (Powers) Act, 1958
10. The West Pakistan General Clauses Act, 1956
11. The West Pakistan Board Of Revenue Act, 1957
12. The West Pakistan Foodstuffs (Control) Act, 1958
13. The West Pakistan Urban Immovable Property Tax Act. 1958
14. The Khyber Pakhtunkhwa, Sikh Religious Endowment Act, 1944
15. The Good Conduct Prisoners' Probational Release Act, 1926
16. The West Pakistan Agriculturists' Loans Act, 1958
17. The West Pakistan Motor Vehicles Taxation Act, 1958
18. The West Pakistan Requisitioning Of Immovable Property (Temporary Powers) Act, 1956
19. The West Pakistan (Adaptation and Repeal of Laws) Act, 1957
20. The Punjab Court Of Wards Act, 1903
21. The Khyber Pakhtunkhwa Prohibition Of Dancing Act, 1974
22. The Khyber Pakhtunkhwa Judicial Academy Act, 2012
23. The Khyber Pakhtunkhwa Police Act, 2017
24. The Khyber Pakhtunkhwa Mental Health Act, 2017
25. The Khyber Pakhtunkhwa Arms Act, 2013
26. The Khyber Pakhtunkhwa Borstal Institutions Act, 2012
27. The Khyber Pakhtunkhwa Bonded Labour System (Abolition) Act, 2015
28. The Court-Fees Act, 1870
29. The Canal And Drainage Act, 1873

30. The Khyber Pakhtunkhwa Charitable and Religious Trusts Act, 2014
31. The Khyber Pakhtunkhwa Consumers Protection Act, 1997
32. The Khyber Pakhtunkhwa Child Protection And Welfare Act, 2010
33. Covid-19 (Prevention Of Hoarding) Act, 2020
34. The Khyber Pakhtunkhwa Court Fees (Abolition) Ordinance, 1978. (Ordinance No. Xiv 1978).
35. The Civil Procedure (Special Provisions) Ordinance, 1968.
36. The Criminal Law (Special Provisions) Ordinance, 1968
37. The Khyber Pakhtunkhwa (Enforcement Of Certain Provisions Of Law) Act, 1989
38. The Khyber Pakhtunkhwa Elimination Of Custom Of Ghag Act, 2013
39. The Khyber Pakhtunkhwa Explosives Act, 2013
40. The Khyber Pakhtunkhwa Explosives Substances Act, 2013
41. The Khyber Pakhtunkhwa Evacuee Trust Properties (Management And Disposal) Act, 2014
42. The Khyber Pakhtunkhwa Environmental Protection Act, 2014
43. The Establishment Of Civil Mobile Courts Act, 2015
44. The Khyber Pakhtunkhwa Enforcement Of Women Ownership Rights Act, 2012
45. The Khyber Pakhtunkhwa Forest Ordinance, 2002
46. The Khyber Pakhtunkhwa Industrial And Commercial Employment (Standing Orders) Act, 2013
47. The Khyber Pakhtunkhwa Injured Persons And Emergency (Medical Aid) Act, 2014
48. The Khyber Pakhtunkhwa Industrial Relations Act, 2010
49. The Khyber Pakhtunkhwa Laws (Amendment) Act, 2011
50. The Khyber Pakhtunkhwa Enforcement Of Women's Property Rights Act 2019
51. The Land Acquisition (Mines) Act, 1885
52. The Khyber Pakhtunkhwa] Land Revenue (Re-Imposition) Ordinance, 1978
53. The Khyber Pakhtunkhwa Land Tax And Agriculture Income Tax Ordinance, 2000
54. The Khyber Pakhtunkhwa Minimum Wages Act, 2013
55. The Malakand Protected Area (Vesting Of Evacuee Property in Government) Regulation, 2010

56. The Khyber Pakhtunkhwa (Prohibition Of Firing And Use Of Explosive Substance At Marriages And Other Ceremonies) Act, 1988
57. The Khyber Pakhtunkhwa] Public Property(Removal Of Encroachment).Act, 1977
58. The Khyber Pakhtunkhwa Payment Of Wages Act, 2013
59. The Khyber Pakhtunkhwa Prohibition Of Employment Of Children Act, 2015
60. The Khyber Pakhtunkhwa Protection Of Breast-Feeding And Child Nutrition Act, 2015
61. The Khyber Pakhtunkhwa Prevention Of Hindus Bigamous Marriages Act, 1946
62. The Khyber Pakhtunkhwa Prohibition Of Kite Flying Activities Act, 2006
63. The Khyber Pakhtunkhwa Provincial Ombudsman Act, 2010
64. The Khyber Pakhtunkhwa Prohibition Of Interest On Private Loans Act, 2016
65. The Khyber Pakhtunkhwa] Prevention Of Gambling Ordinance, 1978
66. The Revenue Recovery Act, 1890
67. The Khyber Pakhtunkhwa Right To Information Act, 2013
68. The Khyber Pakhtunkhwa Right To Public Services Act, 2014
69. The Khyber Pakhtunkhwa Rented Buildings (Security) Act, 2014
70. The Khyber Pakhtunkhwa River Protection Ordinance, 2002
71. The Khyber Pakhtunkhwa Subordinate Judiciary Service Tribunal Act, 1991
72. The Suits Valuation Act, 1887
73. The Khyber Pakhtunkhwaservice Tribunals Act, 1974
74. The Khyber Pakhtunkhwa Surrender Of Illicit Arms Act, 2014
75. The Khyber Pakhtunkhwa Shops And Establishment Act, 2015
76. The Shar'i Nizam-E-Adl Act, 1999
77. The Khyber Pakhtunkhwa] Suppression Of Crimes Ordinance, 1978
78. The Shariah Nizam-E-Adl Regulation, 2009
79. The Khyber Pakhtunkhwa, Sikh Religious Endowment Act, 1944
80. The Good Conduct Prisoners' Probational Release Act, 1926
81. The Stamp Act, 1899
82. The Khyber Pakhtunkhwa Waqf Properties Ordinance, 1979
83. The West Pakistan Civil Courts Ordinance, 1962
84. The West Pakistan Maintenance of Public Order Ordinance, 1960
85. The West Pakistan Government Dues Recovery Ordinance, 1962
86. The West Pakistan Anti-Corruption Establishment Ordinance, 1961

87. The Khyber Pakhtunkhwa Workers' Compensation Act, 2013
88. The West Pakistan Tribunals of Inquiry Ordinance, 1969
89. The Khyber Pakhtunkhwa Zakat And Ushr Act, 2011
90. The Khyber Pakhtunkhwa Sentencing Act, 2021
91. The Khyber Pakhtunkhwa Witness Protection Act, 2021
92. The Khyber Pakhtunkhwa Probation And Parole Act, 2021
93. The Khyber Pakhtunkhwa Letters of Administration And Succession Certificates Act, 2021
94. The Khyber Pakhtunkhwa Alternate Dispute Resolution Act, 2020
95. The Khyber Pakhtunkhwa Legal Aid Act, 2019
96. The Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019
97. The Khyber Pakhtunkhwa Domestic Violence Against Women (Prevention And Protection) Act, 2021
98. The Khyber Pakhtunkhwa Home Based Workers (Welfare And Protection) Act, 2021
99. The Khyber Pakhtunkhwa Reproductive Healthcare Rights Act, 2020
100. The Khyber Pakhtunkhwa Protection Against Harassment of Women at Workspace (Amendment) Act, 2020
101. Khyber Pakhtunkhwa Enforcement Of Women's Property Rights Act 2019

### **Federal Special Laws**

1. The Abolition of The Punishment of Whipping Act, 1996
2. The Anti-Terrorism Act, 1997
3. Anti-Money Laundering Act, 2010
4. Anti-Rape (Investigation and Trial) Act, 2021
5. The Arbitration Act, 1940
6. The Arms Act, 1878
7. The Bankers' Books Evidence Act, 1891
8. The Banking Companies Ordinance, 1962
9. Benami Transactions (Prohibition) Act, 2017
10. The Central Law Officers Ordinance, 1970
11. The Child Marriage Restraint Act, 1929
12. The Christian Marriage Act, 1872
13. The Companies Act, 2017

14. The Conciliation Courts Ordinance, 1961
15. The Control Of Narcotic Substances Act, 1997
16. The Copyright Ordinance, 1962
17. The Court fees Act, 1870
18. The Customs Act, 1969
19. The Defamation Ordinance, 2002
20. The Destruction of Record Act, 1917
21. The Disabled Persons (Employment and Rehabilitation) Ordinance, 1981
22. The Dissolution Of Muslim Marriages Act, 1939
23. The Divorce Act, 1869
24. The Drug Regulatory Authority Act, 2012
25. The Drugs Act, 1976
26. The Electricity Act, 1910
27. The Electronic Transactions Ordinance, 2002
28. The Employees' Old Age Benefits Act, 1976
29. The Employment of Children Act, 1991
30. The Exit From Pakistan (Control) Ordinance, 1981
31. The Explosive Substances Act, 1908
32. The Explosives Act, 1884
33. The Extradition Act, 1972
34. The Fatal Accidents Act, 1855
35. The Federal Investigation Agency Act, 1974
36. The Federal Ombudsmen Institutional Reform Act, 2013
37. The Foreign Exchange Regulation Act, 1947
38. The Foreigners Act, 1946
39. The Gas (Theft Control and Recovery) Act. 2016
40. The General Clauses Act, 1897
41. The Guardians and Wards Act, 1890
42. The High Treason (Punishment) Act, 1973
43. The Illegal Dispossession Act, 2005
44. The Imports And Exports (Control) Act, 1950
45. The Income Tax Ordinance, 2001
46. The Injured Persons (Medical Aid) Act, 2004
47. The Insurance Ordinance, 2000

48. The Intellectual Property Organization of Pakistan Act, 2012
49. The Investigation for Fair Trial Act, 2013
50. The Judicial Officers' Protection Act, 1850
51. The Juvenile Justice System Act, 2018
52. The Land Reforms Act, 1977
53. The Law And Justice Commission Of Pakistan Ordinance, 1979
54. The Law Reforms Ordinance, 1972
55. The Law Reports Act, 1875
56. The Legal Practitioners And Bar Councils Act, 1973
57. The Legal Aid Ad Justice Authority Act, 2020
58. The Letters of Administration and Succession Certificates Act, 2020
59. The Limitation Act, 1908
60. The Majority Act, 1875
61. The Mental Health Ordinance, 2001
62. The Muslim Family Laws Ordinance, 1961
63. The National Accountability Ordinance, 1999
64. The National Judicial (Policy Making) Committee Ordinance, 2002
65. The Negotiable Instruments Act, 1881
66. The Notaries Ordinance, 1961
67. The Oath Act, 1873
68. The Offence of Qazf (Enforcement of Hadd) Ordinance, 1979
69. The Offence of Zina (Enforcement of Hudood) Ordinance, 1979
70. The Offences Against Property (Enforcement of Hudood) Ordinance, 1979
71. The Pakistan Citizenship Act, 1951
72. The Pakistan Criminal Law (Amendment) Act, 1958
73. The Partition Act, 1893
74. The Partnership Act, 1932
75. The Passports Act, 1974
76. The Powers of Attorney Act, 1882
77. The Prevention of Corruption Act, 1947
78. The Prevention of Electronic Crimes Act, 2016
79. The Prevention of Gambling Act, 1977
80. The Prevention of Smuggling Act, 1977
81. The Prisoners Act, 1900

82. The Prisons Act, 1894
83. The Probation of Offenders Ordinance, 1960
84. The Protection Against Harassment Of Women At The Work Place Act, 2010
85. The Reformatory Schools Act, 1897
86. The Registration Act, 1908
87. The Revenue Recovery Act, 1890
88. The Right of Access To Information Act, 2017
89. The Sale of Goods Act, 1930
90. The Specific Relief Act, 1877
91. The Stamp Act, 1899
92. The Succession Act, 1925
93. The Suits Valuation Act, 1887
94. The Supreme Court (Number Of Judges) Act, 1997
95. The Offences In Respect Of Banks (Special Courts) Ordinance, 1984
96. The Trust Act, 1882