DISTRICT JUDICIARY

BENCHBOOK

PAKISTAN
2002

The Judicial Approach

"A person who; -

listens to both sides;

treats both sides fairly;

judges only on the evidence;

recognizes his own prejudices;

recognizes what is relevant;

reasons logically and impartially;

seeks information when needed;

has unlimited patience and courtesy;

then, applying these principles; reaches a

decision firmly, excluding all other

considerations and consequences —

this is, of course, perfection."

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Acknowledgements

This bench book has been produced for the judges of Pakistan. Special thanks are due to Retired Justices K.M.A.Samdani, Fazal Karim and Shafi-ur-Rahman who wrote the manuscript. Further thanks are due to many leading members of the judiciary of Pakistan who have brought their knowledge of law and practical experience in the field to improve this publication with their useful suggestions. J.K.R. Stanford-Smith has edited the manuscript and contributed his experience to the production of the manuscript, the first of its kind in Pakistan [1]. This bench book has been produced as a project of the courts of Pakistan, supported by the Asian Development Bank, with technical assistance from The Asia Foundation and DPK Consulting.

[1] The Editor would like to acknowledge the work of the Judicial Studies Board UK. Institute of Judicial Studies New Zealand, Clifford . E.M. Chatterton and other individuals who have been drawn upon to assist the development of this benchbook.

Foreword by the Chief Justice of Pakistan

This bench book is specifically written for the guidance and use of the District judiciary of Pakistan by eminent Retired Justices K.M.A. Samdani, Fazal Karim and Shafi-ur Rahman. It is hoped that this publication will become a useful additional material to that which may be already available.

The bench book is a practice manual for judges which contains guidance, suggestions and advice upon the daily work they do, and seeks to encapsulate qualities, values, ethics and good practice that reflect the judicial approach. It provides judicial officers with a basic knowledge of law and procedural matters of importance in dealing with common cases either at the trial or appellate level. In this sense, it is a personal tool for judges to help perform their day-to-day duties effectively. The bench book is not however a substitute for recourse to the primary sources of law, nor is it designed as an encyclopaedic text. For these reasons, the reader is actively encouraged to research the law with numerous citations of relevant statutory provisions and cases.

It is my hope that judges throughout Pakistan use this bench book in their day-to-day duties in court and find it useful, and I look forward to judges providing their feedback for the production of future editions, in due course.

Honourable Justice Sheikh Riaz Ahmed

Chief Justice,

Supreme Court of Pakistan.

Preface

This benchbook has been prepared for guidance and use by the District judiciary. This includes Magistrates, Civil Judges, Sessions Judges, Additional Session Judges, District Judges and Additional District Judges.

This is the first edition; it is hoped that the guidance contained herein will be referred to and proves to be a useful addition material to that, which may be already available to judicial officers.

The major difference between this and other publications is it is specifically written for judicial officers of Pakistan. The benchbook contains practical guidance, suggestions and advice upon the work they do, and seeks to encapsulate qualities, values, ethics and good practice that reflects what has been referred to as judicial approach. Those attributes, qualities and skills that make up judicial approach will be themes that will be repeated throughout this benchbook. It is hoped that other officers working within this jurisdiction will have access to this text and find the contents of practical assistance. The benchbook should provide you, the judicial officer, with a basic knowledge of procedural matters likely to assume importance in dealing with cases either at the trial, appellate, or revisional level.

This benchbook is not a substitute for the original source. In many cases, you will be referred to primary sources, which are more detailed, and comprehensive. For example, the relevant code should be referred to when dealing with a specific matter. Preferably recourse to the Acts and an examination of entire statute should take place before going to the commentaries and the case law.

The parties', counsel's submissions and the individual circumstances of the case will dictate the actual decisions you make. Where an approach is indicated it should not be regarded as the last word upon any subject contained herein. You are encouraged to always sit with an open mind and listen to another view. Counsel's submissions in a particular case may change an already held or popularly accepted opinion. The door to that possibility must always be kept open except where the court is bound by precedent.

Where appropriate, examples have been given by way of illustration. These should be viewed simply as illustrations and are not intended to be exhaustive, exclusive or be interpreted narrowly. In this benchbook, where the text so permits, the masculine includes the feminine and the singular includes the plural.

This benchbook is a personal tool. The format of single-sided print and loose-leaf has been adopted to allow you to add, make your own notes on the left-hand side and add additional material as you see fit. As new material, directions or legislation become available some sections will change and new pages will be issued to be inserted or to replace old material.

This publication is a process as opposed to a blueprint; it is hoped you will assist to make improvements to it and feedback on its appropriateness and contents. Whether you are new to the bench or an experienced judge, your contribution will be valued.

Any feedback or suggestions should be noted on the pro-forma cards found at the back of the manual and sent to the Benchbook Co-ordinator at the Federal Judicial Academy, Islamabad.

1. The Constitution

Introduction:

1.1 The Constitution is the fundamental law of the land that provides a framework for the Federal and Provincial Governments within which to function. Governments should observe the parameters of the framework. The Constitution prescribes limits for the legislature, not only in the matter of law making but also in respect of the conduct of the members within their espective houses. For example no discussion is allowed by the Constitution either in the Majlis-e-Shoorah (Parliament) or in a Provincial Assembly, on the conduct of a Judge of the Superior Judiciary in the discharge of his duties although *Art. 66* read with *Art.127* grants freedom of speech in the said Houses. The members have to respect this restriction.

Separation of powers

1.2 There is no formal and rigid separation of powers under the Constitution. It is only a functional separation, as a requirement of good governance, by means of checks and balances *[PLD 1977 SC* 397]. The mandatory requirement of separation of the judiciary from the executive *(Art.175)* coupled with the independence of judiciary *(preamble and Art. 2A)* has made the judicial organ of the state fully functional and independent in rendering decisions, in administering its finances, in disciplining its employees and in managing its Courts and Tribunals *[PLD 1994 SC].* The leadership role of the judiciary rests with the judiciary itself.

Jurisdictional limits

1.3 The Constitution has laid down the jurisdictional limits for the judiciary. However, the Constitution is not a procedural law like the Civil or Criminal Procedure Code. The Courts must be clear on the limits of their respective jurisdictions. However, the authority to interpret law is inherent in every court or tribunal, as is the authority to determine its own jurisdiction under the law. Therefore, jurisdiction has to be determined strictly in accordance with the Constitution and law with a full sense of judicial

responsibility. No court is above the law, not even the Supreme Court. Art.175(2) states "no court *shall have any jurisdiction* save *as* is or *may* be conferred on it by the onstitution or by or *under any law".*

1.4 In the context of jurisdiction, note must be taken of areas that are out of bounds for the courts. While it is the duty of the courts to see that the executive and legislature do not exceed their limits, it is of utmost importance that the courts do not exceed theirs. If they do, they will lose not only their credibility but also respect. It is their constitutional and legal duty not to cross their own jurisdictional limits. Exceeding one's jurisdiction, albeit in the name of justice, is as harmful as refusing to exercise it or acting short of it.

1.5 Examples outside the jurisdiction of the courts include; the proceedings before the Supreme Judicial Council or its report to President; or the removal of a Judge under *Art. 209(6).* The election to either House of Parliament or a Provincial Assembly cannot be questioned before any court, as the Election Tribunal is the designated forum for that purpose.

The Supreme Court

1.6 The Supreme Court consists of the Chief Justice and a notified number of Judges. The Court has exclusive original jurisdiction in any dispute between any two or more Governments and shall make declaratory judgements only. This Court has jurisdiction to hear certain appeals against the judgment, decrees and orders of the High Court as a matter of right, some only when leave to appeal is granting by the court itself. This court also has jurisdiction under *Art. 212(3)* to hear appeals from a judgment decree, order or sentence of an administrative court or tribunal, if leave is granted for that purpose on the substantial question of law of public importance.

1.7 The Supreme Court has concurrent jurisdiction with the High Court in the enforcement of Fundamental Rights under *Ad.184(3),* if it considers that a question of public importance is involved. The petitioner does not have to be an aggrieved person and the availability of an adequate alternative remedy is not a bar for exercising this jurisdiction.

1.8 Part of the Supreme Court's advisory jurisdiction includes a provision allowing the President to refer, at any time, for consideration a question of law of public importance, which he considers that it is desirable to obtain the opinion of the Supreme Court *Art.* 86.

1.9 An important and wide power of the Supreme Court is contained in *Art.187.* There are two aspects of this power. By virtue of *Art.187(1),* the Court may issue such directions, orders or decrees as may be necessary for doing "complete justice" in any case before it.

However, *Art.187(2)* places the responsibility on the High Court to execute any such direction, order or decree.

Art. 187(1) [Subject to Art. 175 (2)] The Supreme Court shall have power to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it, including an order for the purpose of securing the attendance of any person or the discovery or production of any document.

(2) Any such direction, order or decree shall be enforceable throughout Pakistan and shall, where it is to be executed in a Province, or .a territory or an area not forming part of a Province but within the jurisdiction of the High Court of the Province, be executed as if it had been issued by the High Court of that Province.

(3) If a question arises as to which High• Court shall give effect to a direction, order or decree of the Supreme Court, the decision of the Supreme Court on the question shall be final.

1.10 Any decision of the Supreme Court, to the extent that it decides a question of law, is based upon, or enunciates a principle of law, shall be binding on all other courts in Pakistan. All executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court.

1.11 Subject to the Constitution and law, the Supreme Court may make rules regulating the practice and procedure of the Court.

The High Courts

1.12 Each High Court comprises the Chief Justice and the notified number of judges of the High Court. There are four High Courts, one for each province located at the respective capital. The High Court has jurisdiction in all matters concerning Judicial Review and in respect of preservation and enforcement of any fundamental rights
conferred by Part II of the Constitution.

1.13 The High Court has the power to issue orders in judicial review. However, these are usually issued subject to there being no other adequate remedy available to the aggrieved persons. The petitioner must show they are an aggrieved person. They have exhausted all other remedies. They come before 'the court with "clean hands" and issuance of the writ will not result in manifest injustice. Relief is granted to an aggrieved party. The exception to the proceedings being issued by the aggrieved person is a quo-warranto but the applicant must show there is no alternative remedy.

1.14 The High Court is subject to the Supreme Court's decisions. 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.

1.15 Subject to the Constitution and law, a High Court may make rules regulating the practice and procedure of the Court or of any court subordinate to it. Each High Court shall supervise and control all courts subordinate to it.

Federal Shariat Court

1.16 The Court consists of a notified number of Muslim Judges including the Chief Justice. The Court may, either of its own motion or on the petition of a citizen of Pakistan, the Federal Government or a Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam, as laid down in the Holy Quran and Sunnah of the Holy Prophet, hereinafter referred to as the Injunctions of Islam. Appeals from its decisions lie to the Shariat Appellate Bench of the

Supreme Court. The decisions in this domain are prospective from a future date indicated in the judgment wherein after the offending provisions of law cease to have effect.

1.17. The Court may call for and examine the record of any case decided by any criminal court under any law relating to the enforcement of *Hudood* for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed by, and as to the regularity of any proceedings of, such court and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Due process

1.18 When dealing with individuals, the tenor of *Art.4* in all its ramifications must be borne in mind. It is the due process clause of our Constitution. The individual's rights enshrined in the Constitution and the law have to be jealously guarded particularly against the juggernaut of the government. If the judiciary cannot afford protection to the citizen or to a person for the time being present in Pakistan, there is no justification for its existence. Further, in this behalf, if the judiciary brooks any undue delay, it really amounts to denial of justice.

Art. 4. *(1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.*

(2) In particular: -

(a) No action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;

(b) No person shall be prevented from or be hindered in doing that which is not prohibited by law; and

(c) No person shall be compelled to do that which the law does not require him to do.

Fundamental rights

1.19 It is also the duty of the judiciary to enforce the fundamental rights effectively. Fundamental rights collectively represent the conscience of the society. A society without conscience is a tyrannical society. It is up to the judiciary, therefore, to keep our society from degenerating into tyranny. It must, however, be remembered that the fundamental rights guaranteed under *Art.18, 23 & 24* are to be read with the provisions of *Art. 253.*

1.20 There are three levels at which questions relating to fundamental rights can be raised. The Supreme Court has the original jurisdiction *(Art.184(3))* in a matter of public importance with reference to the enforcement of any of the fundamental rights. The High Courts have jurisdiction in the exercise of their power of judicial review to enforce any of the fundamental rights *(Art.199(2)).* The courts of plenary jurisdiction subordinate to the High Court, viz., the District Courts have also the jurisdiction and power to deal with the enforcement of fundamental rights if otherwise their jurisdiction is attracted under *S.9 C.P.C.* The one condition to be observed in examining such questions is the mandatory requirement of *0.XXVIIA* i.e. Notice to the Attorney General is given *(1990 SCMR 189).* Not only the laws framed by Parliament are to be tested for compliance but also executive actions, ostensibly taken under the cover of law.

1.21 The fundamental rights are deemed to be engrafted on all existing laws and are to be so interpreted *[PLD 1956 Lah 668 at 670].* Fundamental rights become eclipsed when specified fundamental rights are suspended *(Art. 232).*

Principles of policy

1.22 It is the responsibility of all three arms of the government to honour the Principles of Policy *(Articles 29 to 40).*

Art. 29(1) *The Principles set out in this Chapter shall be known as the Principles of Policy, and it is the responsibility of each organ and authority of the State, and of each person performing functions on behalf of an organ or authority of the State, to act in accordance with those Principles in so far as they relate to the functions of the organ or authority.*

1.23 It is not only the duty of the judiciary to ensure that the legislature and the executive do not encroach upon the fundamental rights contained in *Articles 8 to 28.* It is also the judiciary's duty to see that individuals' fundamental rights are honoured and protected in their dealings with the courts and the courts interpretation of law, practice and procedure. The judiciary must as an organ of state, within its own domain, ensure as far as possible the observance of the Principles.

Laws

1.24 Since the courts have to deal with the cases before them always in accordance with law, it is their duty to see that the law being relied upon has been competently made and is valid. A law may be invalid because it has been repealed by, under, or by virtue of the

Constitution or otherwise. In case of Constitutional repeal, the effect will be that mentioned in *Art. 264.* Otherwise, the General Clauses Act will apply. The courts cannot go behind the Constitution itself; this would be contrary to courts and judges duty to uphold the Constitution.

Acts

1.25 Acts within the Federal domains are enacted by Parliament. Those within the Provincial domain enacted by the appropriate Provincial Assembly. Courts cannot inquire into the proceedings of Parliament or Provincial Assemblies. However, it is the duty of the judiciary to see that the Provincial and Federal domains are not encroached upon; that there is no violation of *Art. 142.*

1.26 There can be objections to the validity of an Act e.g. the absence of a necessary assent. Such objection should not be dismissed without due consideration. A judicial officer must have an open mind. Submissions by a party or counsel can only be accepted or rejected after hearing and considering their merits, not before. A party or his counsel is

entitled to submit that an opinion already held by the court may have to be revise, except where a court is bound by a view earlier held *(Art.189 & 201).*

Ordinances

1.27 The above also applies to Ordinances, albeit the procedure for promulgation of an Ordinance is different from that for an Act. The President can promulgate an Ordinance when the National Assembly, or Governor when the concerned Provincial Assembly, is not in session. Ordinances are temporary legislation, the duration of a Federal Ordinance being four months, and a Provincial Ordinance being three months. The court should be careful not to enforce an Ordinance that has ceased to be law under *Art.89* and *Art.128.*

Interpretation

1.28 In any case in which it appears to the court that a substantial question of interpretation of Constitutional law is involved, the court shall not proceed to determine the question until after notice has been given to the Attorney General for Pakistan If the question of law concerns the Central Government. Notice must be given to the Advocate-General of the Province, if the question of law concerns the Provincial Government. See *0.XXVII-A C.P.C.* Notice to Attorney General *[1990 SCMR 189 Fed. Vs. M.D. Tahir].*

Tax laws

1.29 In disputes arising out of a levy of tax of any kind, it must be remembered that there can be no taxation for a Federal purpose except under the authority of an Act of Parliament. The Courts must also be cautious that a tax-law may be invalid because of a violation of *Art.162* or *Art.163.* These two provisions should not be ignored. Further, any interim orders in respect of tax matters are limited to six months duration.

Art.199 (4B) *Every case in which, on an application under clause (1), the High Court has made an interim order shall be disposed of by the High Court on merits within six months from the day on which it is made, unless the High Court is prevented from doing so for sufficient cause to be recorded.*

Injunctions of Islam

1.30 The Objectives Resolution having been incorporated in the Constitution by introducing *Art.2-A* therein, the injunctions of Islam, as set out in the Quran and the Sunnah, assume relevance in the enforcement of the Constitution and other laws. However, the court must always keep in mind *that Art.2-A* was never intended to be self-executory or adopted as a test of repugnance. Therefore, no provision of the Constitution or a law can be invalidated on the ground that it is inconsistent with the Injunctions of Islam. The cure, if any, lies solely within the province of the Parliament, the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court *[PLD 1992 SC 595, Hakim Khan vs. Government of Pakistan].*

Contempt of court

1.31 The Constitution that deals with contempt is *Art. 204.* However, this applies only to the Supreme Court and the High Courts. Contempt in the face of the court will be dealt with under Part 1, Paragraph 1.15.

Dissolution of national and provincial assemblies

1.32 The relevant articles are *Art. 58* and *Art.112.* Where the President or Governors exercise their discretion, it is subject to challenge. The courts may be asked to declare whether the discretion has been exercised arbitrarily or based on facts or opinion justifying the dissolution. If the opinion of the concerned authority is plausible, although the court might have come to a different conclusion, interference therewith is not called for.

Extent of the executive authority

1.33 The extent of the respective authorities of the Federation and Provinces has been clearly laid down in *Art. 97* and *Art.137.* The courts' function is to determine whether there is encroachment by one on another's authority. It is important to observe and enforce the distribution and exercise of authority to prevent the system from sinking into chaos. .

Suits by and against the federation or a province

1.34 *Art.174* provides for the name in which the Federation or a Province may sue or be sued. The court needs to be aware of this. If, under the Constitution, the rights and obligations of the Federation or a Province have changed, the name of the .concerned authority should accordingly be substituted or, in case of pending proceedings, should be deemed to have been so substituted.

Miscellaneous provisions

1.35 While dealing with matters before them the courts must bear in mind amongst other things, the following;

Full faith and credit has to be given to public acts and records and judicial proceedings *(Art. 155).*

Failure to comply with requirement as to time does not render an act invalid *(Art. 254).*

The President has special authority under *Art. 258* to make Orders for areas not forming part of a Province.

2. Judicial culture

Public power as a trust

2.1 The judiciary of every civilised country functions not only within the scope of its Constitution (if any) and law but also under the constraints of its own judicial norms, which are the product of its history, culture, and social and psychological makeup. This is the judicial culture of the country. Pakistan is no exception; it has its own judicial culture. No culture is Without flaws, each judge should strive to identify any flaws and address them**.**

2.2 There will be a great deal of improvement in our society in general and in our judiciary in particular if public servants and judges (judicial officers) alike consider the authority conferred upon them by law and Constitution to be a sacred trust never to be betrayed. No one in our country is born with any authority. It is conferred by the society upon certain selected persons through the Constitution and law to be exercised strictly in accordance with the provisions thereof**.**

2.3 Any deviation there from is a betrayal of that trust. Since it is the duty of the judiciary to keep the executive and the legislative authority within the bounds of the Constitution and law, it is all the more necessary for the members of the judiciary to honour the trust vested in them by the society.

2.4 The concept of public power as a trust can hardly be over emphasised. In fact, its importance has been demonstrated not only in the Constitution but also in the Codes of Conduct framed by the Supreme Judicial Council and for the Punjab province prescribed by the Chief Justice of the Lahore High Court.

2.5 The newly introduced S.24-A General Clauses Act also points in the same direction.

2.6 The preamble to the Constitution and Art.2-A provide "the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a Sacred Trust".

2.7 The opening words of the *Code of Conduct* framed by the Supreme Judicial Council for Judges of the Supreme Court and the High Courts in Pakistan provide, *"The Constitution, by declaring that all authority exercisable by the people is a sacred trust from Almighty Allah, makes it plain that the justice of this nation is of Divine origin. It connotes full implementation of the high principles which are woven into the Constitution, as well as the universal requirements of natural justice".*

2.8 Clause 1, Code of Conduct for the members of Subordinate Judiciary in Punjab prescribed by the Chief Justice provides, "The judicial power being a sacred trust, the Judicial Officer should exercise it honestly, efficiently and to the best of his capacity keeping always in mind that he is accountable not merely to his superior officers but to God Almighty himself".

2.9 Section 24-A General Clauses Act introduced in 1997 by Act No. XI of 1997 provides, "Exercise of power under enactments. - (1) Where, by or under any enactment, a power to make any order or give any direction is conferred on any authority, office or person such power shall be exercised reasonably, fairly, justly and for the advancement of the purposes of the enactment".

Accountability to self

2.10 Except the members of the Superior Judiciary in our country, who are not answerable to any temporal authority [answerable only to their own conscience], all other authorities are answerable to some individual or group. The members of the district judiciary are no exception. They are answerable to their respective High Courts, not only for their performance, but also for their official conduct.

2.11 What is required of a judicial officer is accountability to self. It is this accountability, which gives him credibility. Therefore, a judicial officer should be taking account of himself all the time lest he should fail in one respect or another.

Principles and technicalities

2.12 The law is technical and detailed. However, law is based upon principles. The principle may not be immediately intelligible from the detail of the law. This means that you should not ignore or dismiss off-hand any provision of law as a 'mere' technicality. In doing so, you may defeat the principle of the law. Technicality is not a critical term. Having said this, having given due consideration to the provision, unless of insurmountable nature, it should not stand in the way of substantial justice.

Relief

2.13 Granting relief in a case where it is due is the duty of the judicial officer, not a favour from him. Some judicial officers grant relief as if they are giving charity. This attitude is unbecoming. Individuals have a right to enjoy the protection of law and to be treated in accordance with law is the inviolable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan *(Art.4).*

Appearance of justice

2.14 The dictum is that justice should not only be done but should appear to have been done. This is possible only if all standards of judicial conduct are meticulously observed. The presiding officer of the court should deal with all the parties even-handedly. He should be totally unbiased. It is not enough to appear unbiased but should be, in fact, neutral for all purposes. The faith of the public in the judiciary is the pivot of our legal system; this faith must be preserved. It is human to err; however, the public should have implicit faith that no decision is influenced by any extraneous consideration. The judicial officer should be able to inspire such faith.

Qualities of a judicial officer

2.15 In *Chairmanship in the Magistrate's Court*[2]*,* the author lists qualities and attributes that should be sought. These are appropriate for all judicial officers. A judicial officer must, at all times, act judicially and be detached. They should fulfil their role with a mixture of dignity, patience, politeness and courtesy. All situations should be dealt with in a relaxed and tolerant manner, coupled with firmness, decisiveness and authority when required. These attributes coupled with a sense of humour are, of course, perfection — but they must always be sought.

Legal knowledge and experience

2.16 A judicial officer will have attained a high level of professional achievement and effectiveness in the areas of law in which they have been engaged whilst in professional practice. They should possess a sound knowledge and understanding of the law and rules of procedure commonly involved in the exercise of judicial office in the court to which they are to be appointed; or the ability to acquire quickly an effective working knowledge of the law and rules of procedure in areas necessary for their work not covered by their previous experience.

Professional qualities

2.17 A judicial officer should possess the following

qualities: Intellectual and analytical ability;

Sound judgement

Decisiveness and the ability to discharge judicial duties promptly;

Written and verbal communication skills;

[2] Clifford E. M. Chatteron

Authority, the ability to command respect and to promote expeditious disposition of business whilst permitting cases to be presented fully and fairly;

Capacity and willingness for sustained hard work;

Management skills, including case management skills;

Acknowledge the need to undertake both formal and informal judicial education.

Personal qualities

2.18 A judicial officer should possess:

Integrity, good character and reputation

Fairness;

Independence and impartiality;

Mature and sound temperament;

Courtesy and humanity, and

Social awareness, including gender, ethnic and cultural awareness.

Continuing judicial education

2.19 The need for judges to participate in continuing or on-going judicial education has been recognised worldwide. Many jurisdictions are now establishing formal courses for new judges *(orientation),* designed and delivered by a national judicial college, academy or institute with its own faculty of judicial trainers. Informal judicial education has been the way many gain newt knowledge, skills and attitudes. Access to judicial education material is improving. More judges are now using the Internet as a source for research. Enhanced information is now freely available.

Useful Internet websites

2.20 Searching the Worldwide Web (WWW) can be frustrating and time consuming. It is recommended that you seek assistance in learning how to search and where to search. If you cannot obtain this locally, it is worth noting that many universities have information about searching on the Internet on their websites. An example of this is given below along with a number of websites dealing with various aspects of judicial education or judicial reference material:

Pakistan Law Reform Commission	www.paklawcom.gov.pk
Pakistan Official Website	www.pak.gov.pk
Lahore High Court	www.lhc.gov.pk
UN	www.un.org
UNHCR	www.unhcr.org
Project DIAL	www.auslii.edu.au/dial/
European Court of Human Rights	www.echr.coe.int/
Australian Institute of Judicial Administration	www.aija.org.au
Commonwealth Magistrates & Judges Association	www.cmja.org
Commonwealth Judicial Education Institute	www.dal.ca/cjei
Judicial Education Reference, Information and Technical Transfer Project (JERITT)	http://jeritt.msu.edu
Judicial Studies Board	www.jsboard.co.uk
National Judicial College	www.judges.org
University South Pacific, Law Library	www.vanuatu.usp.ac.fj/library

3. The rules of natural justice

3.1 Compliance with the rules of natural justice, which is rooted in ensuring fairness, is necessary. The two principles of natural justice are *audi alteram partem;* "hear the other side" and h*eno judex in causa sua;* "no one may judge his own cause". These principles combine to ensure that all relevant information is submitted; bias and prejudicial information is ignored; and proceedings are fair in the sense that each party has the opportunity to know what is being said about them and has an adequate opportunity to reply.

Hear the other side

3.2 A party whose rights or property may be affected by a decision has the right to be heard before the decision is made. This rule focuses on the procedures followed by the decision-maker and its effect on the parties. To affect this rule you have to consider what has to be done to allow a person to be heard. This extends to allowing a person sufficient notice to prepare their case and to collect evidence to support their case. They must also have the opportunity to rebut or contradict their opponents. There are exceptions to this rule where a provision specifically allows an order to be made in the absence of one party *(ex parte).*

No one may judge his own cause

3.3 This is specifically referred to in *S.556 Cr.P.C.* Decision-makers should never allow their decisions to be affected by bias, prejudice or irrelevant considerations. Bias arises when a decision-maker has a predisposition to a particular result, or that it may appear to the parties that that is the case. There may be a pecuniary or other interest; some relationship with a party or witness; or a personal prejudice or predetermination of an issue. Each case depends on its factual and legal circumstances.

Suggested guidance

3.4 Don't discuss the case outside of the Courtroom. Don't receive any information about the case privately; all information must be open to the scrutiny of both the parties.

If you do, then you must disqualify yourself. The court must give an opportunity to each party to respond to everything that is said to you by the other side. If a party does not appear at the hearing after service of process, you need evidence that service has actually taken place before proceeding with the hearing. If the summons has not been properly served and a decision is made in the absence of the party, this decision will have to be set aside by a higher Court because the party had not been given an opportunity to be heard.

3.5 Before a hearing is concluded, you must consider the question: "Has each party had a fair opportunity to state his or her case?" If the defendant: is not represented by counsel, is clearly not familiar with procedures, is not fluent in English or has other difficulty in expressing himself; they may be unable to put forward their side of the case. These are questions for your judgment of the situation and the degree of disadvantage. If you have doubts in the particular circumstances, an adjournment may be the course

to take.

3.6 If you have any interest in a case, you should disqualify yourself from presiding. The question to ask yourself is: "Is there any factor present, which technically could amount to bias if I hear this matter?" If so, you should let another judge take the hearing. You may consider you could do the job quite fairly and impartially, but that is not the issue. The appearance to others is important.

Justice must not only be done but must be seen to be done

Pecuniary or other interest

3.7 You should never preside over a case in which you may have, or the public may think you have, a financial or personal interest in the result. The question to ask yourself is: "Would a reasonable person suspect bias in the decision made?" For example: If you are a shareholder in a company, you should not hear a charge against the company. However, as a small shareholder in a large public company, you may hear a case against the company, provided your interest is first disclosed to the parties.

Relationship to a party or witness

3.8 You should never preside Over a case where the accused or a witness is a near relative; a close friend; your employee; or has a close business relationship with you. Careful consideration will be needed in situations where your spouse or family has an involvement or a financial interest in the outcome of a proceeding. At times, you may commence the hearing of a case without realising, for example, that one of the witnesses is a close friend. When the facts become known, you should abandon the hearing, record an order to that effect and seek transfer of the case.

Personal prejudice or predetermination of an issue

3.9 You should not sit in judgment over a matter, in which you may have or appear to have preconceived or pronounced views. This may be in regard to issues, witnesses or parties. An example: If you witnessed a motor accident, you should not preside over any case arising out of that accident. The danger is that subconsciously you may prefer your recollection of the events to the evidence heard in Court. If you have publicly expressed opinion in respect of any matter, you should disqualify yourself from presiding over a case in which that opinion is relevant. Preconceived ideas of guilt or of punishment are unthinkable and wrong. If you have, or a near relative has, been recently involved in a serious motor accident, you should not preside over traffic cases at all until the trauma of the experience has subsided.

1. Trial Courts

Criminal jurisdiction

1.1 At present, every civil district has a Sessions Judge. Depending upon the workload, he is assisted by a number of Additional Sessions Judges. The Session Judge distributes the cases to the Additional Sessions Judges. The Provincial Government appoints Magistrates of the first, second and third class for the district but Sessions Judge, previously the District Magistrate, distribute cases according to the territorial boundaries or according to the police stations depending upon the work load. Offences under the *Pakistan Penal Code* may be tried in the Magistrates courts that are set out as triable in the eighth column of Second Schedule. The class to which the magistrate is appointed
limits his powers of sentence.

Class	Imprisonment '	Fine	Others
First	Not exceeding three years	Nor exceeding 15,000 Rupees	Whipping
Second	Not exceeding one year	Not exceeding 5,000 Rupees	
Third	Not exceeding one month	Not exceeding 1,000 Rupees	

The Provincial Government may invest any first class magistrate with power to try all offences not punishable with death *(S.30 CrP.C.).* However, such Magistrate may not pass a sentence exceeding seven years *(S.34. Cr.P.C.).*

Notification of appointment

1.2 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. It is very important that the magistrate should respect these constraints on his authority. 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.

Sources of powers

1.3 Jurisdiction of Magistrates, in respect of their powers to try criminal offences, is set out in the Criminal Procedure Code. It is essential that all such Acts are available to the presiding officer and that he is familiar with their provisions. In addition to these primary sources, judicial officers should seek to ensure that they are kept informed of decisions of their superior courts that guide their practice and procedures. Specifically, they are encouraged to seek out and refer to the Rules and Orders of the High Court, which are published from time to time setting out instructions to criminal and civil courts.

Punctuality

1.4 Court hearings and judicial officers should be punctual. Punctuality adds to credibility. Courtesy demands that the court should start on time. There can be no justification for not being punctual. A judge who is not punctual loses respect or at least it is greatly diminished. Should there be an unavoidable delay it would be prudent to apologise to those present prior to starting the court(')s business.

Dress

1.5 Judicial officers should be properly dressed. This means that they should adhere to any prescribed dress code. In the absence of a prescribed dress code then dress should be either national or a dark coloured suit with an appropriate tie. Dress is important as it establishes dignity and reflects the nature of the responsibility a judicial officer holds. It will also assist in being distinguished or recognised in the court

complex.

Conduct outside the court room

1.6 The members of the judiciary must not forget that they have to perform special and solemn functions in the society. Therefore, their standards of behaviour need to be high. The common excuse for every judicial impropriety 'we are also human beings' is not a valid excuse. They must realise and be conscious of their responsibility. Therefore, even outside the courtroom, the behaviour of the judicial officers should be impeccable and as

far as possible, they should keep themselves distanced and their social activity within acceptable parameters.

Examples:

A There is a club or teashop at the place of your posting which is not exclusively for judicial officers. Should you visit the club? Should you become a member of that club? You will need to consider the nature of the club, its membership and ask yourself whether this could compromise your position and standing.

B. You should not receive visitors at home whom you do not know.

C. If an acquaintance, friend or relative calls on you and wants to talk about a case in your court, you must stop them firmly. However, if they have blurted out something, which may prejudice you one way or the other in that case before you, transfer the case or have it transferred to another court.

D. Do not attend public functions unless you are assured a secluded place where you are not likely to be exposed to the members of the public.

1.7 In personal conduct, the members of the judiciary should stand out. Faith in the integrity of the judiciary, which means in the individual members thereof, is pivotal to the system. Judges or Magistrates are fallible but the public should have an unshakeable faith that their decisions are not influenced by extraneous considerations. This is possible only if they remain distanced. This is not to say they should become reclusive, as this would distance then too far from the society they serve. However, judicial officers need to consider their position and avoid undesirable social contacts or a profile that could detract from their office.

1.8 A necessary quality of a judge is courage. A judge without courage is no judge. Sitting in judgement over others is difficult, particularly those who hold high office, social or religious positions. However, all are equal before the law and you should not flinch from your duty.

Inside the court room

1.9 The dignity of man is inviolable *Art.14* but more so because it is one of the most cherished values of Islam. Therefore, all members of the public are entitled to courtesy, due respect and consideration in your dealings with them, whether they are observers, witnesses, parties or accused persons. Similarly, treat members of the Bar, as officers of the court, with the respect their position merits. A defendant in a criminal case is looking towards the legal system to see justice administered fairly, objectively and impartially.

1.10 During the court proceedings, take care to use appropriate temperate language. The use of inappropriate language derogates from the dignity of the court. Try to use simple language without legal jargon, avoid being patronising and express yourself simply, clearly and audibly. It is important that what is said in court be heard by everyone. Give reasons clearly and concisely when required and generally refrain from interrupting counsel or a witness.

1.11 His Honour Judge White in a Judicial Studies Board Benchbook for County Court Judges writes "If there comes a moment on the bench when you feel your patience is being over extended, or you find yourself a little short on courtesy, it might be helpful to recall: 1) that judging at all levels is a most privileged occupation — there is hardly a day on the Country Court bench when you will not, by a judgment or order, greatly affect some person's life and ii) that whether the case before you lasts ten minutes or ten days, it will be of supreme importance to those involved, and it may be their only experience in a lifetime of the judiciary."

1.12 Presiding officers should listen more and talk less. They should speak when necessary. Their attention should be focused on what is being said, taking accurate notes and effort to follow the party's or counsel's point of view. There is obviously a difference between appreciating a point of view and agreeing with. A presiding officer should never assume the role of a party or counsel; his function is to listen and determine. He must fully understand the case before it is decided. The presiding officer must sit with an open mind. He should never consider (ed) his own opinion to be the last word. Counsel may change that opinion. Keep the door open to that possibility. In the judicial process, there is no

such thing as routine. Apply the mind at every step of the proceedings. Never show indulgence to one party at the expense of another and at the expense of justice.

Delay

1.13 Delay may be due to causes beyond the control of the courts but some within their control. We are concerned with the latter. One cause can be lack of weight, the tendency of the court to treat procedural matters as routine. Showing indulgence to one party at the expense of another is unfair and smacks of partiality. No adjournment should be granted without good cause. Unnecessary adjournments should be avoided at all cost. Once a case is concluded, the decision should not be delayed. Never leave judgements unannounced, unwritten or unsigned on transfer or retirement. **Justice delayed is justice denied.** Some delays caused by others may be beyond the control of the judicial officer, albeit if the court can seek to expedite these they should. Any delay in the pronouncement of judgement, after the conclusion of the trial, is the sole responsibility of the presiding judge from which he cannot escape.

Disorder in court

1.14 When an accused is sentenced, makes a comment about the judge or the court in the heat of the moment, then it may be wise to develop a little judicial deafness. Where there is minor disorder in court the presiding officer may give a verbal warning or direct the police or court clerk to advise the person to behave himself. Where necessary he may order the person to leave the courtroom. If the disorder is more serious, it is suggested that the judge should immediately adjourn and seek assistance of the police who may charge the offender with a criminal offence.

Contempt of court

1.15 The court as an institution is entitled to respect. Contempt of court proceedings, except in extreme cases, should always be avoided. Jurisdiction to punish contempt should be exercised to vindicate the integrity of the court and its proceedings and not to vindicate the personal dignity of the judge. However, if the contempt in the face of the

court is designed to frustrate or obstruct the process of the court, it has to be firmly dealt with so that the trial may proceed smoothly. Procedure in cases affecting the administration of justice is dealt with by *S.476 to S.487 Cr.P.C.*

Offences affecting administration of justice

1.16 Proceedings for certain offences affecting the administration of justice are set out in *S.476 to S.487 (Cr.P.C.).* Caution is advised when effectively dealing with a class of offences in substance amounting to contempt. While dealing with such offences, the object must be to promote justice rather than to retaliate.

Adversarial system

1.17 The system under which the Courts in Pakistan function is adversarial. This system implies, so far as the criminal trials are concerned, that the court's function is only to decide whether the person accused of an offence is guilty or not. If the court is satisfied that the offence in question has been committed but the person accused before it is not the offender or there is a reasonable doubt about his involvement in the commission of the offence, it is not for the court to find out who the offender may be. That is the duty of the police or the complainant as the case may be.

1.18 Two advocates will assist the court normally, one representing the prosecution and the other representing the accused. Sometimes, the complainant may engage counsel to represent him in a police case. These counsel are there to assist the court, on the basis of their respective points of view, to arrive at a correct conclusion. The paramount concern of the court is to secure justice in accordance with law. The court should not attempt to make up the deficiencies of one side or the other. However, the court may call for a document or a witness, if considered necessary for promoting the cause of justice.

Role of advocates

1.19 Although the first duty of counsel is to his client, he should not forget that he is also an officer of the court. Counsel's duty is to present his client's case in the best

possible light but remain within the framework of law and standards of professional conduct and etiquette. This means that he should render full assistance to the court in the conduct of the case in which he is appearing. Counsel should show the court and others respect and courtesy. Even in cross-examination where they are seeking to discredit a witness they should not bully them or be abusive.

Defence counsel

1.20 Whilst defence counsel must never mislead the court. They are under no duty to be impartial. Their interests are those of the party they represent. Counsel should not try to delay the court proceedings simply because such delay will work to the advantage of his client nor should he embark upon cross-examination of a witness putting a defence case for which there is no evidence.

Prosecuting counsel

1.21 Counsel for the prosecution should place the case impartially before the court. Whilst it is their duty to prosecute, not defend the accused they are also under a duty to assist the court in arriving at a decision, which is consistent with truth and justice. This means all relevant facts should be placed before the court. A prosecutor should not withhold a witness's name or any other evidence from the court that comes to his notice even if it is detrimental to his case; this should be disclosed to the defence. Changes have been taking place in other jurisdictions, which are being considered here. Full disclosure of the prosecution evidence is now commonplace.

Individual case management

1.22 Management of the cases before him is the responsibility of the presiding officer. There may be a pilot case delay reduction or management system being adopted, in your court. We are not talking about this at this time. The presiding officer should be conscious at all times of the number of cases on his file and the stage at which each case is. He should maintain his personal court diary with details of the cases for each day and he must consult this before fixing any case in order to ensure that the case will proceed. If the accused is in custody, it is the court's responsibility to ensure that he is

not incarcerated unnecessarily. Even if on bail, the court should remind itself that having a criminal case pending is an ordeal which should be resolved as soon as is reasonably practical. Unnecessary adjournments or delay by either party must be avoided. The presiding officer may like to place himself in the shoes of the accused to see whether the court is ensuring a fair and timely disposal of the case. It is the primary duty of the court to be just and fair to all concerned.

Order of the list

1.23 It might be prudent of a magistrate to ensure, as far as possible, that his list of cases is arranged in a manner that causes the least inconvenience to the parties. For example, the cases in which process is to be served on one party or the other may be taken up first and the cases in which evidence is to be recorded taken last. Where hearings involve production of the accused from jail or where witnesses are required to attend the case may need to be taken a little later in the day. Magistrates may have worked out their own systems. It is always wise to have a routine to be followed. Each presiding officer should fix a schedule for his court work showing exactly what time is allocated for different types of cases or applications. This kind of schedule assists all court users but it is important that the schedule is circulated and known, particularly by the advocates.

Overview of a criminal case

1.24 At all times it is essential that the relevant provisions of the *Cr.P.C.* be applied at the relevant time during the investigation and trial of a criminal offence. Delay has been referred to throughout this benchbook; this is even more important in the progress of a criminal case where the liberty of the citizen is at stake. A primary duty of the court must be to ensure that the case is processed as expeditiously as is practicable.

1.25 When a report is received, the police commence their investigation. If an arrest is made, the question of a remand or bail will arise. If a remand is to be applied for, the court must be informed and a decision of police custody must be addressed. When the investigation is complete, the court will inspect the challan and if satisfied there is

sufficient evidence to commence a trial the case will proceed. The accused is brought before the court and charge(s) framed. A plea is taken and if not guilty, the trial will proceed.

1.26 Magistrates must ensure that only those cases where there is sufficient evidence to proceed are taken forward. At any stage, where the court is satisfied that no sufficient evidence exists the court must acquit the accused. The courts can save much time and effort by weeding out weak cases at the earliest stage.

2. Investigation

Search for persons wrongfully confined

2.1 *S100 Cr.P.C.* is particularly important. Under this section, any magistrate of the first class may order the recovery of a person in wrongful confinement. Once such a person has been produced before the magistrate, he can pass any appropriate order which he deems fit in the circumstances of the case. If the powers under this section are properly invoked and used, not only is a burden of the High Court under *Art.199* lightened but the fundamental rights of the individual are also protected and enforced immediately, and without the costs and attendance complicated procedure of a High Court case. *See Part 1, Paragraph 14.5, Writs of Habeas Corpus.*

Searches

2.2 Search of private premises is a very sensitive matter and, therefore, it is the duty of the magistrate concerned to strictly adhere to the law on the subject. The provisions are found in *S. 101-S.105 Cr.P.C.* A search warrant may normally be issued if the court is satisfied that there is reasonable ground for believing that certain conditions are met:

- The prospective search must relate to a particular place; and
- The court must be satisfied that the thing or things to be searched for are;
- Those upon or in respect of which the offence has been or is suspected of having been committed; or
- Will be evidence as to the commission of any such offence; or
- Are intended to be used for committing any such offence.

Commission for examination of witnesses

2.3 In circumstances where it appears to the court that a witness cannot attend court without an amount of delay, expense or inconvenience, which under the circumstances of the case would be unreasonable, they may be examined on commission. It is for the court to decide whether resort to such examination is justified. If it is found justified, the procedure to be followed is set out in *S.503 to S.508 Cr.P.C.*

Police inquires into cause of death

2.4By virtue of the power contained in *S.174 Cr.P.C.,* where the police believe a person to have died and the death is suspected of being caused by the person:

Committing suicide, or

Has been killed by another, by an animal, by machinery or by accident; or

Has died in circumstances raising a reasonable suspicion that another has omitted a criminal offence.

They must inform the Magistrate empowered to hold inquests and then to make investigations and report on the apparent cause of death to the Magistrate *(S.174 Cr.P.C.).*

Magistrates inquires into cause of death

2.5 When a person dies in custody of the police, the Magistrate shall hold an inquiry into the cause of death, and may do so even in cases listed above in addition to the police investigation *(S.176 Cr.P.C.).* Any evidence must be recorded by the magistrate.

Identity parades

2.6 Where the 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 *[1974 SCMR* 175]. An identification parade conducted without the supervision of the magistrate is of no value *[PLD 1958 DC1].* 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. As far as possible, people of similar height and features, should be arranged in a group from which the person is to be identified. The accused should be given the choice to place himself in the group wherever he wishes. 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. On being correctly identified, the accused should be asked to offer an explanation, reason or mitigation, which should also be noted by the Magistrate. For example, while in police custody the accused was shown to the witness by the police to facilitate subsequent identification. 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.

Power to record confession

2.7 A magistrate of the first class and any specially empowered magistrate of the second class may record a statement of confession made to him in the course of investigation or afterwards but before the commencement of the inquiry or trial. The power to record, the mode of recording and the details are given in *S.164 Cr.P.C.* The recording of confession is a very responsible duty of the magistrate, which must be taken seriously and discharged with the utmost care and satisfaction. In the first place, the person confessing has to be convinced that he is before a judicial officer who has no link to the police, the prosecutor or investigator. He must be cautioned that he is free to make a confession or may choose not to, however, if he does, it may be used against him in his trial. The confession must be made and recorded without threat, intimidation or awe. The accused should be allowed time to compose himself, to think about it and make the decision himself. Confessions must be recorded and authenticated upon a printed form available. This is designed to ensure that the conditions are met and it includes the questions to be asked. Magistrates should not simply fill out the form as an administrative act but ensure that they are satisfied the purpose and conditions are satisfied and that the confession is free and voluntary.

3. Arrest and appearance

Duty of magistrates in respect of those arrested

3.1 When a person is arrested without warrant and is required to be held by the police, the police must report this to the Magistrate and bring him before the court as soon as is possible. By virtue of *Art.10* and *S.61 Cr.P.C.,* the accused must be presented before the nearest criminal court within twenty-four hours of arrest excluding the travel time, if any. The restrictions under the *Cr.P.C.* on the police in respect of arrest and custody are very important and their aim is to ensure that the Magistrates promptly exercise their authority to ensure that the individual's rights are not compromised. In addition, the provisions of the code place a positive duty on Magistrates to supervise police investigation and they are *not "at liberty to relax the supervision which the law intends that they should exercise".*

3.2 It is the Magistrate(')s duty to ascertain the time elapsed since his arrest. If the police have detained the accused for more than the prescribed period, the matter should be recorded and a report sent to the Sessions Judge. Criticism on the conduct of police officers and others should generally not be subject to remarks but normally be dealt with according to directions received from time to time from the High Court. Further advice on complaints about police officers' conduct is set out later. The Magistrate should consider, in addition, advising the detainee that a civil remedy may be available to him and that he should seek legal advice.

Legal representation

3.3 The accused should be allowed to engage counsel to advise and assist him at the earliest opportunity and the court should advise him of this, and if necessary, grant an adjournment for this purpose. This will assist the accused but also the court, as counsel will be able to draw the court(')s attention to any number of matters which would be more difficult for the court to ascertain itself. Further, management of the trial should immediately become more effective to marshal. In all serious cases where an offences carries sever sentence i.e. death sentence, if the accused is unable to engage

counsel for financial reasons, the court is duty bound to ensure counsel at state expense.

Police custody

3.4 The accused may be remanded to the police custody for a maximum period of 15 days in aggregate, for the purpose of investigation *(S.167(2) Cr.P.C.).* At the end of this period, or if the investigation is completed sooner, or if he is not satisfied that he is needed by the Police any longer, the accused has to be remanded to judicial custody provided he has not been enlarged on bail. Women cannot be remanded in police custody; any remand must be to judicial custody *(S.167(5) Cr.P.C.).*

3.5 The High Court has given specific guidelines in respect of Police Custody:

a) There must be some important or specific purpose connected with the completion of the enquiry in order to justify a remand to Police custody. A general statement that the accused may be able to give further information is not acceptable.

b) The period should be as short as possible.

c) If the case is of the type which normally requires time to complete the enquiry the person may be remanded.

d) A remand to verify the accused's statement is justified.

e) Where the accused has refused to make a confession or has made one and the prosecutor states the confession is unsatisfactory, the accused in no circumstance should be remanded to police custody.

Where a remand is ordered, reasons must be recorded and a copy of the order together with the reasons, sent to the Sessions Judge.

Judicial custody

3.6 The magistrate must never forget that the person's liberty is at stake. Liberty is one of the most cherished fundamental human rights guaranteed under the Constitution. Therefore, the court should always be on guard against depriving the

accused of their liberty without due sanction of law. Like any other step taken by court, the granting of remands should not be taken as a routine matter. At the end of a period of remand, the magistrate must insist on the physical production of the accused before any further remand is granted, whether to the police or to the judicial custody. The magistrate should also speak with the accused to make sure that there has been no maltreatment in custody. The magistrate is responsible for the safe lawful custody of the accused. Put yourself in the place of the accused.

3.7 Once the challan in a case is submitted to the court, the magistrate may commence the trial forthwith. However, if the trial has to be postponed or having commenced the hearing is to be adjourned, the accused, if produced from police custody, may be remanded to judicial custody. Such remand cannot be for more than 15 days at a time, regardless of the length of adjournment *(S.344 Cr.P.C.).* Where the challan is not submitted, in the absence of good cause, the court should proceed with the case.

3.8 The Court should take a robust approach in order to ensure that an accused is not prejudiced by delay. Justice demands the right to a fair trial; an essential element of this must be a trial within a reasonable time.

4. Bail

4.1 The purpose of bail is to secure the presence of the accused at the trial, whilst allowing the accused his liberty and protecting him for unnecessary detention. It must always be kept in mind that the accused is innocent until proven guilty. Therefore, when deciding to grant bail, any amount of bond, the number of sureties or conditions imposed should only be sufficient to ensure that the accused attends the next hearing, it should not be excessive nor becomes a punishment.

Bailable offences

4.2 Where a person is arrested, detained, or brought before a court in case of a bailable offence, the court has no option but to grant bail or discharge the accused on his personal bond. ". such person shall be released on bail" *(S.496,Cr.P.C.).* The officer-in-charge of the police station is also empowered to grant bail in respect of bailable offences.

Non-bailable offence

4.3 Where a person is accused of a non-bailable offence, the court may release on bail *(S.497 Cr.P.C.).* The practice is to grant bail rather than refuse it. However, in case of offences punishable with death, imprisonment for life, or imprisonment for ten years, bail hould not be granted if there exist reasonable grounds to believe that the accused is guilty of such an offence.

4.4 Exceptions apply:

Persons below the age of sixteen years, or

Any women, or

Any sick or infirm person

In these cases, the court may release on bail. However, before granting bail, the prosecution must be given notice to make any objection.

Further inquiry

4.5 Where a further inquiry is necessary before it can be held that reasonable grounds exist for believing that the accused is guilty of a non-bailable offence, the accused has to be granted bail *(S.497(2) Cr.P.C.).* In this situation, the reasons for doing so must be recorded in writing.

Pre arrest bail

4.6 Pre arrest bail can only be successfully claimed where on the face of the FIR, it discloses no commission of an offence. Where a bailable offence is disclosed but the executive arm of the state is using the process more to harass and disgrace the named accused than pursue a genuine case. Similarly, it can be claimed in a case where positive *mala fides* (from Latin - undertaken in bad faith) is alleged against the Police or prosecutor and where there is *prima facie* (from Latin - at first appearance or on the face of things) support for it on record *[PLD 1989 S.C. 192]*

Bail after arrest

4.7 Bail after arrest in a non-bailable case can be claimed, where there are features in the cases or material on record, which must be mentioned without passing judgment on merit, which necessitate a further inquiry into the guilt or innocence of the accused before finding a prima facie case. These matters will include the previous conduct of the accused in associating with or avoiding investigation, submitting to the authority or challenging it. The likelihood of his remaining a fugitive from justice is a factor to be kept in view in granting bail.

Grounds for refusing bail

4.8 As stated the purpose of bail is to ensure that the accused attends court at the next hearing. Therefore, the primary reason for refusing bail will be that the court is satisfied that the accused will abscond. There are other grounds that are proper for the court to consider that are in the public interest:

That the accused will commit further offences whilst on bail.

That the accused may interfere with witnesses or obstruct the course of justice e.g. by ampering with evidence.

That the accused may be subject to physical attack by others or himself

Information needed for assessment

4.9The court will need information upon which to assess the nature of the risk it fears in refusing to grant bail. Where there is an objection to bail by the prosecution it is not sufficient simply to object, they will need to furnish the court with information upon which they based their objection. Similarly, if the accused applies for bail despite the prosecution's objection, the court will need information upon which it can base its decision. Information that can assist the court may include the following:

Community ties, Fixed address, Previous criminal record, Previous bail record, Circumstances of the offence, Nature and seriousness of the offence, Likely sentence if convicted, Strength of the prosecution case, Length of any remand, Need to seek or pursue legal advice, Employment and education, and the accused's condition e.g. a drug user or in danger from others or himself.

4.10 It is possible for the court to impose a condition that the accused must comply with during the remand period. The condition will vary from case to case, but should be decided upon to ensure the attending of the accused. A condition that could be considered would be to surrender a passport or any travel documents to the court. The court should note any condition imposed on the record and ensure that any condition imposed is as precise as possible.

Cancellation of bail

4.11 The High Court or Court of Sessions, or any other court, which has released an accused on bail for a non-bailable offence, may order his arrest and remand in custody. This will be where there has been a change in circumstance and there is apprehension he

may abscond, he has breached the terms of his bail, committing other offences, interfering with witnesses or the administration of justice, or there are further grounds for his remand *(S.497(5) Cr.P* C.).

Guidelines cases

4.12 See the following cases. [PLD 1998 SC 97], [PLJ 1996 SC 797], [PLD 1984 SC 192].

Basic information

4.13 It is suggested that there is basic information you may consider recording that could be devised into a bail decision form.

NAME: AGE:

ADDRESS:

CHARGE(s);

SUMMARY OF PROSECUTION OBJECTION TO BAIL:

SUMMARY OF ACCUSED REASONS FOR GRANTING BAIL

RELEVANT LEGAL PRINCIPLES

RELEVANT FACTS

DECISION

REASONS

Bail Checklist

4.14 The following bail decision checklist may assist you.

CONSIDERATIONS	IN FAVOUR OF BAIL	AGAINST
Probability of Answering Bail		
Nature and gravity of offence	Not Serious	Serious
Strength of evidence: Probability of conviction (any confessions; eye witnesses, etc)	Not Strong	Strong
Severity of likely punishment	Fine	Imprisonment
Character and past conduct of the offender	No previous convictions	Previous convictions
	No previous record	Previous record
Other special matters relevant to likelihood of appearance/non appearance.	If so, record here:	
Public Interest		
Will accused get an immediate or delayed trial?	_ Immediate	Delayed
Risk of accused tampering with evidence or witnesses.	Little risk	Great risk
Risk of re-offending on bail?	Little risk	Great risk
Possibility of prejudice to defence in preparation of defence?	Yes	No
Any other special matters relevant in the particular circumstances to the public interest.	If so, record here:	

5. The charge

5.1 Before recording the prosecution evidence, the charge(s) must be framed. Before framing the charge it must be ensured that the accused has been provided well in time with all the relevant documents i.e. copies of statements of witnesses examined by the Police during the investigation and the site inspection. Framing of the charge is one of the most important steps in the trial of a criminal case. A charge is framed in accordance with the provisions of *S.242 Cr.P.C.* Detailed instructions with regard to the framing of charge are contained in *S. 221 to S.240 Cr.P.C.*

5.2 When the accused is charged with several offences each charge must be framed separately.

5.3 The trial judge must have a thorough overview of the case from the contents of the FIR and the statements in Court of the main witnesses of the cases so as to be able to exercise his powers under *S.249-A Cr.P.C.* in suitable cases. . Before framing the charge, the presiding officer must consider the evidence. If the charge is groundless or there is no probability of a conviction, the case should be dismissed. Many cases proceed beyond this stage where they should have been dismissed thereby clogging up judicial and court resources, and putting the accused through unnecessary stress and expense**.**

Roles of the judge and the counsel

5.4 It is the responsibility of a judge to frame the charge correctly and follow *S.221 to S.240 Cr.P.C.* meticulously. The importance of the charge lies in the fact that it defines the scope of the trial. It is therefore critical from the perspective of the prosecution and the defence. In the framing of the charge, the prosecutor and the defence counsel are both expected to assist the court. It is only after the charge has been correctly framed that the prosecutor knows exactly what he must prove and the accused what he is required to answer.

Language and content

5.5 The charge has to be written either in English or in the language of the court. Some offences do not carry specific names. Where an offence has a specific name, it may be described by that name in the charge. Otherwise, the offence must be so described as to give the accused notice of the matter with which he is charged. The purpose of the law on the subject of 'charge' is to ensure that the accused is not prejudiced or taken by surprise. It is therefore important that the Magistrate or any other judicial officer trying a criminal case is always on his guard against prejudicing the accused.

Previous conviction specified on the charge

5.6 If an accused has a previous conviction which will make him liable to enhanced punishment or punishment of a different kind, the fact, date and place of the previous conviction must be set out in the charge. He should be asked if he admits it, and his reply should be recorded. However, if he denies the conviction, it must be proved according to the provisions of *S.511 Cr.P.C.,* after, the accused has been convicted of the offence that he is charged with. If the conviction has been inadvertently omitted it may be added at any time before passing the sentence. This is one of the exceptions to the general rule that previous convictions are only relevant after conviction. Magistrates must be careful not to allow this knowledge in any way to predetermine any finding of guilt in respect of the actual offence charged.

Time and place

5.7 The charge must include the time and place of the occurrence and a description of the victim, if any, in such a manner as to give the accused reasonably sufficient notice. .

Joinder of charges

5.8 If the court is in doubt as to which offence the accused should be charged with i.e. where the alleged acts fall under two or more separate definitions. The accused may be charged with and tried at one trial for each such offence. For joinder of charges, the court

should refer to *S.233 Cr.P.C.* and the sections that follow. For charging two or more persons jointly see *S.239 Cr.P.C.*

Variance in charge and evidence

5.9 Where the accused is charged with one offence but the evidence adduced reveals that he is guilty of another. The accused may be convicted of the other offence.

Clarity

5.10 The charge requires as much clarity as possible. Such clarity is in the interest, of all concerned in the trial including the court. Most important of all, it is in the interest of justice.

Effect of error

5.11 There is a saving provision whereby an error in the framing of charge will not be considered material except where it can be shown that the accused was misled or prejudiced in his defence. No finding or sentence shall be deemed invalid simply because no charge was framed unless such omission caused injustice *(S.535 Cr.P.C.).*

6. The trial

6.1 The procedure that shall be followed in the trial of cases before Magistrates is set out in *S.241 to S.250-A Cr.P.C.*

Supply of statements and documents to the accused

6.2 In all cases prosecuted by the Police, except those tried summarily or punishable with fine or imprisonment not exceeding six months, copies of statements of all witnesses recorded under *S.161* and *S.164 Cr.P.C.* and the inspection note recorded by an investigation officer, shall be supplied to accused, free of cost, not less than seven days before the commencement of the trial *(S.241 Cr.P.C.).* An exception to this exists where disclosure of a statement or part, would be inexpedient in the public interest.

6.3 Once the charge has been framed, the case can proceed. If it is not possible to proceed with the case immediately after framing of the charge or altering a charge, the trial may commence at a subsequent date to be fixed by the court. The trial may commence immediately if it does not prejudice the accused in his defence.

Note: The court should ascertain from the prosecution whether any exhibits are to be produced, if so, check that they are available. If not, and they cannot be obtained easily, then the trial will be disrupted, as they will not be able to be produced in evidence. In appropriate cases, a short adjournment at this stage may save much time later.

Non-appearance of complainant

6.4 Where a summons was issued upon complaint, if the complainant fails to appear on the day of hearing or any subsequent day following an adjournment, the magistrate shall acquit the accused, unless for some reason he thinks proper to adjourn the case to some other day *(S. 247 Cr.P.C.).*

Dispensing with presence of accused

6.5 The court may dispense with the attendance of the accused in court where a lawyer represents him. The court should record the reasons why the accused is incapable of being present. The court may direct his attendance at any later stage of the proceedings *(S.540-A Cr.P.C.).*

The Plea

6.6 The charge shall be read out and explained to the accused. He shall then be asked whether he admits that he has committed the offence charged *(S.242 Cr.P.C.).* The court should satisfy itself that the accused understands the charge. If the accused is represented the court will need to explain it to him. If he is represented, counsel will have done this.

Mental illness

6.7 Where a Magistrate believes the accused to be mentally ill and consequently incapable of making his defence, he should arrange for the accused to be examined. A medical officer designated by the Provincial Government should carry out the examination. The court should record the medical officer's report and opinion. If the Magistrate is satisfied that the illness means the accused is incapable of defending himself, he should postpone the case and record his finding. The court may grant bail where the court is satisfied he will be taken proper care of and will not injure himself. If the court is not satisfied then the accused may be detained in appropriate place of safe custody. The court must report what action has been taken to the Provincial Government *(S.464 to S.466 Cr.P.C.).* Where the medical illness is temporary condition, the accused may be brought back to court at a later date when if found to be fit, the trial may proceed *(S.467& S.468 Cr.P.C.).*

Acquittal on ground of lunacy

6.8 Where the accused appeared of sound mind at the time of hearing. Having heard all the evidence in the case, the court may acquit the accused, if satisfied that whilst the accused committed the act necessary for the offence but at the time, as a result of unsoundness of mind, he was incapable of knowing the nature of the act or that it was wrong and against the law. The court must state whether he committed the act or not *(S.469 and S.470 Cr.P.C.).*

6.9 If acquitted on the ground of lunacy, the court must order the accused detained in a place of safe custody and report the action taken to the Provincial Government. *S.471 to S.475 Cr.P.C.* set out the steps to be taken thereafter.

Guilty plea

6.10 If the accused pleads guilty, the admission shall be recorded as nearly as possible in the words used by him. If the accused has pleaded guilty to the charge as framed without any qualifications or reservation and shown no sufficient cause why he should not be convicted then the court may proceed to record a conviction *(S.243 Cr.P.C.).* Caution is required. A plea of guilty can only be recorded when the accused person raises no defence at all. Situations have arisen where the plea may not be an honest one. For example, the accused person may be trying to shield someone else or may have some other reason best known to him to say he is guilty. If there is a slightest doubt about the plea at any stage, the court should call upon the prosecution to prove the case.

Not guilty plea

6.11 If the plea entered is not guilty, the trial shall proceed and the court will hear the evidence of the prosecution and defence. If the accused makes no admission, admits the charge partially or has a defence to advance e.g. an alibi, grave and sudden provocation, etc. the court should record the plea as not guilty. The defence may bring out its case during the trial.

Presumption of innocence

6.12 The accused is presumed innocent of the offence he has been charged with, unless and until he is proved guilty. This is a very important presumption, which is not diluted by the fact that the accused has a previous conviction. He may have been convicted of several offences before but it does not mean that he is guilty in the case now before the court. Therefore, this presuniption should never be taken as an idle indulgence to the accused

Persons convicted or acquitted may not be tried for the same offence

6.13 The general principle is that a person competently convicted or acquitted of an offence is not liable to be tried again for the same offence or for a different offence based on the same facts. This is also called the rule against double jeopardy or autre fois convict or acquit and is preserved by *Art.13(2)* of the Constitution. Presiding officers are advised to read *S.403 Cr.P.C.* and the illustrations following the section. This is a preliminary issue that should be raised at the first opportunity.

Standard of proof

6.14 In a criminal case, the prosecution has to prove the charge against the accused **beyond a reasonable doubt.** This is the criminal standard of proof. That is the reason why the benefit of the doubt, which means a reasonable doubt, is given to the accused.

"In a criminal case, it is the duty of the court to review the entire evidence that has been produced by the prosecution and the defence. If, after an examination of the whole evidence, the court is of the opinion that there is a reasonable possibility that the defence put forward by an accused might be true, it is clear that such a view reacts on the whole prosecution case. In these circumstances, the accused is entitled to the benefit of doubt, not as a matter of grace, but as of right, because the prosecution has not proved its case beyond reasonable doubt."
Abdul Rashid C.J.

"It need not reach certainty, but must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to

protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it is possible but not in the least probable' the case is proved beyond reasonable doubt, but nothing short of that will suffice." Lord Denning.

Burden of proof

6.15 The burden to prove every element of the charge against the accused is entirely on the prosecution to the criminal standard of proof. However, if the accused takes a plea of alibi or self-defence, the burden of proving such lies on the accused. Whilst the burden of proof shifts to the accused, the standard of proof is not as heavy as that of the prosecutor. For example; in a case where the accused pleads self-defence, the accused does not have to prove he acted in self-defence beyond reasonable doubt; he only needs to establish he so acted **on the balance of probabilities.** If he succeeds in showing the court that on balance he was acting in self-defence, he must be acquitted. In order for there to be a conviction, the prosecution must rebut the accused's evidence and must prove beyond reasonable doubt that he was not acting in self-defence. The Federal Court has stated "*it is not incumbent on the accused to establish his plea in mitigation or justification of the offence with the same rigidity and exactitude as the prosecution".*

7. Evidence

Prosecution evidence

7.1 The prosecution evidence has to be adduced by the prosecutor, which is subject to challenge by the defence, The court has a primary duty to ensure that any evidence adduced is relevant to the case before it. The relevance or otherwise of a piece of evidence, whether oral or documentary, has to be judged on the basis of the criteria laid down in *Chapter III* of the *Qanoon-e-Shahadat.* It is the duty of the prosecutor to set out the prosecution case clearly through the presentation of evidence. The most common form of evidence is testimony i.e. oral evidence of witnesses, given in court, on oath or after affirmation.

Examination -in-Chief

7.2 It is the burden of the prosecutor to disclose the case against the accused by his examination-in-chief of the witnesses. The witness, in examination-in-chief, tells the court his or her version of the facts in their own words. No leading questions should be put to the witness. No gaps should be allowed to be filled by the prosecutor by making suggestions, indications or prompting the witness. The witness should be led through his evidence by the prosecutor keeping the witness focused on relevant, admissible disclosures concerning the crime and circumstances of its commission. The prosecution evidence should lead logically to prove each element of the charge. The evidence given "in-chief" is then subject to challenge by the defence by way of cross-examination.

Cross-examination

7.3 In cross-examination, it is very important that the defence case must be "put" to the prosecution witness. The defence must adduce evidence in support of the defence case after the prosecution case.

Re-examination

7.4 When the cross-examination is completed, the prosecution has the right to re-examine the witness. This is often very necessary to explain matters, which may have come out in cross-examination and appear to be damaging or unhelpful to the prosecution case. It is confined therefore, to matters raised in the cross-examination and fresh matters must not be raised. Again, leading questions are not permissible. There can be no re-examination where there has been no cross-examination. A party entitled to cross-examine is under no obligation to do so but cannot later have the witness recalled because a question he should have asked was not asked. In those cases where there are more than one accused and each cross-examines a witness, re-examination follows the last cross-examination.

Questions by the court

7.5 After re-examination by the prosecutor, the court may only ask questions to clarify any matters. If there is any ambiguity, contradiction or confusion in the statement of any witness, which is relevant and material, the court has a duty to clarify it by putting questions to the witness. This duty should be exercised with great care so as not to give an impression of prejudicing or prejudging the cases of any party or doubting at that stage the credibility of the witness.

7.6 When the court comes to the point of making a decision in the case, no part of the examination-in-chief or the cross-examination should be considered in isolation, the evidence as recorded has to be considered as a whole. In the course of recording evidence, the court should distinguish examination-in-chief, cross-examination and re-examination. Further, the court should note any matters concerning the demeanour of witnesses, if noteworthy and if it affects the weight or credibility, the court attaches to the evidence adduced.

Courts power to summon and examine witnesses

7.7 Under *S.540 Cr.P.C.* the court has the power while holding an inquiry or trial or any other proceedings under the *Criminal Procedure Code* to summon any person as a witness or examine any person already in attendance. Similarly, a court has the power to recall and re-examine any such person. However, these powers have to be exercised only to promote the cause of justice. The parties have the right to cross-examine such a witness.

Relevance and admissibility

7.8 The prosecution or defence should not be allowed to ask irrelevant questions. Further, admissibility of evidence depends upon whether its prejudicial effect outweighs its probative value. The court has discretion to exclude such evidence. However, the court can be in a difficult position to make an immediate decision as to its relevance or admissibility. It may well be that defence counsel starts a line of questioning which, may be "putting" the defence case to the witness in cross-examination or seeking to adduce evidence to attack a witnesses' credibility that cannot be done without setting out certain circumstances. In these situations, an objection will normally be raised by the other party, who will insist the court make a ruling immediately. The reality is that this is not always possible.

7.9 Where a judge or magistrate sits alone, he is the sole decision maker in respect of fact and law. Any evidence necessary and properly called and admitted during the trial is in fact before the trial judge for all purposes of the trial. It is the judge's duty, so long as that evidence remains on the record, to give such weight to it on the question to whether it may be relevant as is proper. If a leading question is put in examination-in-chief the matter can be dealt with immediately and the court should get the question rephrased. If in cross-examination a party objects to a question as being irrelevant or inadmissible, the preferred course is to note it and dispose of it forthwith. If it is more complex it should be noted and the decision can be deferred until an overall view of the case has emerged. However, it will be important that the court records and announces its decision in respect of that

submission. Should the court not address the matter or deal with it, this would give rise to grounds for an appeal. This approach is supported by the High Court's instructions urging criminal courts to make notes of all material matters and orders made during the trial *[Safdar Ali Vs Crown PLD 1953 F.C. 1993].*

Documentary evidence

7.10 The rule with regard to evidence is that only the best evidence has to be produced at the trial. Primary evidence is always to be preferred. For secondary evidence to be admitted sufficient reason has to be recorded for allowing it to be brought on record.

Hearsay

7.11 Hearsay evidence is evidence, either oral or written, that tries to prove a fact the existence of which is based on what someone else has said and not what the person testifying has seen or heard himself. It is not based his personal knowledge or observation. As a general rule, hearsay evidence is inadmissible. If admitted, no objection being taken, should never be given much weight. Hearsay can never be admitted to prove the truth of what is being alleged. The exceptions to this general rule of exclusion are:

Dying declarations

Declarations against interest, pecuniary or moral

Act or declaration about pedigree

Family reputation or tradition regarding pedigree

Common reputation

Part of *res gestae* (Latin: things done)

Entries in the course of business

Entries in official records

Commercial lists and the like

Learned treaties and

Testimony at a former trial

Acquittal at any stage

7.12 At any stage of the trial, if the Magistrate thinks that there is no case for the accused to answer, the charge is groundless or there is no probability of the accused being convicted of any offence, then the Magistrate may, after hearing both the sides and recording his reasons, acquit the accused *(S.249-A Cr.P.C.).* Sessions Judges have a similar provision under *S.265-K Cr.P.C.* These provisions mean that if there is insufficient prosecution evidence to call upon the accused to make his defence the court should acquit the accused. The court should consider whether the prosecution has established there is a case to answer before asking the accused if he wishes to give evidence on oath or call evidence in support of his defence. If counsel represents the accused then this submission would be made on his behalf. However, if the accused is unrepresented, it is important that the court considers the position.

Power to examine the accused

7.13 At any stage of the inquiry, without any previous warning to the accused, the court may put questions to the accused. The purpose is to enable the accused to explain any circumstances in the evidence against him. The accused shall not be sworn, and therefore he may refuse to answer any of the questions and he cannot be prosecuted for that. However, the court may draw such inference from such refusal or answers, as it thinks fit. The answers should be recorded. They may be taken into consideration in relation to the trial before the court and put in as evidence for or against them in any other trial or enquiry in- relation to another offence *(S.342 Cr.P.C.).* It should be in the form of questions and answers. There must be no influence, promise threat or inducement to the accused to disclose or withhold any matter. All the material factors, and circumstances brought on record and appearing to be against the accused have to be specifically put to the accused

in the form of questions and the answers recorded in the words of the accused. Additionally, he has to be asked why the witnesses are making statements against him. Finally, whether he has anything further to say. His statement has to be certified by the court. Suggested questions may include; "Why has the case been taken against you?" "Why have the witnesses said what they have against you?" "Do you wish to call anyone as a witness in your defence?"

Accused giving evidence on oath

7.14 The accused is a competent witness and may give evidence on oath in his defence in his trial *(S.240 (2) Cr.P.C.).* The accused should be asked whether he wishes to give evidence on oath, and importantly, particularly where the accused is unrepresented, he should be warned of the implication. Those are that he may be cross-examined, and whilst he is under no obligation to answer any question which may incriminate him in respect to any other offence he has committed or this offence or is of bad character. He will lose this protection in three circumstances; similar fact evidence is admissible i.e. proof of other offences will show his guilt in respect of this offence, he has attacked the credit of a prosecution witness, or he has given evidence against a co-accused. In these circumstances, he must answer incrimination questions or if he refuses, the prosecution may call evidence to prove the substance of the question put to him. If he elects not to make a statement on oath, this fact shall not be held against him i.e. no adverse inference should be drawn, as there is a constitutional right against self-incrimination.

Defence evidence

7.15 The accused should be asked if he wants to produce evidence in his defence. If so, the defence evidence needs to be called. The accused may lead evidence in support of his specific defence plea of alibi or self-defence, etc., or to contradict the prosecution evidence or merely to prove his good character. The defence evidence, including the testimony of the accused recorded on oath, is subject to cross-examination as the prosecution evidence. When the evidence in defence has been closed, the stage is set for arguments.

Closing submissions

7.16 Where the accused has led his evidence in defence, the defence counsel or the accused, as the case may be, has to present his submissions first to which the prosecutor has the right to reply. That will be the end of the submissions. However, if the defence has chosen not to adduce evidence at all, the prosecutor should open with his submissions followed by the defence counsel's right to reply and close the arguments. At the stage of closing submissions, no fresh evidence can be brought on record. Counsel for prosecution and defence will seek to persuade the court to accept their respective points of view on the basis of the evidence on record. It is important to remind oneself that these are submissions only. Whilst they will deal with the evidence adduced they are not evidence, the court must make its findings of fact only on the evidence adduced during the trial.

Process to compel production of documents, etc.

7.17 The duty of magistrates in relation to the process of compelling the production of documents, are described in detail in *Chapter 7, Cr.P.C.* The provisions enable the magistrates to compel not only the production of documents but also other movable property also concerned with the case before the court.

Special rules of evidence
Medical expert

7.18 Provision is made for depositions of Civil Surgeons, other medical witnesses or other expert witnesses, taken and attested by a magistrate in the presence of the accused or taken on commission, to be given in evidence in the absence of the witness. However, the court may call for the attendance of such witness if it thinks fit *(S.509 to S.510 Cr.P.C.).*

Previous convictions

7.19 The mode of proving a previous conviction or acquittal by way of certificate is prescribed in *S.511 Cr.P.C.*

Absconding Accused

7.20 If the accused is absconding, evidence may be taken by way of deposition from witnesses and used in evidence in the case subsequently when the absconder is arrested and the witness is not available for any good reason (S.512 *Cr.P.C.).*

Unknown offender

7.30 If the offender is unknown, evidence may be taken by way of depositions from witnesses and used in evidence in the case subsequently when the offender identified, if the deponent is dead, incapable of giving evidence or outside Pakistan. The relevant provision is *S.512(2) Cr.P.C.*

8. The decision

8.1 It may be easy to come to a conclusion as to the guilt or otherwise of the accused after hearing the evidence in the case, but the presiding officer should always be on guard against resorting to conjecture. He should be completely insulated from possible outside influence or information. Courts must avoid generalisation and must decide the case strictly by the evidence on record. The logic by which the court arrives at its conclusion should be reflected in the judgment.

8.2 The judgment should contain all the relevant facts of the case including the pleas taken in defence. The points for determination should be set out in the judgment and the evidence on record should be assessed in the light thereof. The analysis of the evidence should be precise and to the point. The whole transcript of the evidence should not be reproduced in the judgement.

8.3 No opinion of any witness as to the guilt of the accused is admissible. If such an opinion was expressed, and recorded, it should not be the basis of court's decision. The court must arrive at its own independent conclusion. The only opinion evidence admissible, which the court may accept, is that of an expert witness e.g. a surgeon giving a medical pinion as to the nature of injuries or the cause of death, or a handwriting expert with regard to handwriting *(SS 59-65. Qanoon-e-Shahadat).*

8.4 The judgment should contain only relevant information. The judgment should onvey, primarily to the parties, the reasons in clear terms for the verdict recorded. The decision may be subject to appeal and therefore will need to be comprehensive, however, the judgment should not be written solely for the appellate court.

Structure of a decision

The Elements of the offence

8.5 State the offence and source of the offence. Identify each and every element of the offence, which must be established before there can be a conviction.

What is admissible evidence?

8.6 Evidence is admissible in the form of testimony, documentary or expert opinion. Identify and exclude from consideration what is inadmissible e.g. assertions by counsel not supported by evidence, statements by co-accused. All witnesses, defence and prosecution are entitled to equal consideration. Facts must be established by evidence. No adverse inference can be drawn if the accused does not give evidence on oath. Is there a legal requirement for corroboration?

What are the matters in issue?

8.7 Identify the matters in issue; Issues of primary fact e.g. Where did the accused overtake on the road? Did the accused take the goods from the vendor's stall without paying for them? Who struck the first blow? Conclusions from primary facts e.g. whether it was safe or unsafe to overtake at that point. Whether the accused was acting dishonestly. Whether the blow was unlawful or was in reasonable self-defence.

Does the accused have a case to answer?

8.8 If the evidence has not established an essential element of the offence or that evidence is so unreliable then the court should acquit the accused.

Is the case proved?

8.9 Do the facts you have found proved having considered the evidence establish the elements of the offence? The prosecution has the burden of establishing all the elements of the offence against this accused. The accused does not have a burden to prove his innocence nor in most cases establish a defence. However, in offences of strict liability or where a defence is raised the accused has a burden to prove certain issues.

What is the standard of proof?

8.10 If after a fair review of all the evidence you are sure of the guilt of the accused, all elements of the offence are made out, you can properly convict. If you are not sure, or the

accused has raised a defence that upon the evidence you accept on the balance of probabilities, then you must acquit.

Statutory requirements

8.11 *Chapter 26, Criminal Procedure Code,* sets out requirements as to the mode of delivering judgment and language and contents thereof. The judgement shall be pronounced or the substance of the judgement shall be explained in open court and in the language of the court or in some other language that the accused or his counsel understands. The accused must be present unless this has been dispensed with. The judgment shall be written and shall contain:

The points for determination;

The decision thereon; and

The reasons for the decision

be signed and dated by the presiding officer in open court

The offence, section and punishment to which he is sentenced;

Once the judgment is signed, it should not be altered or revised, except to correct a clerical error. A copy of the judgment, in case of conviction, shall be delivered to the accused promptly *(S.371 Cr.P.C.).*

Acquittal or conviction

8.12 A trial can end only in the acquittal of the accused or conviction. If there is a doubt, the benefit of that doubt should go to the accused and he should be *acquitted (S.245 Cr.P.C.).* The court must specify the offence clearly and direct the accused be set at liberty. In case of conviction, the offence the accused is convicted under must be recorded. This determines the punishment to be passed upon the accused.

Copies of proceedings

8.13 If a person affected by judgment or order passed by a criminal court wishes to have a copy of any order, deposition or other part of the record, it shall be provided on payment of any fee. However, the costs may be waived if there are special reasons.

9. Sentencing

9.1 Sentence follows conviction. It should, therefore, be commensurate with the gravity of the offence and the manner in which that offence has been committed. The sentence has to be within the bounds of law and those of the judge. In some cases a minimum punishment is prescribed e.g. *S.397 P.P.C.* Upon a conviction for robbery or dacoity with attempt to cause death or grievous hurt the punishment shall not be less than seven years imprisonment. Such limits must be respected. When passing sentence, the sentence prescribed in *Schedule II, Code of Criminal Procedure* must be kept in view. The maximum sentence prescribed or that can be awarded by a court should be reserved only for the extreme cases. The dictum of law is that justice should always be tempered with mercy.

9.2 Some magistrates always impose the maximum sentences prescribed by law or the maximum within their power. This is not the correct approach. The maximum sentence prescribed should be reserved only for the extreme case. The sentence should be commensurate with the gravity of the offence and the manner in which the offence has been committed. No two cases are the same. The nature of the offence, the way in which it was committed and the offender are always different. The passing of sentence is a matter that requires a structured approach.

Where the magistrate is of the opinion that the punishment should be greater than he can impose

9.3 Where 2nd and 3rd Class magistrates are of opinion that they have insufficient powers of sentence for the offence for which the accused has been convicted owing to the nature of the offence, previous convictions of the accused or other circumstances, they shall forward the accused with their opinion to a 1st Class Magistrate to pass sentence. Likewise, a First Class Magistrate should report the matter to the Sessions Judge, who may either transfer it to a magistrate with special jurisdiction under *S.30* or to the Court of Sessions.

Principles of sentencing

9.4 The principles of sentencing have been developed and adopted by the Courts over many years, and although they generally have wider application to sentences involving the loss of liberty of the offender, they are important in the imposition of any sentence. There are four accepted principles of sentencing which are described as follows, albeit other principles have been identified:

Retribution - is punishment for wrongdoing imposed on behalf of the community to mark its disapproval of the offence committed

Deterrence - the punishment is designed to deter an offender from breaking the law again and also to deter anyone else from breaking the law

Prevention - relates to dealing with an offender so that he is strictly limited in the opportunity to offend during the period of punishment. The most severe form of prevention is full custody in prison. A term of disqualification from driving can be regarded as a form of prevention

Rehabilitation - the penalty is selected to aid an offender to reform and not offend again. As far as fines are concerned, it is difficult to distinguish this principle from that of penalty. However, the payment of a fine together with compensation might encourage in an offender the idea of a need to reform.

9.5 Although each of these principles is equally important, there will be occasions when one or more of those principles will be thought to apply more strongly than the others in a particular case. This kind of emphasis is usually found in dealing with charges involving imprisonment. However, even in the imposition of a fine, there are some cases when that emphasis should properly be applied. For example, an illegal importation of goods in breach of the Customs Act might require more emphasis to be given to deterrence than to rehabilitation.

9.6 In applying the principles, there is no set formula as such. What the court must do is to consider each one against the offence itself, the circumstances of the offence, the

offender and his circumstances, the purpose of the legislation, and the welfare of the community. A magistrate then turns his mind to an assessment of all of these factors in combination with the aim of selecting the most appropriate and balanced penalty. This is rarely an easy task, but it is alleviated by a constant refreshing of the mind on the principles of sentencing and on the assistance that practice and experience bring with it.

9.7 One of the essential qualities of mind that must be retained in your approach to sentencing is flexibility. This does not mean that you should be inconsistent with the penalties you impose for similar offences or with those of other presiding officers. On the contrary, it means that a mental attitude of rigidity to punishment generally or to any class of offences will prevent the imposition of the best or proper penalty.

9.8 One other characteristic required of the sentencer is the ability to recognise in him personal bias or strong dislike that he may have for a particular offence or class of offences. In the imposition of all penalties selecting the proper penalty must be done with as much detachment as is possible. For example, one judicial officer may have such, a disapproval of physical violence that, unless he balanced his personal feelings, he might irnpose a term of imprisonment for an assault offence that should properly have been dealt with by a fine.

9.9 These matters of flexibility and personal bias are equally important in the penalty of a fine as well as imprisonment because what the offender desires and what ought to be imposed is a just and fair punishment for what has been done.

9.10 In paying full attention to the principles of sentencing and in guarding against any influence of personal bias, judicial officer must aim not only at fixing the appropriate penalty for the particular accused, but also at the achievement of consistency in sentencing. Consistency does not mean uniformity; it really means a consistency of approach to sentencing, although the actual penalty imposed in each case on the same charge may be different. Apart from one's own consistency, due consideration must be given to being consistent with other presiding officers. You must always remember, however, that the responsibility for each particular sentence is that of the Judge presiding over that case. Whilst limits of sentence are imposed upon the court by legislation, the

level of sentence in each case is a matter for the court. That level of sentence must be just and correct in principle. Arriving at a sentence in a particular case is not simply something that should be done automatically. It requires the sentencer to apply proper principles of sentencing and to exercise discretion.

"Discretion is a science or understanding to discern between falsity and truth, between right and wrong, between shadow and substance, between equity and colourable glosses and pretence, not to do according to the will and private affections. Discretion ought to be bounded with the rules of reason, law and justice" Rooke and Keighley 1609

9.11 Discretion is not personal whim but a judicial approach to a particular decision based on the facts of the case. No matter if one is dealing with a simple minor offence requiring a fine or a more complex case, the judicial act of sentencing needs to be balanced between a number of factors; gravity of the offence, needs of society and a just disposal taking into account mitigation. One of the most common criticisms of the Courts is that sentences are inconsistent. Consistency means that offenders who commit similar offences and whose circumstances are similar receive like sentences. Failure to achieve consistency must lead to individual injustice and ultimately society's view of judicial equality will suffer. A means of ensuring consistency is for the sentencer to seek continuity in the approach to sentencing.

"The proper approach to sentencing was to look first at the offence itself and the circumstances in which it was committed, then to assess sentence for the offence on the basis that there were no mitigating circumstances; and finally, to see what mitigating circumstances there were, if any, to reduce the assessed sentence to give effect to those mitigating circumstances". R v Lister 1972.

"The proper way to look at the matter is to decide sentence for the offence and then consider whether the court can extend some leniency to the offender, having regard amongst other things to the offender's record of previous convictions". R v Queen 1982

"We are not aiming at uniformity of sentences; that would be impossible. We are aiming at uniformity of approach" Lord lane Lord Chief Justice R v Bibi 1980.

The sentencing approach

9.12 This next section is prefaced by these comments. Considering that sentence follows immediately after the judgment of being guilty; in ever case it may not be possible for the trial court to bring on record all the facts and circumstances, which are required to be taken into consideration for adjusting the sentence. It is important that, in working one's way through this process prior to conviction and sentence, the accused should not see that that the judge is pre disposed to convict him and for that reason is collecting such information. This should not happen, as sentence will only be imposed upon conviction. The mitigating circumstances, as far as the offence is concerned, should always be on record from counsel for the accused. If not represented then the sentencer may need to elicit more information.

Ensure you have the fullest information

9.13 If there is a conviction following a trial, the court will have all the information it requires. On a guilty plea, the Court must ensure that it is given all the relevant facts. This is very important in this jurisdiction where in framing the charge the court plays a key role. It has been held in Great Britain that the prosecution is under a duty to give a full account of the facts and cursory summaries are to be deprecated. If the accused has made a voluntary statement then this should be read as it may give an indication as to his attitude towards the offence. The Court is in artificial situation, try to visualise the incident and if statements are made that do not seen to tie in with the facts try to clarify them. Have you ever been in the situation when after a case someone has started to make comments about the sentence saying "Did you know that ……"and the situation then described by the speaker bears little resemblance to the case as presented to you in court.

Analyse the information relating to the offence

9.14 The Court must analyse the information it has received relating to the offence and taking into account the nature of the charge, determine the gravity of the offence. In doing so it will also take into consideration any matters, which, of themselves, either aggravate or mitigate the circumstances of the offence. Examples of aggravating factors may include

danger to the public e.g. drinking and driving; a premeditated act of burglary or white collar frauds; prevalence e.g. theft, burglary or violence or other offences 'taken into consideration'. Mitigating factors may include provocation, insulting words or a swear which do not amount to a defence but placed the offence in context; Technical nature of the offence e.g. a road traffic offence or a minor offence committed as a gesture with no harm done to person or property.

9.15 The seriousness of an offence is indicated by the maximum penalty prescribed in the legislation. Where the statute prescribes the same maximum penalty for a variety of offences, it is for the Court to determine the seriousness of each one. The legislature decides that one is a less serious offence than another. Accordingly, a different level of penalty will be considered for each offence. The particular penalty for each offence is determined on the facts of each case. For example, in one case, a fine of 200 Rs. might be appropriate, but in another such case, a fine of 2000 Rs. might be the proper penalty.

9.16 The penalty should not be fixed without reference to the facts of the offence. For example, the first penalty might be fixed because a traffic offence did not endanger any person, traffic and the vehicle was travelling only at five km/h at night when it was clear there was no other traffic. However, the facts of the other case might show that the offence was committed during the day at a busy intersection and the vehicle was travelling at 80 km/h.

The prevalence of the offence

9.17 From time to time, it is desirable to raise the level of penalty for an offence that is increasing in prevalence in order to deter the commission of it. This should be done only by those who have sufficient experience of the work and only after consultation with others presiding in the district. In practice, judicial officers should change any sentencing policy as social conditions change and where possible discussion with other members of the bench should be encouraged. Whilst considering the circumstances of the offence the Court must only pass sentence on the facts as found after trial or accepted by the plea of the accused for the particular offence charged. It may not assume the offender guilty of a

more serious offence. However, prevalence may be a ground for increasing the level of sentencing for a particular offence.

Consider the views of the victim and the public

9.18 The Court should consider the views and impact upon the victim and public and any compensation so these may be reflected in the final decision of the court. This does not mean that those views must be part of the sentencing calculation because the Court will have more information before it concerning the offence and offender. *"Courts should take public opinion into account but not pander to it because it may be wrong headed or sentimental".* The provisions of *S.544* Cr.P.C as to compensation support this element of the approach. Where the court must record in writing the reason why it is not ordering compensation in addition to any other sentence.

Principles or guidelines issued by the superior courts

9.19 The court should take into account any decisions of the Supreme Court or other superior courts. These may be in the form of *"Guidelines" .* These could be on the type of sentences that should or should not be mixed together, as to the length of custodial sentences or what punishment should be considered for a particular offence.

Determine which principle of sentencing applies

9.20 Is the Court to punish the offender? Will justice be served by a disposal, which seeks to rehabilitate the offender? Sometimes it is a clear decision in others there is a fine line. There are a number of sentences available to the sentencer under rehabilitation i.e. probation, conditional discharge, or bond for good behaviour.

Determining the normal sentence

9.21 The Court having considered the above factors can then determine what should be the **NORMAL SENTENCE** for the offence. Having arrived at the normal sentence the Court should then proceed to consider the following to arrive at the **PROPER SENTENCE.** To do this the Court must take into account the following

Mitigating factors in respect of the offender

9.22 Take into account any mitigating factor in respect of the offender The accused's counsel will have addressed the Court on this or if the accused is not represented the Court will have heard from the accused directly. The reality is that most people get nervous in court and do not volunteer information. The sentencer should make sure that the accused does have an opportunity to bring out mitigating factors and by asking a few questions this can be achieved.

9.23 Matters that can be taken into account will include; Good character, Genuine contrition or regret, A plea of guilty, Employment or good work record, Family ties, Age (very young and very old), Inadequacy, Domestic or emotional stress (Traditional Ties), Physical and mental disability, Low income, Provocation which does not amount to a defence in law.

9.24 These may be set off by; previous convictions (If a previous conviction is not - admitted by the accused or separately proved, it must not be taken into account), Lack c contrition, Persistent offending, Premeditation of offence, Evidence of lack of control resulting in danger to the public, Lack of remorse.

9.25 The court when considering sentence may take into consideration any scandalous or false and frivolous plea taken by him or on his behalf *(S.382 Cr.P.C.).*

9.26 The following are suggested guidelines to help you understand the place that previous convictions have in the sentencing process: A previous conviction must be relevant to the offence you are dealing with. An earlier conviction for arson would have no relevance to the offence of driving a vehicle without a red rear light, and therefore you would completely disregard it. As a rule, offences that were committed many years before should be disregarded or less weight given to them. In fact, you could give some credit to an accused who has not offended for many years. If, however, the accused had been in prison for the intervening years, you may be justified in paying some attention to the much earlier previous conviction. When the previous convictions are not only relevant but indicate a pattern of persistent offending, then that may be taken into account in fixing

penalty because a severer penalty might encourage the offender to break the pattern of offending. Do not consider a previous conviction merely to increase the penalty for the present offence because that would be punishing the offender again for the earlier offence. It is taken into account because the previous offending indicates that the present offence was thereby committed with full knowledge and experience of the offence itself or that kind of offending, so that the present penalty ought to be greater because of that added guilt responsibility in the present offence.

Consider the totality of sentences

9.27 If more than one penalty is to be imposed consider the totality of sentences. Where the Court imposes a custodial sentence, it should review the aggregate to ensure that the overall effect is just. The same applies with fines, not only that the total is not excessive for the offence charged, but also the total is not excessive having considered the accused's means. Where the accused is convicted at a trial of more than one offence and is sentenced to imprisonment, each term will be consecutive to the other unless the court directs that such punishments shall run concurrently. This is an important consideration when reviewing the totality of the sentence.

Determining the proper sentence

9.28 Having considered all the relevant mitigation: the normal sentence for the offence: and the classic principles of sentencing: the Court will then be in a position to determine the extent of that mitigation and what effect it should have on the normal sentence for the offence. In doing so, the Court will then arrive at the **PROPER SENTENCE** for both the offence and the offender.

Give your reasons

9.29 If the proper sentence is substantially more or less than the normal sentence, give your reasons for the decision This is important as it allows the offender to know why he is receiving that sentence, it allows the public to know that this is not the normal sentence and most importantly it will allow the appellate court to know why the sentence is not within the Normal sentence band. An example is provided in the directions from the High Court

in respect of an offence punishable with death. Wherever a court imposes a lesser penalty permitted by law the court must state in its judgment reasons for doing so.

10. Sentences

Death

10.1 A sentence of death imposed by a Court of Sessions is subject to confirmation by High Court. The High Court may call for further enquiry either before itself or by the Court of Sessions in respect of any aspect of the case. The High Court may:

Confirm the sentence,

Annul and convict of any other offence, which Court of Sessions could have convicted

Order a new trial

Order an amended charge,

Acquit

10.2 The High Court has directed the Court of Sessions that when a death sentence is passed the court must;

Direct that he be hanged by the neck till he is dead.

Submit its proceedings for confirmation of the sentence

Inform the accused of the period within which he must appeal.

The normal penalty under the law is death but there may be circumstances appearing on the record such as influence of elders, social pressure, age of the accused (this is not an exhaustive list), which must be specifically mentioned, for not awarding the normal sentence of death.

Life imprisonment

10.3 Since the amendment in *S.57 P.P.C.* by the *Law Reform Ordinance 1972,* life imprisonment means twenty-five years imprisonment.

Imprisonment

10.4 Where a court passes a sentence of imprisonment it shall take into consideration any period during which the accused was detained in custody for the offence. It is a general sentencing principle that the maximum sentence provided by statute must be
reserved for the most serious type of offence. It would not be appropriate to impose the maximum sentence for an attempt or where there is substantial mitigation. Where the accused is convicted at a trial of more than one offence and is sentenced to imprisonment, each term will be consecutive to the other unless the court directs that such punishments shall run concurrently. This-is important when considering tie totality of the sentence. In respect of offences in the *Pakistan Penal Code* and other Acts, if it is provided for that the offender **shall** be punished with imprisonment up to a certain term and shall also be liable to a fine. The High Court has stated that whilst in such cases the offender must be sentenced to some period of imprisonment (however small), it is not obligatory to impose a fine in addition contrary to the practice of some magistrates *[PL 1978 SC 189].*

10.5 Custodial sentences should be reserved for those offenders who commit acts of serious violence, who use violence to impede the police in maintaining public order, and people in a position of trust who breach that trust, offenders convicted of house breaking, offenders who persistently commit minor offences and offenders who commit sexual assaults on women and children. It would be wrong in principle to impose a sentence of imprisonment when; the offender would normally be dealt with by way of fine but that person does not have the means to pay it. Where a fine is appropriate but the offender is rich and wealthy person, it would be wrong to sentence him to imprisonment. A disproportionate period of imprisonment should not be imposed for a trivial offence even though the offender has a substantial record of previous convictions.

10.6 Imprisonment may be simple or rigorous partly or wholly. The court shall indicate the form to be imposed. Simple imprisonment is deemed suitable where a fine would not be sufficient punishment for the offence and the period imposed is short. This provision allows the court to ensure that casual offenders are kept apart from hardened criminals.

Solitary confinement

10.7 In offences committed under *the Pakistan Penal* Code, the court may determine a period of solitary confinement in respect of the term of imprisonment imposed in more heinous classes of offence. The offence must state rigorous imprisonment as an available sentence. Solitary confinement must be in accordance with the following table and may not exceed three months;

Term of imprisonment	Solitary Confinement
Not exceeding 6 months	**Not exceeding one month**
Not exceeding 12 months	**Not exceeding two months**
Exceeding one year	**Not exceeding three months**

Commentary suggests that this provision rarely, if ever, should be used and only in very exceptional circumstances. It is only available for Penal Code offences.

Whipping

10.8 This is only available in Hudood cases, in all other case it was abolished *Abolition of Whipping Act 1996.* A sentence of whipping may not be imposed in addition to imprisonment where the period of imprisonment is less than three months. No sentence of whipping shall be carried out until a period of fifteen days has expired or if an appeal has been filed, until the appellate court confirms the sentence. However, the sentence shall be inflicted as soon as practicable thereafter i.e. after the fifteen days or confirmation. The whipping shall be carried out in the presence of the officer-in-charge of the jail unless the judge or magistrate orders it to be inflicted in his presence. There are restrictions upon the manner of whipping in respect of persons under sixteen, it may not be inflicted in instalments and may not be imposed in respect of women, men over 45 years old or those sentenced to death or imprisonment in excess of five years. The sentence shall not be inflicted unless a medical officer certifies, or the Magistrate or officer present, is satisfied

the accused is in a fit enough state of health to undergo such punishment. If during the execution it appears the accused is not fit, the whipping shall be stopped. Magistrates of the second and third Class may not pass this sentence.

Fines

10.9 Where no sum is expressed the fine is unlimited, however, the amount shall not be excessive *(S.63 P.P.C.).* The amount must be fixed having taken in to account the nature of the offence and means of the accused *[AIR 1929 All 919 (DB)].* However serious the offence, the fine should not be wholly impossible for the accused to pay without ruining himself and inflicting great hardship upon his family, and the maximum fine should depend in every case on his position in life. In most circumstances it is desirable that the fine should be capable of being paid within 12 months. The High Court has drawn attention to the fact that the indiscriminate imposition of excessive fines without regard to the offenders means only results in waste of the courts and the Police in attempting to realise it and harassment of the offender and his family. It is inappropriate to fine an offender with substantial means for an offence for which a person of lesser means would be imprisoned. Equally, it is wrong to imprison an offender solely on the grounds that he has insufficient means to pay an appropriate fine. If the offence is aggravated in nature then a sentence of imprisonment may be more suitable *[AIR 1924 Lah. 81].* The test to be applied is "would it be impossible or very difficult for the accused to pay or is it wholly disproportionate to the nature of the offence?" [(67) *7 Suth W.R. (Cri.)* 37]. Where the accused is to be fined for several offences the court should review the aggregate sentence to see that in totality the sentence is just and appropriate.

10.10 In fixing a fine, the Court should take the means of the accused into account. The means are normally ascertained more easily when the accused has counsel appearing for him or her. When counsel does not represent the accused, then the Court itself should ask the accused what his or her means are. The aim of these questions is to determine what is the accused's financial position and minimum income, upon which the appropriate fine may be assessed. The Court should take into account necessary financial obligations already entered into such as the payment of rent or outgoing on a house owned by the

accused and/or the accused's spouse. The Court should also ask the accused to mention what savings are available and any special financial obligation he or she might have, for example, a payment due under a summary instalments order or a payment due under a maintenance order. Apart from necessary set payments, Justices must use their own knowledge and experience of affairs to assess what is a reasonable minimum income for penalty purposes.

Imprisonment in default of payment

10.11 A term of imprisonment in default of payment of a fine is not a "sentence". In respect of an offence punishable by fine only, any period in default shall be simple, and limited in duration ***(S.67 P.P.C).***

Amount of Fine	Period in default
50 Rupees	Not exceed two months
100 Rupees	Not exceed four months
In any other case	Not exceed six months

10.12 In respect of an offence punishable by imprisonment as well as a fine, in fixing the term of imprisonment in default, the term shall not exceed one quarter of the maximum period of imprisonment for the offence. If the maximum period of imprisonment for the offence is one year, then a period no greater than four months in default can be imposed *(S.65 P.P.C.).* Whilst *S.66 P.P.C.* states the imprisonment may be of any description, imprisonment should normally be simple, rigorous imprisonment in default has been found wrong in principle *[PLD 1959 Lah. 851].* Any imprisonment in default must be consecutive to any term of imprisonment imposed at the same time. A Magistrate may not impose periods of imprisonment in default that exceed their powers (S.33 P.P.C.).

Security for keeping the peace upon conviction

10.13 *Prevention of Offences (S.106 Cr.P.* C.). Where a person is convicted of any offence punishable under *Chapter VIII, Pakistan Penal Code,* Offences against the Public Tranquillity. The court, if of opinion it is necessary to require such person to execute a bond for keeping the peace, may order the accused to execute a bond, proportionate to his means, for a period not exceeding three years. This provision does not apply to convictions in relation to unlawful assembly, promoting enmity between different groups, assault or other offence involving a breach of the peace and criminal intimidation,

Probation of offenders

10.14 The Probation of Offenders Ordinance, 1960 provides for the release on probation certain offenders in certain cases. The High Court, Court of Sessions, Magistrates of the first class and any other Magistrate specifically empowered may exercise the powers contained in the ordinance. Where the Magistrate is not empowered but of opinion that an order under S.4 or S 5 should be exercised, he shall record his opinion and commit the case to a magistrate so empowered (S3.(4)).

Order for absolute or conditional discharge

10.15 Where a court convicts an accused of an offence punishable with imprisonment for not more than two years, and the accused has not been previously convicted, the court may discharge the offender *(S.4).* The court must take into account the age, character, antecedents or physical or mental condition of the offender, and the nature of the offence or any extenuating circumstances attending the commission of the offence. The court must be of opinion that it is expedient to inflict punishment and that a probation order is not appropriate. The court may either, having recorded its reasons in writing:

Admonish (tell off or give a warning to) the offender and then discharge him, or Make an order discharging him upon condition that he enters a bond, with or without sureties, to be of good behaviour and commit no offence during a period not exceeding one year from the date of the order.

Explanation of effect of the order

10.16 The court must explain to the offender, in ordinary language, that if he commits any offence or does not behave during the period of discharge he will be liable to be sentenced for the original offence. It is important that the offender should not think that the order is a let off but must appreciate that the order is instead of passing sentence.

Probation order

10.17 *S.5* specifies that instead of sentencing the offender at once, the court may place the offender on probation. This order is available in respect of:

Males convicted of offence under Chapter VI or VII P.P.C., or under Sections 216A, 328, 382, 386, 387, 388, 389, 392 393, 397, 398, 399,401, 402, 455 or 458 of that Code, or an offence punishable with death or life imprisonment, or

Females convicted of any offence other than an offence punishable by death.

10.18 The court must be of opinion it is expedient to make an order, having regard to all the circumstances, including the nature of the offence and the character of the offender. The court must record its reasons in writing. The court may make an order that the offender be placed upon probation for a period not less than one year or more than three. The offender must enter a bond, with or without sureties, to be of good behaviour and commit no offence during the period of probation and to appear and receive sentence if called upon to do so. Further, the offender or one of his sureties must have a fixed abode or a regular occupation within the courts' jurisdiction during the duration of the order.

Conditions of probation order

10.19 The court may direct that the offender be subject to such conditions. These may be any the court is of opinion may be necessary to secure a) supervision of the offender, and b) additional and specific conditions to prevent a repetition of the same offence by the offender, commission of other offences and for the rehabilitation of the offender as an honest, industrious and law-abiding citizen. These conditions will vary from case to case;

and the court should specifically design these for the offender and the circumstances of the offence *(S.5.(2)).*

Ancillary orders

10.20 The court may direct payment as to compensation or costs as it deems fit in addition to making any order of conditional discharge or probation *(S.6).*

Variation of conditions of probation

10.21 Where necessary the probationer, the probation officer or the court on its own motion may vary the conditions imposed with *S.5* having given the probationer an opportunity to be heard. The variation may be to extend the duration or reduce the duration of the bind, or alter any other terms or conditions or inserting additional conditions. The duration may not be less than one year or more than three years from the date of the original order. Any change of conditions must be with the consent of the sureties or if they refuse then a new bond with or without sureties shall be executed. The court may discharge the probation order and bond where it If satisfied that the probationer has conducted himself such that it renders it unnecessary to keep him under supervision *(S.10).*

Breach of conditions

10.22 If the court has reason to believe that the offender has broken the conditions of the bond or special conditions under *S.5(2),* the court may issue a summons or warrant for his arrest, and may remand him in judicial custody or grant him bail to appear on the hearing date *(S.7(1)).* Upon hearing, if the offender is found to have breached the conditions of his bond or the special conditions imposed under *S.5* (2) the court may:

a) Sentence him for the original offence, in which case the probation order shall cease; or

b) Fine him for the breach and allow the order to continue: or

In fixing the fine under b) the court shall take into account any compensation, damages or costs to be paid under *S.6.*

Effects of discharge or probation

10.23 An absolute discharge, conditional discharge or probation order shall not be deemed a conviction other than for the purposes of any proceedings taken in relation to the order. If the offender is under eighteen, an absolute discharge, conditional discharge or probation order shall be disregarded for the purposes of any law which imposes any disqualification or disability upon a convicted person or authorises or requires the imposition of any such disqualification or disability *(S.11).*

Appeal or revision

10.24 Where an appeal or application is made against conviction of an offence for which an order of absolute or conditional discharge or probation was made. The appellate court or revisional court may either pass such order as it could have passed under the code, or set aside or amend the order under *S.4* or *S.5* and in lieu thereof pass sentence authorised by law. The court may not impose a greater punishment than the punishment, which might have been imposed for the original offence.

Notification of previous conviction

10.25 In certain cases, if a person is convicted a second time, the court may order that his residence, any change therein or absence there-from be notified. The details of the kind of cases and the mode of notification are given in *S.565 Cr.P.C.*

Hudood laws

10.26 In 1979, Islamisation of penal laws led to the promulgation of a series of Hudood laws; on prohibition, offences against property and offence of *zina,* offence of *qazf,* followed by *Qisas* and *Diyat* law amending the Penal Code with regard to offences affecting the human body *SS.299 to 338-H P.P.C.*

10.27 In trying these offences under the Hudood laws it should be clearly kept in mind that for imposing *Hud* punishments it is necessary that the requirements of exact number, of witnesses, their high credibility established through *Muzakee* by a process of *Tazkia-e-Shahood* should be strictly satisfied *[PL 1986 SC 497; 1998 PSC (Cn) 9]* in the absence of categorical, unequivocal, sustained admission of the accused himself. Any of the Conditions wanting and the offence otherwise proved beyond reasonable doubt, the alternative ordinary punishment under the *Tazeer* should follow. Further, the nature of various types of injuries to the human body and their distinction as specified in *S.337 P.P.C.* should be well understood, so as to adjust the punishment accordingly under *S. 337A to 337G P.P.C.*

10.28 Another distinction, which should always be kept in view, is that offences against human body are all compoundable at any stage starting with the pre trial to the last appellate court. The courts have to satisfy themselves by all means at their disposal that the compromise is voluntary, is for a lawful consideration and whatever is required to be paid or done has in fact been paid or done. Any element of threat, coercion, undue influence and unconscionable transaction would invalidate the compromise and not receive acceptance of the court.

11. Ancillary orders

Compensation

11.1 In addition to any sentence for the offence, the court shall unless it records in writing otherwise, order compensation to be paid by the offender. The compensation is in respect of death, hurt, injury, and includes mental anguish or psychological damage to any person; loss, destruction or damage to any property. The amount of compensation is such as the court may determine having regard to the circumstances of the case. The compensation may be payable to any person suffering the loss or their heirs where death results *(S.544-A. Cr.P.C.).*

11.2 As compensation shall be awarded and injuries or losses can be serious, the fact is that sums awarded may be large. The court should obtain as much information as possible in order to fix quantum.

"Such enquiry becomes necessary so that, on the one hand the compensation awarded is commensurate with the loss suffered by the victim of the crime or his family and on the other hand the order for compensation is not made in vain for want of capacity of the convict to pay. Power to conduct such inquiry must be regarded as incidental or ancillary to the main power exercisable under S.544-A Cr.P.C., which, the section being remedial, will be necessarily read in to it so as to advance the remedy and give effect to the legislative intent "Gul J.

The accused was convicted of killing the deceased, who was non-partisan and who acted purely from lofty motive to save a human life in imminent danger and in that noble effort sacrificed his life. **Held**: It would be appropriate to award substantial compensation to the heirs of the deceased. It would, therefore, in addition to the sentence of life imprisonment, impose a fine of 5,000 Rs. under *S.544-A Cr.P.C.,* which if and when recovered shall be aid to the heirs of deceased. *[State V. Rab Nawaz PLJ. 1974 S.C. 25].*

11.3 The factors to be considered may include any medical report, period of hospitalisation, extent of any disability or impairment and any effect upon earning capacity. The award of an inappropriate amount, whilst well intentioned, could be deemed derisory

and unjust. Longer periods would be appropriate for payment of compensation but this should be able to be paid within two years. Imprisonment in default of payment may be ordered not exceeding six months or in the case of a magistrate of the third class not exceeding 30 days. The compensation may additionally be ordered payable out of any fine imposed.

Expenses of complainants and witnesses

11.4 Any order for costs should be just and reasonable. The amount awarded should not be excessive. The whole or any part of any fine recovered may be applied to defraying expenses properly incurred in the prosecution etc, as provided in *S.545 Cr.P.C.*

Disposal of case property

11.5 In cases where property is involved in the commission of offence, custody of that properly pending trial and its subsequent disposal is subject to orders made by the court to which it is produced. The procedure is found in *S.516A to S.525 Cr.P.C.* that sets out the means of dealing with certain specified property such as explosives or dangerous drugs. The section further empowers the court to order the sale or disposal of property liable to speedy or natural decay after it has been recorded. After the case is concluded the court may make such orders as it thinks fit for the disposal by destruction, confiscation or delivery to any person claiming the property. As a general rule, any order made shall not be carried out until one month after the order or until any appeal has been disposed of

12. Miscellaneous provisions

Irregular proceedings

12.1 Mistakes are made, irregularities occur and magistrates may exceed their powers. Those matters that do not vitiate the proceedings if the mistake was made in good faith are listed in *S.529 Cr.P.*C.. Those irregularities that vitiate proceedings i.e. the action taken by the magistrate shall be void, are set out in *S.530-A.* Proceeding in the wrong place is not fatal unless it occasions a failure of justice *(S.531). Chapter XLV, Criminal Procedure Code,* sets out the effect of other non-compliance with specific sections of the Code, that Magistrates need to read carefully.

Local inspection

12.2 Sometimes the circumstances of a trial or inquiry require that the court visit or inspect a certain local area for better understanding of the facts of the case. In such circumstances, the court may visit or inspect the area in question under *S.539-B* and make a memorandum of such visit or inspection.

Investigations into cognisable offences

12.3 While in a cognisable case, the Police can investigate without permission from the magistrate of the area, in a non-cognisable one, the Police cannot. However, a magistrate of the first or second class, having power to try such a case, may order investigation into it by a police officer. Further, the procedures to be followed in case the commission of a cognisable offence is suspected and the role of a magistrate in such a case are given in *SS.157 to 159 Cr.P.C.*

Cognisance of offence by magistrate

12.4 Apart from the Police, a magistrate of the first class or any other specially empowered magistrate may take cognisance of any offence under *S.190.*

Powers of summary trials

12.5 A first class magistrate specially empowered by the Provincial Government in that behalf may summarily try the offences enumerated in *S.260.* How a summary trial should proceed is given in *Chapter XX* and XXII*,* which should be read together to figure out the
details of such a procedure.

Bonds

12.6 Except in the case of a bond for good behaviour, it is permissible to deposit a sum of money or government promissory note in lieu of executing a bond *(S.513 Cr.P.C.).* When a bond stands forfeited or a surety dies or becomes insolvent, the procedure to be followed is given in S.514 and *S.514-A.* Since a minor is not competent to execute a bond, a surety or sureties may be allowed under *S.514-B* to execute the required bond. All orders passed under *S.514* by a magistrate may be appealed against to the Sessions Judge under *S.515.*

Forfeiture of bond

12.7 S.514 Cr.P.C. sets out the procedure to be followed.

Inquiries and trials

12.8 In the main, the procedure with regard to inquiries is the same as in the case of trial except that an inquiry will culminate only in a report or recommendation but not in acquittal or conviction. All the principles of fairness and justice will equally be applicable in inquiries. However, the general provisions for determination of the venue or those relating to the issuance of summons or warrant, etc., are given in S.S.177 *to 189.* The conditions requisite for initiation of proceedings and the provisions for allied matters are contained in S.S.190 *to 199-B.*

Miscellaneous provisions in respect of women

12.9 If a female is taken into custody, the Magistrate shall not, except in the case of *qatl* (murder) or dacoity authorise the detention of the female accused in police custody. Further, the police officer making the investigation shall interrogate the accused in the presence of an officer of jail and a female police officer *(S.167(5) Cr.P.C.).* Whenever a woman has to be searched, another woman shall perform the search with strict regard of decency *(S.52 Cr.P.C.).* In respect of the execution of a search warrant, under *S. 48,* if the women's quarters in a building are to be broken open, it is necessary that any women occupying those quarters be given an opportunity to leave. If they do, arrangement be made to allow them to leave. A woman accused of non-bailable offences may be released on bail. A woman sentenced to death who is found to be pregnant would have her sentence postponed and normally commuted to imprisonment

Misconduct by police officers

12.10 Any shortcoming, misconduct or abuse of authority coming to the notice of the court should be reported in separate official correspondence to the Sessions Judge. The Sessions Judge should request the Superintendent of Police to deal with the matter departmentally, if the incident does not require prosecution. The Sessions Judge if not satisfied, depending upon existing directions in his province, will either take the matter up with the Inspector-General of Police or the High Court. In Sindh Province, if the Sessions Judge feels the police authorities have not dealt with the misconduct adequately, he may bring the matter to the attention of the Government.

13. Prevention of offences

13.1 An important function that a magistrate has to perform within the local area of his jurisdiction is to keep the peace and compel good behaviour. The question of keeping the peace may arise after the conviction of a person who is a threat to peace. However, if a 1st Class Magistrate receives a report that a person is likely to commit a breach of peace or disturb public tranquillity, he can issue a notice to such person to show cause as to why he should not be ordered to execute a bond for keeping the peace for any period not exceeding three years. The person or the place where the breach may take place must be with the magistrate's geographic jurisdiction.

13.2 Where a magistrate, who is not empowered to act as above, has reason to believe that a person is likely to commit a breach of peace, etc., he may after recording his reasons, issue warrant for the arrest of such person and forward him to a magistrate empowered to deal with the case. This provision for security for good behaviour can also be used against persons disseminating seditious matters, vagrants and suspected persons, and habitual offenders other persons *(SS.108 to 110).*

13.3 Whenever a magistrate receives a report of the kind mentioned above, he must issue a written notice setting out the substance of the information received, the amount of bond to be executed, its term and details of any sureties required. The magistrate must enquire into the truth of the allegation and determine the issue by holding an inquiry in the manner prescribed in *Chapter XX, Criminal Procedure Code.* The constraints on the bond to be executed are given in *S.118.* If the magistrate is satisfied that there is no substance in the information given to him against the suspected person, the magistrate shall release and discharge him.

13.4 After an order for furnishing the security has been made, the magistrate may run into various difficulties, e.g., the bond may not be in order; the sureties may not be satisfactory; and even the person called upon to furnish security may fail to do so. All such matters are set out in *SS.120-126-A,* which magistrates need to consult for proper guidance.

Offences committed in the presence of a magistrate

13.15 If an offence is committed in the presence of a magistrate, he has the power to arrest the offender or have the offender arrested under *S.S.64-65 Cr.P.C..* Similarly, a magistrate of the first class may, under *S.78,* issue a warrant for the arrest of an escaped convict, proclaimed offender or person accused of a non-bailable offence, who is eluding pursuit. The procedure to be followed after the arrest of such a person is given in the same section. A magistrate who receives a warrant under *S.83* has to cause it to be executed, if practicable, within the local limits of his jurisdiction. The duties of magistrates in the process of arresting a person wanted under the law are generally given *in Chapter VI, Criminal Procedure Code* that they must discharge.

Public nuisance

13.16 Magistrates of the first class have powers in respect of prevention and limination/removal of public nuisances. This is derived from *S.133 to S.143.*

Disputes over immovable property

13.17 Disputes relating to immovable properties are essentially a matter for the civil courts to decide. However, before it goes to such a court or before it is finally decided, the disputes may result in the breach of the peace. In such a case it is the duty of the magistrate of the first class having jurisdiction in the area, to prevent the deterioration of the situation by taking some pre-emptive action. What the magistrate is required to do in such a situation is contained in *Chapter XII, S.145 to S.148.*

14. Sessions Judges/Additional Sessions Judges

Powers

14.1 Sessions Judges and Additional Sessions Judges try certain offences of a serious nature as shown in the last column *Schedule II, Cr.P.C.* Sessions Judges may pass any sentence authorised by law; however, any sentence of death shall be subject to confirmation by the High Court. Assistant Sessions Judges may pass any sentence authorised by law, except a sentence of death, or of imprisonment for life or imprisonment for a term exceeding seven years. They also hear appeals from the orders and sentences passed by magistrates as given in *Chapter XXXI, Cr.P.* C.

Pre arrest bail in sessions court

14.2 Pre arrest bail can be successfully claimed only where the FIR, on the face of it discloses commission of no offence at all or a bailable offence, but the executive arm of the state is likely to be used more to harass and disgrace the named accused than to pursue a genuine case. Similarly it can be claimed in a case where positive mala fides is alleged against the Police or prosecutor and where there is prima facie support for it on record *[PLD 198 S.C. 192]*

Bail after arrest

14.3 Bail after arrest in a non-bailable case can be claimed, where there are features in the cases or material on record, which must be mentioned without passing judgment on merit, which necessitate a further inquiry into the guilt or innocence of the accused before finding a prima facie case. These matters will include the previous conduct of the accused in associating with or avoiding investigation, submitting to the authority or challenging it. The likelihood of his remaining a fugitive from justice is a factor to be kept in view in granting bail.

Trial

14.4 The Sessions Judges and Additional Sessions Judges, sitting as trial courts, will do well to follow the advice recorded in the preceding chapters for the magistrates. The special provisions for trials by the Courts of Session are *S.265-A to S.265-N.* However, special attention has to be paid to *S.265-I,* which deals with the situation when there is also a charge of previous conviction against the accused. Further, under *S.265-K,* the Court has the authority to acquit the accused at any stage of the trial for reasons to be recorded, if it considers that there is no possibility of the accused being convicted of any offence.

Directions of the nature of habeas corpus

14.5 After the introduction of the amendment to *S.491(1A) Cr.P.* C. the powers exercised by the High Court under *S.491* are also exercisable by the Sessions Judge or Additional Sessions Judges by general or specific order. The courts must in the exercise of this delegated power show an awareness of the authorities to whom the power has been delegated, and strictly observe the terms on which, and the extent to which, this power has been delegated. The orders of the court for the production of the detained must be promptly executed and the proceedings must be conducted expeditiously and fruitfully.

Sentence

14.6 When a sentence of death is passed by Sessions Judge or Additional Sessions Judge, it shall be referred to the High Court for confirmation and the sentence shall not be executed unless it is confirmed *(S.374 Cr.P.C.).*

Appeals

14.7 Appeals to the Court of Sessions are from orders and sentences of magistrates. In the first category are appeals from orders under *S.S.405-6: -*

Rejecting applications for restoration of attached property;

Requiring security for keeping the peace or for good behaviour refusing to accept or rejecting a surety

In the second category are appeals from sentences passed by Magistrates of the Second or Third Class *(S.407)* and Magistrates of the First Class *(S.408).*

When the accused pleaded guilty

14.8 If a Magistrate of the First Class has convicted an accused that pleaded guilty, there can be no appeal against conviction, only as to the extent or legality of the sentence *(S.412).* No appeal is permitted in cases where a Magistrate of the First Class passes a sentence of fine not exceeding fifty rupees, or from a sentence of imprisonment in default of payment of fine when no substantive sentence of imprisonment has been passed *(S.413)* or in a case summarily tried by a duly empowered Magistrate in which a sentence of fine not exceeding two hundred rupees has been passed *(S.414).* However, an exception to this rule of law is where such a punishment is combined with any other punishment. An order for security to keep the peace or imprisonment in default of payment of fine is not punishment within the meaning of this section *(S.415).* If an appealable order or judgment is passed against one co-accused then other co-accused may also appeal *(S.415-A).* A prisoner can submit his appeal through the officer-in-charge of the jail. It is necessary that the record of the case be called for before deciding the appeal. However, if, after hearing the parties and examining the record, the court considers that there is not sufficient ground for interfering with the conviction or sentence, the appeal may be dismissed.

Appeal against acquittal

14.9 In appeals against acquittal the entire record, both on law and fact have to be reexamined. Interference in acquittal cases is called for only where conclusions drawn could not be reasonably drawn, irrelevant considerations have prevailed, or legally inadmissible evidence has materially weighed in recording an acquittal. Simply because another conclusion can also be drawn is no ground for interference with the Judgment. [PLD *1985 SC 11].* The alleged severity of sentence is deemed to be a matter of law. The public

prosecutor if directed by the Provincial Government may appeal against an acquittal to the High Court *(S.265 Cr.P.C.).*

Where the appeal is allowed

14.10 If it is an appeal from an order of acquittal, the court may reverse the order and direct that further inquiry be made; or that the accused be retried or sent for trial to the court of sessions or the High Court, as the case may be; or find him guilty and pass sentence on him according to law.

Appeal against conviction

14.11 Where the appeal is against conviction; the court may;

Reverse the finding and sentence and acquit the accused or order him to be retried by a court of competent jurisdiction, subordinate to such appellate court or sent for trial; or

Alter the finding maintaining the sentence or with or without altering the finding, reduce the sentence; or

With or without such reduction and with or without altering the finding, alter the nature of sentence but subject to the provision of *S.105(3),* not so as to enhance the same.

Appeal against other orders

14.12 If an appeal is from any other order; the court may; alter or reverse such order or make any amendment or any consequential or incidental order that may be just or proper *(S.423 Cr.P.C.).*

Rules to be applied

14.13 The rules contained in *Chapter XXVI* as to the judgment of the criminal court of original jurisdiction shall also apply so far as may be practicable to the judgment of any appellate court other than a High Court.

Bail Considerations in respect of appeals

14.14 It is not necessary that the accused shall be brought up or required to attend the court on the day the judgment is delivered unless so directed by the court *(S.424).* The appellate court may release the appellant, if he is in confinement, on bail or on his personal bond and suspend the sentence appealed against. However, reasons shall be recorded *(S.426 (1)).* If the conditions mentioned in *S.426 (1-A)* are satisfied, the appellate court must release the appellant on bail. The appellate court may, however, refuse to do so if there are reasons militating against the grant of bail. These reasons must be recorded before such refusal. In a case of a conviction for a bailable offence, if the conviction and sentence are appealable, the court may release the appellant on bail to enable him to present the appeal and obtain the orders of the appellate court *(S.426 Cr.P.C.).*

Further evidence

14.15 Under *S.428,* the appellate court may take further evidence or direct it to be taken. The additional evidence shall be taken in conformity with the requirement of this section. The judgment and order passed by an appellate court upon appeal shall be final as provided for under *S.430,* except in the cases referred to in *S.417* under *Chapter XXXII.* The appeals generally abate on the death of the appellant under *S.431.*

Powers of revision

14.16 A Sessions Judge or an Additional Sessions Judge has the powers of revision under *S.439-A,* which he may exercise in terms thereof. In the exercise of its revisional powers the court is under no obligation to hear the parties or their counsel except when the court itself considers such hearing to be necessary or is so required by S.*439(2)* Cr.*P.C.*

Police Order 2002

14.17 District and Sessions Judges must be aware of their powers and responsibilities of the under the *Police Order 2002 (Chief Executive's Order No. 22 of 2002),* which came into force on the 14th August 2002.

14.18 The District and Sessions Judges are to act ex-officio as Chairperson of a three member District Selection Panel for recommending a panel of names for appointments to District Public Safety Commission *(Art. 41).* This has to be done after inviting applications and interviewing the candidates *(Art. 42).*

14.19 On the request of Naib Zila Nazim, as the Chairperson of the District Selection Panel, the District and Sessions Judges are required to conduct the election of the members of the District Public Safety Commission as required by *Art. 38(1)* and *Art. 38(4).*

14.20 The District and Sessions Judges are required to act ex-officio in their respective districts as Chairperson of a seven member District Criminal Justice Co-ordination Committee *(Art. 110),* the meetings of which are required to take place at least once a month *(Art. 1.111(2)).*

14.21 In order to lend institutional strength and effectiveness to the District Criminal Justice Co-ordination Committee, it may appear necessary to have a senior judicial magistrate as in-charge of the criminal judicial work of the entire district, to inspect jail once a month, to oversee the overall progress of investigations in the cases pending in courts and to maintain liaison with the District Parole Officer and District Probation Officer. Once a month meeting of the judicial magistrates should be conducted by the senior judicial magistrate of the district and the difficulties, progress and requirements of the magistracy should be reviewed, recorded and supplied to District and Sessions Judges well in time who can then get these appropriately attended to at all such, monthly meetings of the District Criminal justice Co-ordination Committee.

14.22 The District and Sessions Judges have been authorised *(Art. 167(2))* to call for and inspect the daily diary of a police station to ensure compliance with the law.

14.23 *Art 157* makes it an offence for police to unnecessarily delay the producing of accused persons in courts punishable with imprisonment and fine.

15. Juveniles

Jurisdiction

15.1 *The Juvenile Justice System Ordinance, 2000* provides for the protection of the rights of children involved in criminal litigation. It is recognised that it is expedient not only to provide for protection and rehabilitation of children in society, but also to reorganise Juvenile Courts and their practice and procedures. The law provides for the establishment of one or more Juvenile Courts in each area having exclusive jurisdiction to try children. The High Court may confer jurisdiction upon Court of Sessions or First Class Magistrates to deal with juvenile cases and power to appoint Presiding Officers of Juvenile Courts, from amongst practising advocates with at least seven years standing at the Bar *(S.4).*

Definition of child

15.2 A child is defined as "a person who has not attained the age of 18 years at the time of the commission of a criminal offence" (S.2.). If a question arises as to whether a person brought before the court is a child, the court will decide the issue under S.7, after inquiry that may include a medical report. Existing cases in which a child is accused of a criminal offence shall be transferred to the Juvenile Court (S.4(3)).

Legal assistance

15.3 Every child who is accused of commission of an offence or is a victim of an offence shall have the right of legal assistance at the expense of the State *(S.3(1)).* Such advocates appointed shall have at least five years standing at the Bar *(S.3(2)).*

No joint trial of a child and adult person

15.4 Notwithstanding the provisions of *S.239 Cr.P.C.* or any other law, no child shall be charged with or jointly tried together with an adult. In the event that a court has taken cognizance of such a case the court shall direct separate trial by the Juvenile Court *(S.5.).*

Procedure of juvenile courts

Restricted access & reporting

15.5 The procedure of the court is set out in S.6. This provides for separate courts for hearing juveniles trials and exclusion of the public. Only those directly involved in the case may be present i.e. Juveniles Court members, parties and legal representatives, guardians of the child and any person directed by the court to be present. No publication may be made, that directly or indirectly identifies the child in Juvenile Court proceedings unless the court specifically authorises it, this includes photographs of the child (S.6. (8)).

Clearing the court

15.6 The juvenile Court has power to clear the court of any person during a trial, where the court is of opinion it is in the interests of the child, decency or morality (S.6(4)). This may be relevant where the nature of the evidence or offence involves any form of sexual
assault on a child.

Dispensing with the child's attendance

15.7 Where the court is satisfied that it is not essential for the child to be present, at any stage of the trial, the court may dispense with the child's attendance.

Probation officer's report

15.8 A Probation Officer shall assist the court by making a confidential report on the child's character, education, social and moral background. The Court may communicate the substance of the report as necessary to the child or child's guardian and give then an opportunity to call evidence relevant to any matter contained in the report.

Arrest and bail

15.9 Where the police arrest a child for the commission of an offence, the officer in charge of the police station, shall inform, as soon as possible:

The guardian of the arrest, and time and place where the child shall be produced to the juvenile court

The Probation officer, in order to prepare any report for the Court

The child must be presented before the court without delay and in any case no later than twenty-four hours of arrest for a non-bailable offence.

Bailable offence

15.10 There is an absolute prohibition on holding a child in police custody or jail in such cases *(S.10).* In respect of bailable offences the police shall release the child under *S.496 Cr.P.* C. However, if they have reasonable grounds to believe that if released, the child will be exposed to danger or associate with a criminal, the child shall be placed in the custody of the Probation officer or a suitable person or institution dealing with the welfare of children in the absence of the child's parent or guardian *(S.10.(3)).* Where a child is remanded in these circumstance the court shall direct the guardians to be traced, and if found, the child shall be released immediately on bail.

Restrictions on remands in custody

15.11 There are further restrictions which presiding officers of the Juvenile Court must be familiar. The restrictions set out are all mandatory:

A child under 15 years old and detained for an offence punishable with imprisonment of less than 10 years shall be treated as if he were accused of a bailable offence *(S.10* (5)).

No child under the age of 15 years shall be arrested under any law dealing with preventative detention or under *Chapter VIII (S.10(6) Cr.P.C.).*

Except where there is any delay attributable to the accused, a child shall be granted bail;

if, being accused of an offence punishable by death, and has been detained for a continuous period of one year and the trial is continuing;

a) If, being accused of an offence punishable by imprisonment for life, and has been detained for a continuous period of six months and the trial is continuing;

b) Who, being accused of an offence not punishable by death or life imprisonment, and has been detained for a continuous period of four months and the trial is continuing

15.12 In respect of a), b) and c) there is a proviso. Where a child is 15 or above and arrested for an offence, which in the opinion of the court is s serious, heinous, gruesome, brutal, sensational in character or shocking to public morality or he is previously convicted of an offence punishable with death or life imprisonment, the court may refuse bail.

Release on probation

15.13 Where a Juvenile Court, at the conclusion of the inquiry or trial, is satisfied the child committed the offence. Notwithstanding anything to the contrary in any law, the Juvenile Court may, if it thinks fit *(S. 11):*

a) Release the child offender on probation for good conduct and place the child under the care of a guardian or any suitable person executing a bond with or without sureties, for the good behaviour and well-being of the child, for any period not exceeding the period of imprisonment awarded to such child. Provided the child complies with any directions to report to the court.

b) Make an order that the child offender be sent to a Borstal institution until they attain the age of 18 years or the period of imprisonment whichever is the earlier

c) Reduce the period of imprisonment or probation where the court is satisfied further imprisonment or probation is unnecessary.

Restrictions on orders that may be passed in respect of a child

15.14 Notwithstanding anything to the contrary in any law for the time being in force, no child shall be:

Awarded punishment by death, or

Ordered to labour during Borstal attendance

Handcuffed, put in fetters or given any corporal punishment at any time while in custody except where there is reasonable apprehension the child may escape he may be handcuffed.

Note: Pakistan has ratified the Convention on the Rights of the Child, Whilst this has to be fully incorporated within domestic law the Convention is a persuasive guide to the Courts when dealing with Children. There are a number of other guidelines found within the following documents; UN Standard Minimum Rules for the Administration of Juvenile *(Beijing Rules),* UN Rules for the Protection of Juveniles Deprived of their Liberty, UN Guidelines for the Prevention of Juvenile Delinquency *(Riyadh Guidelines).*

Introduction

The civil courts

1.1 Courts have jurisdiction to try all suits of a civil nature unless expressly barred. The Court of District and Sessions Judge is the principal court of original jurisdiction in civil cases. The District Judge is assisted by Additional District Judges of co-ordinate jurisdiction working under the administrative control of the District Judge. The Senior Civil Judge enjoys 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 establishment.

Notification of appointment

1.2 The appointment as a Civil Judge or an Additional District Judge/ District Judge is duly notified. The notification states the territorial and pecuniary limits of the judicial officer's authority, which he should respect.

Adversarial system

1.3 Each party is supposed to put his best foot forward and produce best evidence available at the very first opportunity. A civil dispute between the two or more parties has to be decided on the preponderance of evidence. Before trial, it is important that the issues to be adjudicated upon have to be clearly identified and articulated. The party that asserts bears the onus of proof. When a party has adduced evidence to prove his case, the other party has the right to adduce evidence to rebut. The onus of proof is not fixed or stationary, it may shift during the course of trial. The court, therefore, has to be very careful while ruling whether the party concerned has rightly discharged the onus. Where an issue is contested, it has to be adjudicated upon in the light of admissible evidence.

The role of the judge

1.4 "The part of the judge at a trail of a civil action is to listen to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure, to see that the advocates behave themselves seemly and to keep to the rules laid down by law, to exclude irrelevancies and discourage repetition, to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth: and at the end to make up his mind where the truth lies". Jones v National Coal Board [1957] 2 All E.R. 155.

Civil procedure code

1.5 *The Code of Civil Procedure (C.P.*C.) regulates the procedure of the civil courts. The High Courts have been empowered to alter or add to the rules and orders, provided any new rules or the alterations are not inconsistent with the main body of the C.P.C. However, such rules are subject to the approval of the government of the Province concerned. After the receipt of approval, the rules have to be published. Without prejudice to the generality of the powers conferred upon the High Courts, the matters upon which the High Courts can frame rules are given in *S.128 C.P.C.* The civil courts are under an obligation to adhere to the rules in the first schedule as strictly as to the sections of the Act. The first schedule are the Rules and Orders. Not all the Orders are relevant to the subordinate judiciary. Further, amendments or alteration made in the rules by a particular High Court is applicable only within the jurisdiction of that High Court.

Overview of a civil case

1.6 The stages of a civil case are; 1. Filing of plaint, its scrutiny, and admission. 2. Service on parties and completion of pleadings. 3. Recording of evidences. 4. Hearing of argument. 5. Judgment and decree. 6. Execution of the decree, and 7. Recording of satisfaction of decree.

2. Case management

2.1 As has been indicated in Part 1, case management is the responsibility of the presiding officer. The presiding officer should all the time be conscious of the number of cases on his file and the stages at which these cases are. Unnecessary adjournments should be avoided and where appropriate orders as to costs should be made.

2.1 If the plaintiff is absent without explanation the suit should be dismissed for want of prosecution. If the plaintiff appears later and shows good cause for his non-appearance, the suit may be restored after hearing the other side, with due penalty by way of costs. Similarly, if a defendant fails to attend despite valid service, the case should proceed in his absence. Any order made against him may later be set aside if proper grounds are made out.

2.3 The presiding officer should maintain effective control over the subordinate staff of the Court to ensure that they follow the rules strictly. The summons to be served on the defendant notifying him of the filing of the suit must be accompanied by a copy of the plaint. On the day of hearing when the defendant appears he should file his written statement of defence. There is no justification for granting further time for that purpose. In short, no indulgence should be shown to any party. The law helps those who are diligent about their rights. The court has discretion where a party fails to do what is required of him. However, the court should exercise its discretion carefully to promote fairness and the cause of justice. In cases where the nature of the relief sought requires urgent attention, the court should accommodate and respond to the situation.

The need for improving the civil justice system

2.4 Pakistan is not alone in facing considerable problems in the civil justice system mainly related to cost and delay. Many jurisdictions, jurisprudentially similar, have sought to address the problems. By way of background, it may be helpful to briefly consider changes to the civil justice system, which are taking place in other jurisdictions. The Woolf Report highlighted a number of perceived barriers in the UK civil justice system that included:

Unnecessary delay

. Excessive cost

Undue complexity

Uncertainty as to the duration of a case and

Unfair advantage to a financially stronger party.

2.5 The report put forward proposals that would address these problems, which included:

Litigation to be avoided where possible

Litigation to be less adversarial and more co-operative

Litigation to be less complex

Time scale of litigation to be shorter

More affordable litigation costs

Parties of limited means will be able to conduct litigation on a more equal footing

Structure of the Courts will be designed to meet needs of litigants

Clear lines of judicial and administrative responsibility for the civil justice system

Encourage Alternative Dispute Resolution

2.6 As a result of the Woolf Reforms, the civil justice system has changed and embraced principles of both caseflow management and Alternative Dispute Resolution (ADR). The main thrust of the former being the courts becoming more pro-active and taking control over the progress of civil cases.

Caseflow management

2.7 The American Bar Association expresses the following relating to caseflow management: *"From the commencement of litigation to its resolution any elapsed time other than reasonably required for pleadings, discovery and court events is unacceptable and should be eliminate".* On the question of who controls litigation and Judges' involvement it says: *"To enable just and efficient resolution of cases, the court, not the lawyers or litigants should control the pace of litigation. A strong judicial commitment is essential to reducing delay and once achieved, maintaining a current docket".*

2.8 To make any case management system work requires judicial commitment. The goals of case management are to:

- Ensure the just treatment of all litigants by the Court;
- Promote the prompt and economic disposal of cases;
- Improve the quality of the litigation process;
- Maintain public confidence in the Court; and
- Use efficiently the available Judicial, legal and administrative resources.

"It is essentially a management process and does not influence decisions on the substantive issues involved in a case. Case flow management acknowledges that time and resources are not unlimited, and that unnecessary waste of either should be avoided".

"The principles of caseflow management are based on the managing of cases through the court system to ensure they are dealt with promptly and economically and that the sequence of events and their timing are more predictable. The progress of cases through the courts is closely supervised to ensure agreed time standards are met, and the early disposition of cases that are not likely to go to trial is encouraged"3.

- The principles of caseflow management are:
- Unnecessary delay should be eliminated;
- It is the responsibility of the Court to supervise the progress of each case;

[3] 1995 Report of the New Zealand Judiciary, at page 14,

- The Court has a responsibility to ensure litigants and lawyers are aware of their obligations;
- The system should be orderly, reliable and predictable and ensure certainty;
- Early settlement of disputes is a major aim and Procedures should be as simple and easily comprehensible as possible.

Pakistan court delay reduction pilot project

2.9 The following is taken from a mid-term report by Professor Carl Barr 'Judges from the subordinate courts in three urban centres in Pakistan are taking part in a pilot project to apply caseflow Management principles in order to reduce backlogs and delays in civil and criminal cases. From the beginning of the project, quantitative data has shown continued increases in case disposal over time (now 22% overall, and 41% in the Karachi civil pilot courts). Further efforts in Karachi have reduced the total number of pending cases in one 24-judge district by 18% within four months. This was achieved through an increase in the number of disposals of 10,005 compared with the previous four-month period, and has, moreover, reduced the oldest cases by over 605 in an eight-month period. Innovative efforts are also under way to involve the bar and co-ordinate the work of the police and the courts.

The Final Report on the Delay Reduction Pilot Projects is under preparation. The figures so far obtained show that disposal (both civil and criminal) in the pilot courts has increased by 166% in Sindh, 1% in Punjab and 146% in NWFP. In Punjab the low figures may be on account of promotion and transfer of key Pilot Court Judges during this period. In Balochistan it is reported that there is no case pending for over two years.

The High Courts are preparing a Time Bound Plan of delay reduction in all the respective courts of the province. This requires identification of old cases year wise and focusing attention on their disposal while taking care of the current institutions and pendency. NWFP High Court has already approved and circulated such a plan for compliance by the judges of the district judiciary of the province.

Alternate Dispute Resolution Mechanism

2.10 *Ordinance No. XXXIV, 2002, Code of Civil Procedure (Amendment) Ordinance, 2002,* promulgated by the President on July 28th 2002, introduces two amendments in Civil Procedure Code, which shall come into force immediately.

2.11 A new Section 89-A has been introduced in the following words.

Alternate Dispute Resolution. The Court may, where it considers necessary, having regard to the facts and circumstances of the case with the object of securing expeditious disposal or a case, in relation to a suit, adopt with the consent of the parties alternate dispute resolution method, including mediation and conciliation.

2.12 Another amendment has been made adding a new rule *0.X.rIA.*

The Court may adopt any lawful procedure not inconsistent with the provisions of this Code to-

(i) *conduct preliminary proceedings and issue order for expediting processing of the case;*

(ii) *issue, with the consent of parties, commission to examine witnesses, admit documents and take other steps for the purpose of trial;*

(iii) adopt, with the consent of parties, any alternative method of dispute resolution, including mediation, conciliation, or any such other means.

2.13 The presiding officers of the court should strive at every material stage of the proceedings to induce, in a very non-intrusive and benign manner, the parties to litigation before them, to avail of the provisions of this law in order to permanently settle their dispute without wasting much of their time and money on prolonging the contested litigation.

3. Preliminary matters

Jurisdiction

3.1 The function of the Civil Judge is to try civil cases, to bring civil disputes between parties to a final conclusion within the framework of the law and practice of the courts. There are preliminary matters the Civil Judge must consider. In order to try a particular case, the civil judge must have both pecuniary and territorial jurisdiction.

Pecuniary jurisdiction

3.2 The pecuniary jurisdiction depends upon the grade assigned to the Civil Judge. A civil judge may be appointed within one of four classes, depending upon what powers the Provincial Government wishes to confer on him.

	Punjab	Frontier	Sindh	Balochistan
First Class	Unlimited	Unlimited	Karachi 3 M Rs . Outside Unlimited	Unlimited
2nd Class	Not exceeding 500,000 Rs	Not exceeding 500.000 Rs	Not exceeding 100,000 Rs	Not exceeding 15.000 Rs *(revision to 50,000 TBC)*
3rd Class	Not exceeding 100,000 Rs	Not exceeding 100,000 Rs	Not exceeding 50,000 Rs	Not exceeding 5,000 Rs *(revision to 25,000 TBC).*

Qazi Courts in Balochistan have unlimited pecuniary jurisdiction but in Tribal Areas their jurisdiction is limited to 50,000 Rs.

Territorial jurisdiction

3.3 The territorial jurisdiction extends to the territory for which the civil judge has been appointed.

Limitation Act

3.4 In determining the jurisdiction of a court, the question of limitation must be considered. The court must be satisfied that the suit is within any limitation period prescribed by the *Limitation Act, 1908 (L.A.).* Even if there is no objection from the parties, it is the duty of the court to raise and determine it before proceeding to adjudicate upon the other issues *(S.3 L.A).* The parties cannot confer jurisdiction on a court in which it does not vest by law.

Venue of suit

3.5 Before a Civil Judge, undertakes to try a suit, the place where the cause of action arose and where the defendant(s) resides must be ascertained. These two factors normally determine the court where the suit should be instituted *(S.16 C.P.C.).* The plaintiff may elect in which court the suit is to be filed where it may be commenced in one or more courts.

3.6 The suit may be instituted in any court within the local limits of whose jurisdiction any part of the property is situate. If there are uncertainties, the court should record the ground of the alleged uncertainty. However, the court may still proceed to dispose of case and any decree made shall have the same effect as if the property was situated within the limits of its jurisdiction.

3.7 Where a suit is for compensation for wrong done to the person or to immovable property, the suit may be instituted either where the wrong was done or where the defendant resides. The election lies with the plaintiff *(S.19 C.P.C.).*

3.8 All other suits may be instituted where any defendant(s) reside, carries on business or personally works for gain; or with the leave of the court or with the acquiescence of the defendant where any defendant(s) reside at the time of starting the action; or where the cause of action wholly or partly arises. However, where a suit may be instituted in more than one court, any defendant may apply for the suit to be transferred to another court

under the provisions of *S.22-S24 C.P.C.* to the appropriate appellate court or High Court for an order of transfer.

Frame of suit

3.9 O.II. r.1, every suit shall as far as practicable be framed to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them. This is in keeping with the courts role being to bring a final resolution to disputes and prevent proliferation of litigation. All parties and the court need to apply their minds to this objective. Unless the plaintiff wishes to relinquish a portion of his claim to sue within the jurisdiction of the court, the suit should include the whole of the claim of the plaintiff (0.II.r.2.). Further, the rules allow other causes of action to be united in the same suit.

3.10 Restrictions are placed upon certain claims that may be joined e.g. no cause of action may be joined with a suit for recovery of immovable property without leave of the court (O. II. *r.4.).*

3.11 Having allowed joinder, the rules provide for the situation where it appears to the court that any causes of action joined in one suit cannot be conveniently tried or disposed of together. In these situations, the court may order separate trials or make such other order, as may be expedient *(0.II.r.5.).* As to what objections may be taken in respect of mis-joinder of causes of action and how it should be dealt with is provided in O.II.r.7.

4. Parties to the suit

4.1 Who may or may not be joined as plaintiffs or defendants to a suit is dealt with by.O./. Where it appears to the court that any joinder of plaintiff may embarrass or delay the trial, the court may put the plaintiff(s) to their election i.e. they must elect one plaintiff who will be the party to the case or order separate trials or make such other order as may be expedient. In these situations, the court may give judgment for or against one or more joint parties.

4.2 In some cases there may be a mistake in the name of a plaintiff or deficiency in joining a plaintiff. If the mistake is bona fide (an honest mistake), the court, if it is necessary for determination of the real matter in dispute, may order any other person to be substituted or added to the plaint upon such terms as the court thinks just.

4.3 The court may give the conduct of the suit to one of the parties it deems proper. It must be borne in mind that no suit shall be defeated by reason of the mis-joinder or non-joinder of the parties. The court may in every suit deal with the matter in controversy so far as it concerns the rights of the parties before it *(O.II.r.2, r.4, r.9, r.10 and r.11.).*

Agents and pleaders

4.4 Appearances in court may be in person, by a recognised agent or pleader. This provision extends to making applications and acting on behalf of the party. The definition of recognised agents is given in *O.III.r.2.* The appointment of an authorised agent or pleader must be filed in writing. Once filed, the appointment is deemed in force until such time as the court grants leave to end the appointment.

Suits by or against special parties

4.5 There are special provisions governing the suits for or against special parties.

Government or public officers in their official capacity.	0. XXVII
Officers of the defence forces and soldiers, sailors or airmen	0. XXVIII

Corporations	0. XXIX
Trustees, executors or administrators	0. XXXI
Minors or persons of unsound mind	0. XXXII
Paupers	0. XXXIII

Cases involving the interpretation of constitutional law

4.6 If in a suit any substantial question as to the interpretation of constitutional law is involved, the court may implead the relevant government as party. In such a case, notice to the advocate-general of the province concerned or to the attorney general has to go, depending upon whether the provincial government or the federal government is likely to be affected. The same rule applies also in appeals. The relevant procedure is prescribed in *0.XXVII-A.*

Mortgages of immovable property

4.7 If the suit is for the foreclosure, sale or redemption of mortgage of immovable property, the procedure has been prescribed by *0.XXXIV.*

Negotiable instruments

4.8 The procedure prescribed for a suit founded on a negotiable instrument is given in 0.XXXVII. However, this Order applies only to the High Courts and the District Courts or Such other Civil Courts as notified in this behalf by the concerned High Court. The procedure in such suits will be the same generally as in the suits instituted in the ordinary manner, except as provided by the Order. This means that the special provisions of *0.XXXVII* will prevail over the general rules where such provisions are at variance. Otherwise, the general rules will prevail.

Plaint

Plaint

5.1 Every suit shall be instituted by the presenting a plaint to the Court or such officer as it appoints in this behalf (0:IV.r.1.). A plaint whilst not defined by the code is a written document tendered to the court in which the plaintiff sets out his cause of action, seeks judgment and relief from the court.

5.2 0.VII directs how the plaint should be drafted and details what particulars it should contain. These are matters for the plaintiff or his counsel to settle and comply with. Having said this it is essential that all civil judges are familiar with the rules as the court is under a duty to examine the plaint and take action for a number of purposes.

Return of plaint

5.3 The court can return the plaint at any stage of the suit if it has been instituted in the wrong court. On the return of the plaint, it may be presented to the correct court. The judge returning the plaint shall endorse thereon the date of its presentation and the return, the name of the party presenting it and a brief statement of the reason for doing so (0. VII.r.10*).*

Rejection of plaint

5.4 The court is under a duty, before issuing any summons, to examine the plaint and shall reject the plaint if;

It does not disclose a cause of action.

Where the relief claimed is under-valued and not corrected after the court has requested evaluation.

The plaintiff has failed to furnish the court with sufficient stamp-paper within the time allowed after the request.

The suit appears time barred.

5.5 The grounds are set out in *0.VII.r.11.* The above grounds for rejection must be based upon defects that are on the face of the plaint alone, which the judge in his own deliberate judgment makes a finding. Before rejecting the plaint, the judge must record an order to that effect with the reasons for such order. Such rejection does not by itself preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action *(0.VII.r.10-r.13.).*

6. Institution of suits

6.1 The start of an action is marked by presenting the plaint to the court or to an officer appointed by the court. Particulars of every suit have to be entered in a book kept for the purpose, the Register of Civil Suits. Each suit is allocated a number in the year according to the order plaints have been admitted (0.IV.).

Service of process

6.2 Once the suit has been instituted, a summons may be issued to the defendant to appear and answer the claim together with a copy of the plaint. This "process" must be served on the defendant(s). Service does not necessarily have to be personal i.e. on the party himself. Service may be made on a recognised agent or pleader. If the defendant attended the court when the plaint was filed and admitted the claim no summons shall be issued (0.*V.).* The manner in which a party should be served is set out in detail in O. *V.r.9 to r.30.*

6.3 The presiding officer, it is suggested, should closely monitor and supervise court staff and process serving agencies to ensure that they comply with the requirements of law. Corruption and abuse of process is a real concern. The ultimate responsibility of whatever goes on in the offices of the court is that of the presiding officer. What is purported to be done in the courts name is also a legitimate concern. Mishandling of service of process, whether deliberate or accidental, must not be allowed. Effective control of process serving agencies is an element of court management. Some of the delay in the disposal of cases is attributable to malpractice in the process-serving agencies. If the process serving agencies are centrally placed under the Senior Civil Judge in the district, then it is his responsibility to try and eliminate any malpractice. However, the presiding officer should bring it to the notice of the Senior Civil Judge if he suspects that the service in his court is not being properly effected.

6.4 It is the duty of the plaintiff or petitioner to file an address for service. Should they fail to do so, the court may itself or at the instance of a party, dismiss the suit or petition**.**

This provision is in the discretion of the court and no penalty should be imposed where no one has been prejudiced, and only after asking the defaulting party to file an address. Where a party is not found at the address given by him for the service the procedure for substituted prescribed in O. *V.r.20* should be followed. Where a party wishes to change the address for service, he may file a petition for the amendment of the record. The matter is in the court's discretion as to which of the parties, if any, should be given notice of such a petition.

Substituted service

6.5 Whilst there are specific rules as to service on specific persons and bodies prescribed, the court may, if it thinks fit to do so, direct any other mode of service it deems appropriate. It is important that any order directing substituted service acknowledges that the original address is not the location of the defendant i.e. there is little point in directing substituted service at the same address. Examples of substituted service include affixing the summons on part of a house or office, use of electronic means such as telegram, telephone, telex, fax, radio or television, courier, or publication in newspapers.

Documents relied upon in plaint

6.6 Where a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint (O. *VII.r.14.(1)).*

6.7 Where he relies upon other documents .....as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint (0. *VII.r.14.(2)).*

6.8 There is an important distinction between those sued upon and those to be used in evidence.

Lost negotiable instruments

6.9 Where the suit is founded upon a negotiable instrument, which is proved to be lost, the court may pass such decree as it would have passed if the original instrument had

been produced in court along with the plaint provided the plaintiff gives indemnity to the satisfaction of the court against the possible claims of any other person upon such instrument (O. *VII.r.16).*

Production of shop-book

6.10 Where the document consists of account entries or entries in a shop-book, the shop-book must be produced to the court and the court or an authorised officer, shall mark the entry for the purpose of identification. The original may be returned to the plaintiff and a copy may be retained on the file *(r.17).*

Admissibility of documents not produced when plaint filed

6.11 No document that has been relied upon but not filed along with the plaint, shall be later admitted as evidence, except with the leave of the court. However, a document produced for the purpose of cross-examination of the defendant's witnesses or in answer to any case set up by the defendant or produced for the purpose of refreshing witnesses' memory may be admitted (O. *VII.r.18).*

7. Pleadings

7.1 Pleadings should state the material facts giving rise to the cause of action. They should not state the evidence relied upon nor the law. The purpose of the pleadings is to let the other party know what case it has to meet. Judgments cannot be based upon matters not raised in the pleadings.

7.2 If the pleadings are incorrect, the court may allow the pleadings to be amended. However, the party making the amendments may be ordered to pay any costs of the other side in relation to any amendment. On the failure of any party to amend the pleadings, when required to do so, the court may or may not grant further time or permission to amend. O.*VI* deals with pleadings. Whilst it is for the party's counsel to draft these again it is important that judges are very familiar with their purpose and effect. The court may at any stage of the proceedings order any matter in any pleading, which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit, to be struck out or amended.

Defence

7.3 The defendant may, and if so required by the court, shall, at or before the first hearing or within such time as the court may permit, present a written statement of his defence. Such time should not ordinarily exceed 30 days (O. *VIII.r.*1). The defense cannot be a general denial. It shall not be sufficient in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages *(O.VIII.r.3).* Normally unless the defendant denies a fact in his statement it shall be taken as admitted. However, the court has the power to require any facts so admitted to be proved otherwise than by such admission (O. *VIII.r.5).*

Set off

7.4 In a suit for the recovery of money, where the defendant claims there is a set off i.e. the defendant claims the plaintiff owes him an ascertainable sum of money legally

recoverable from him, to the extent of such claim, the roles of the plaintiff or the defendant shall be reversed. The effect of set off will be that the written statement will be treated as a plaint in a cross suit *(0.VIII.r.6).*

7.5 Normally, after the written statement of a defendant, no other pleading will be admitted other than one by way of defence to a set off.. However, the court has the power to allow such pleadings on such terms as it thinks fit *(0.VIII.r.9).* Where a party fails to present the written statement, required by the court, the court may pronounce judgment against him or make such order in relation to the suit as it thinks fit (0. *VIII.r.10).*

The first hearing

Appearance of parties

'8.1 *0./X* states that on the day fixed in the summons for the defendant to appear, the parties shall attend in perso….. and the suit shall then be heard unless adjourned.... As has been indicated the parties do not necessarily have to be present in person if counsel, or a pleader represents them.

Absence of both parties

8.2 Where neither party attends the court may dismiss the suit *(O.IX.r.2).*

Absence of plaintiff

8.3 If a plaintiff is absent on a date fixed by the court for proceeding when the case is called, and the defendant attends, the suit shall be dismissed. However, if the defendant admits the claim or part of the claim the court may pass a decree in respect of the sum admitted *(O.IX.r.8).* The effect of the dismissal is a bar to a fresh claim. However, the plaintiff may apply for the dismissal to be set aside if sufficient cause is shown. The court shall make the order of dismissal upon such terms as to costs as it thinks fit and appoint a day for proceeding with the suit *(O.IX.r.9).* "Sufficient cause" has no exact definition and each situation must be decided upon its own merits. Where the non-appearance was not intentional a strict view should not be taken to deny a person his claim.

Absence of the defendant

8.4 If the plaintiff appears and the defendant doesn't as long as there is proof of service of the summons within the time limits, the court may proceed to hear the case and pass an ex parte decree. If the summons was served but not in sufficient time to enable the defendant to appear then the court shall fix a new date for hearing and direct the defendant be informed of the new date. If the summons has not been served a second summons shall be issued and served on the defendant. Where the summons was not

served owing to some default on the part of the plaintiff the court shall order him to pay the costs occasioned by the postponement *(O.IX.r.6.(2)).*

8.5 Where the case is postponed and the defendant subsequently appears at the adjourned hearing and he explains his absence to the court sufficiently, the court may allow him to be heard, upon such terms as to costs as the court thinks fit *(O.IV.r.7).*

Note The court must ensure that cases are processed in a timely manner and take a robust stand in respect of wilful default, delay or tardiness. However, this needs to be balanced and tempered by common sense. A great deal of time and expense to the parties and the court can be saved by simple practices. For example, where there is no attendance in cases called early in the list, putting it back in the list a little later, before making an order. Given the physical layout of many courts and the complex that surrounds them it may be as simple as a party is still trying to locate the correct court, locate his counsel or some other practical problem.

Setting aside an ex parte decree

8.6 If a decree was made in the defendant's absence, he may apply to have the order set aside if he can satisfy the court either the summons was not served or he was prevented by any sufficient cause from appearing when the suit was called. The court shall make an order setting aside the decree against him upon such order for costs, payment into court or otherwise as the court thinks fit, and shall appoint a day for proceeding with the case *(O.IX.r.13).* No decree can be set aside unless notice thereof has been served on the other party *(O.IX.r.14).*

8.7 The provision of *S.5 L.A 1908* will apply to all applications and therefore such applications must be made within 30 days of the decree or where the summons was not served, within 30 days of knowledge of the decree.

Examination of the parties by the court

8.8 At the first hearing of the suit, the court shall ascertain from the parties what facts alleged in the plaint or written statement they admitted or denied. The court shall record

such admissions and denials *(O.X.r.1).* To start with, the party or his pleader shall be examined orally and the court may ask questions suggested by the other party. Subsequently, however, the substance of such examination must be reduced to writing to form part of the record. Sometimes, one party is not present but represented by his pleader and the pleader may be unable to answer some material questions. In such a case a date may be given for the appearance of the party himself. If the party fails to appear on the date fixed by the court, it is open to the court to pronounce judgment against him or make any other suitable order *(O.X.r.2 to r.4).*

Interrogatories

8.9 Interrogatories are a series of written questions by one party to ascertain facts. The parties can prepare interrogatories for the opposite parties to answer. However, this can only be with leave of the court. Leave will only be granted for one set of interrogatories. This means that for every new set of interrogatories, permission of the court will be needed. It is for the court to decide under *O.Xl.r.1* as to which, if any, of the interrogatories are relevant. Answers to the interrogatories will be in the form of an affidavit to be filed in court within 10 days or such time as the court may allow. The form of interrogatories and answers are given in O.X/. as are the costs to be borne by one party or another. Where any party to a suit is a corporation or a body of persons, the court may direct the interrogatories to be delivered to, and answered by, a member or officer of such corporation or body. The answers given in response to the interrogatories can be used in evidence (O.X.r.22).

Discovery of documents

8.10 A party may obtain an order from the court directing the other party to disclose and make available for inspection any document. Discovery of facts can be by means of interrogatories under *r.1* above. Discovery of documents is obtained under *O.Xl.r.12.* The party holding the documents may file an affidavit stating which documents he holds in his possession and those that he objects to produce. It will be for the court to decide whether

it will direct discovery of a specific document. The penalties to be imposed on a defaulting party are given in *O.XI.r.21.*

Production, impounding and return of documents

8.11 The documentary evidence of all parties shall be produced at the first hearing whereupon the court may call upon the parties to admit or deny them *(O.XIII.r. 1).* No documentary evidence in the possession or power of any party that should have been but was not produced before the court at the first hearing shall be received at any subsequent hearing. However, the court may allow such subsequent production if sufficient cause is shown.

8.12 Irrelevant and inadmissible documents should be rejected by the court recording the reasons for doing so. If a document is admitted in evidence, it has to be endorsed in accordance with *r.4.* If only an entry in books of accounts or other such record is to be admitted in evidence, a copy thereof after due verification from the original may be endorsed. The documents admitted by the court will form part of the record and those rejected will be returned to the person concerned. The court may also impound a document or book, produced before it if there is sufficient cause for doing so under *r.8.* The court may also send for papers from its own record or from another court. The court cannot use in evidence any document, which is inadmissible under the law of evidence.

Admissions

8.13 A party may call upon another party in a case either through his pleadings or otherwise in writing to admit the truth of the whole or any part of the case. Similarly, either party may require the other party to admit any document. If the party so called upon neglects or refuses to admit the document, the cost of proving such a document shall be on the party so neglecting or refusing unless the court directs otherwise. The Form of Notice shall be *Form-9, Appendix* 'C'. The same goes for specific fact(s) mentioned in a similar notice. The Form of such admission is *Form 11, Appendix* 'C'. Notice to produce documents shall be in *Form 12. Order XII* deals with all such admissions.

Settlement of issues

8.14 Settlement of issues is a critical step in the trial of a suit. The issues drawn by the court articulate the dispute and determine the scope of the case. The issues are either, fact or law. It is, therefore, for the court to ascertain before framing of the issues as to what proposition of the facts or law the parties are at variance. If the defendant at the first hearing of the suit makes no defence, no issues need to be framed.

8.15 If the court is of opinion that the case can be disposed of on the issues of law alone, it shall try those issues first and postpone the settlement of the issues of fact. Before framing the issues, however, the court may examine witnesses or documents to narrow down, if possible, the scope of the case. The court, at any time before passing the decree, can amend the issues, frame additional issues or strike out issues already framed.

8.16 It is possible for the parties to agree upon the questions of fact or law, which are then expressed in the form of issues. If the court is satisfied that the agreement was executed in good faith, it may pronounce judgment *(O.XIV).*

Disposal of the suit at first hearing

8.17 Sometimes, it is possible to pronounce judgment at the first hearing on the basis that the parties are not at issue on any question of law or fact *(O.XV.r.1).* However, care should be taken that no injustice results from such a decision; the court must be satisfied as to the good faith and identity of the parties. Where the parties are at issue and the issues have been framed, if the court is satisfied that no further argument or evidence other than that available is required, the court may proceed to determine such issues, make findings and pronounce judgment even if no summons has been issued for settlement of issues only or final disposal *(r.3).* However, if the Summons has been issued for the final disposal of the suit and one party fails, without sufficient cause, to produce the evidence on which he relies, the court may at once pronounce judgment. In its discretion, however, the court can adjourn hearing and go through the normal process of trial *(r.4).*

Summoning and attendance of witnesses

8.18 No later than seven days after settlement of issues, the parties shall present in court a certificate of readiness and a list of witnesses they propose to call. No witness shall be called without leave and without good cause for the omission who does not appear of the list. *O.XV/* sets out as to how witnesses should be summoned and examined and how the expenses of summoning witnesses should be recovered from the concerned parties and defrayed.

Adjournments

8.19 O*.XV//* permits the court to grant an adjournment from time to time, if sufficient cause is shown. It is important that judges granting adjournments in the trials exercise caution. Thoughtless approach to this matter results 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 blatantly wrong and offends the demands of justice. 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 *r.4* and *r.5.*

9. The hearing of the suit

Hearing of the suit and examination of witnesses

9.1 After the issues have been framed and onus has been assigned, the hearing of the suit begins. Normally, the plaintiff should lead the evidence in proof of the issues of which the burden lies on him. Thereafter, according to the determination of the court the defendant(s) will lead their evidence in the order determined by the court. The defendants in their evidence may refute the evidence led by the plaintiffs and also prove the issues where the onus of proof is upon them. The plaintiff then has the right to rebut the defence evidence. While recording the evidence the court should exercise judicial sense. *O.XV///* should be consulted if any matters are unclear.

9.2 The evidence Must be recorded in the language of the court and ordinarily in the form of a narrative rather than of question and answer. The testimony of each witness, after having been recorded, should be explained to the witness, corrected where necessary and then signed by the presiding officer. Sometimes, information has to be elicited from the witness in the form of question and answer. In such a case, question and answer form may be resorted to. The presiding officer must have a full command of the law of evidence so as not to record inadmissible or irrelevant evidence.

Power to examine a witness immediately

9.3 If a witness is about to leave the jurisdiction of the court, the court, upon the application of any party or the witness, may take the evidence of such witness immediately or at any time before he leaves the jurisdiction of the court. If necessary, a witness may be recalled for further examination. Similarly, if necessary, the court at any stage of the suit may inspect any property or thing involved in the suit.

Incapacity of presiding judge

9.4 Where death, transfer or other causes prevent a judge from completing the trial of a suit, his successor may deal with the evidence taken by the incapacitated judge as if he has recorded such vidence and he may proceed with the suit from the date of incapacity.

Commissions

9.5 The courts can issue commissions for various purposes, viz., for obtaining statements of witnesses and accounts relevant to the suit under trial examined; to undertake partition of the property in suit; and sometimes, commissions can be issued at the instance of foreign tribunals to serve their purposes. Naturally, every commission issued by the court involves expenditure. How this expenditure should be incurred and recovered from the concerned parties is provided for under *0.XXVI.r.15 to r.18.* The procedure for issuing commission to examine witnesses is contained in *r.1* to *r.10* thereof; to examine accounts in *r.11* and *r.12;* and to undertake partitions in *r.13* and *r.14.*

10. The judgment

10.1 On the completion of evidence the court shall fix a date for hearing arguments. Once a case has been heard, judgment has to be pronounced in open court either at once or on some future date not exceeding 30 days for which notice has to be given to the parties or their counsel *(O.XX.r.1).* The judgment must be signed and dated at the time of pronouncing it. Once signed, the judgment cannot be altered or added to except as provided by *S.152. C.P.C..* His successor judge may pronounce the judgment written by a predecessor judge but not pronounced.

10.2 Some have described, writing a judgment as an art. However, it is a skill that can be learnt and practiced. It should contain all the necessary facts and it should proceed logically to the conclusion on each issue. The collective result of the issues involved in the suit will result either in the dismissal of the suit or in a total or partial decree. In accordance with the judgment, a decree is drawn in the prescribed form. One should avoid repetition of facts or law as far as possible. What is important is that any one who reads the judgment should be able to know how the judge has arrived at the conclusion that he hasdrawn.

10.3 Mr. Justice G. L. Davies, Judge of Appeal, Court of Appeal of Queensland in Australia, sets out eight pitfalls in his paper, *Common Pitfalls in Judicial Decision Making,* delivered to new judges undergoing orientation. The first two are closely related.

1. A failure to correctly identify the questions in issue; and

2. A failure to correctly state the facts upon which those question must be resolved.

The next four can occur in the fact-finding process, in the assessment and making of indings of credit. They overlap.

3. Too readily believing that you can access credit from demeanour;

4. Too readily concluding that a witness has lied;

5. Too readily making blanket findings of credit of a witness; and

6. A belief that you can tell where truth lies.

He cautions the two have an element of judicial arrogance in common with the previous four.

7. A belief that you should and can, in all cases, achieve a 'fair' result

8. A belief that you are writing for prosperity or admiration of your peers.

10.4 There is no one way to set out a judgment. However, an accepted feature is that it should follow a logical path. You may find following a format will assist you in your task. A judgment format is set out below for your consideration. This is not prescriptive and summary of many views.

JUDGMENT FORMAT

Introduction:

Name, designation and powers exercisable by judge

the names of the parties,

the nature of the suit by reference to the law under which it has been

filed Substance of the judgment:

The Plaintiff's case

The Defendants case

Issues arising for determination

The decision on each issue

11. The Decree

11.1 The decree shall agree with the judgment and it should contain the number of the suit, name and description of the parties, particulars of claim and shall normally specify the relief granted or other determination of the suit. It shall also clearly state apportionment of the cost between the parties. The date of decree should be the date of the pronouncement of the judgment. The judge shall sign the decree once satisfied that it has been drawn up in accordance with the judgment. If a judge vacates his office after pronouncement of judgment but before signing the decree, his successor may sign it. If the court has ceased to exist, any court to which the deciding court was subordinate may sign the decree.

11.2 If the decree is in respect of immovable property, the extent of such property should be clearly mentioned therein. If the decree is for the delivery of movable property, the decree should also state the amount of money to be paid as an alternative if delivery cannot be made. If the decree holder agrees, the court may direct payment of the judgment sum later or by installments. If the decree is for possession of immovable property and for rent or mesne profits *OXX.r.12* shall be followed.

11.3 There are many types of decree e.g. decree in administration suit, decree in preemption suit, decree in suit for dissolution of partnership, decree in suit for account between the principal and agent, etc. *Rules 13 to 19* will guide the court as to how the decree should be drawn up. Certified copies of judgment and decree should be furnished to the parties, who apply for it, at their expense.

Costs

11.4 Costs must follow the event. They should be adequate, real and compensatory.

12. Execution of decrees and orders

Introduction

12.1 It is said that it is much easier to secure a decree than to have it executed. *O.XXI* deals with execution of decrees and orders; it contains comprehensive guidance in all aspects of execution. Presiding officers need to have a good command of its provisions. Whilst always balancing the competing interests of the parties and maintaining fairness, the court should take a robust position in respect of execution and any attempt to frustrate execution must be dealt with effectively. Until a decree is made in a civil suit the court is a neutral, however, in the matter of execution of decree it should be a matter of honour for the court to see that the decree is executed in letter and spirit. The High Court has expressed concern that due attention is given to this work, it directs that it should be given the same attention from the courts as original work and should be methodically and regularly dealt with, as promptly as possible. It further directs District Judges to exercise close supervision and control to ensure proper arrangements are made, the work is distributed effectively and specific time is allocated to executions.

Application for execution

12.2 The common forms of execution are delivery of specific property, by attachment, attachment and sale, by arrest and detention of the judgment debtor and the appointment of a receiver. Applications are made to the court issuing the decree *(r.10).* Normally the application must be in writing, however, the application may be made orally, if made at the time of passing the decree *(r.10 and r.11).* Any property must be described with as much detail as possible.

Notice of application

12.3 The application must be on notice where an application for execution is made more than twelve months after the order, or is to be issued against the legal representatives of a party to the decree. Notice to show cause shall be issued, to give the party against whom execution is being issued an opportunity to show some cause as to why the execution

should not be issued. Where shown that issue of this notice would cause an unreasonable delay it may be dispensed with *(r.22.)* If valid objections are put forward, the court may make such order as it thinks fit *(r.23).* The court shall consider no objection unless either payment into court or security for costs is furnished *(r.23A).*

Stay of execution

12.4 An application for stay of execution may be granted where sufficient cause is shown *(r.26).* The Lahore High Court has amended *r.26* whereby it makes it compulsory for the court to require security or impose such conditions as it thinks fit unless sufficient cause if shown to the contrary.

Mode of execution

12.5 In decrees for the payment of money, execution is by way of detention of the judgment debtor in prison and by attachment and sale of property *(r.30).* Executions for decrees against specific property are by way of seizure and delivery *(r.31).* Decrees for restitution of conjugal rights or specific performance execution may be by attachment of property in respect of both, however, in respect of an order for specific performance by detention in addition *(r.32.)* Where the decree is in respect of a document or endorsement of a negotiable instrument, the court may execute the instrument drafted by the plaintiff, having first given the defendant an opportunity to make any objection or any alterations *(r.34).*

Attachment

12.6 Where attachment is ordered, if the decree has not been obeyed within twelve months, the property may be sold and the judgment creditor paid such sum in compensation as the court thinks fit, any surplus shall be returned to the judgment debtor.

Arrest and detention in prison

12.7 A judgment debtor can also be detained in prison if he fails to honour a court decree, the method of which is given in *r.37* to *r.40.* The court has discretion to permit the

judgment debtor to show cause against detention *(r.47).* Where a warrant is issued, the judgment debtor must be brought before the court, unless the decretal sum together with any costs and interest has been paid *(r.38).* On appearance of the judgment debtor either on arrest or under *r.37,* the court shall hear both parties in relation to whether the judgment debtor should serve detention.

Oral examination

12.8 Where a decree is for the payment of money the decree-holder may apply to the court for an order that the judgment debtor, any officer of a corporation or any other person be orally examined. The purpose of such an examination is to ascertain what property or means exist or are available to satisfy the judgment debt.

Disputed property to be attached

12.9 There may be claims against the attached property by persons not involved in the suit. Such questions need to be settled before the decree is executed and, if necessary, after recording evidence. All questions arising as to the title, right or interest in, or possession of, immovable property between an applicant and the opposite party shall be adjudicated upon and determined by the court. No separate suit lies for determination of any such matter.

Receivers

12.10 The court may appoint receivers where it considers it just and convenient. The purposes for which a receiver can be appointed and the powers that can be conferred upon the receiver are set out in *O.X.r.1.* The duties of the receiver are found in *r.3.* If the receiver fails to perform the duties or causes loss to the property in his possession under the court's orders by a wilful default or gross negligence, the court can take action against him under *r.4.* In some cases, the Collector of a district, with his consent, can be appointed as a receiver under *r.5.* The court may by general or special order pay a suitable remuneration to the receiver for his services.

Attachment of earnings

12.11 *Rule 46* permits the attachment of debts, shares and other property, which may not be in the possession of the judgment debtor. A debt is a sum of money now payable or which will become payable in the future by reason of a present obligation.

12.12 Attachment of salary is permitted under *r.48* but only in respect of public servants. hould a judgment creditor wish to attach the salary of a private employee he must do so using *r. 46.*

13. Temporary injunction & interlocutory orders

13.1 Sometimes, even, before a dispute is decided it becomes necessary in the interest of justice to make interlocutory orders or temporary injunctions. Two conditions need to be specified before temporary injunction can be granted; *that any property in dispute in* a *suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree; or that the defendant threatened or intends to remove or dispose of his property with a view to defrauding his creditors (O.XXXIX.r.1).*

13.2 An injunction can also be issued to restraint repetition or continuance of the breach of a contract or the injury complained of. However, three principles have been evolved by the superior courts, which must be borne in mind while granting a temporary injunction.

The plaintiff should have a *prima* case, which can be determined from the documents filed with the plaint or the evidence led by the plaintiff in that behalf.

After a *prima facie* case has been established whether by refusing to grant the injunction asked for, an irreparable loss is likely to occur.

To determine on which side the balance of convenience lies.

These three principles are the principles of prudence. The facts of each case differ. The court should not, therefore, blindly follow a precedent to grant or refuse an interim injunction. It should apply its mind to the facts of the case before it can decide what kind of order to be passed so that the cause of justice is promoted.

13.3 Before granting an injunction, normally notice must be given to the opposite party. However, in some cases, it may be necessary to issue an interim injunction to be effective until the other party appears. An injunction directed to a corporation is binding not only on the corporation itself but also on members and officers of the corporation, whose personal action it seeks to restrain.

13.4 It must be borne in mind that an interim injunction passed under *r.1* or *r.2* in the absence of defendant, should not ordinarily exceed 15 days. However, the period may be

extended if there is a failure of service on the defendant and when such failure is not attributable to the plaintiff or when the defendant seek time for defence of application for injunction *(r.2A).* At any rate, the injunction will cease to have effect after the expiry of six months unless the court extends the period after hearing the parties and for reasons to be recorded provided that report of such extension shall be submitted to the High Court *(r.2B).*

14. Appeals

14.1 Appeals may be from original decrees, from appellate decrees, and from Orders. *S.96 — S.99 C.P.C.* deal with the appeals from original decrees. These sections need to be read with *O.XLI. r.1 to r.37.*

Appeals from original decrees

14.2 An appeal normally lies to the authorised court, unless otherwise provided elsewhere. An ex *parte* decree is no exception, however no appeal lies from a consent decree. If an aggrieved party fails to appeal from a preliminary decree, he stands precluded from disputing its correctness in the course of the appeal from the final decree. Unless there is a defect or irregularity in the proceedings in the suit affecting the merits of the case or jurisdiction of the Court, the appellate court should neither reverse nor substantially vary the decree appealed from nor remand the case.

Rules and orders

14.3 The form and contents of the memorandum of appeal are prescribed in *r.1* with which they should conform. What grounds can be urged by the appellant and on what grounds the Appellate Court decides the appeal are given in *r. 3. Rule 4* provides that one of several plaintiffs or defendants may obtain the reversal of the whole decree on a common ground.

Stay of proceedings and execution

14.4 The fact of an appeal does not operate as a stay of proceedings or decree. However, a stay can be granted on the grounds given in *r.5.(3)* upon the conditions given in *r.6.* On the same grounds and conditions, an order made in the execution of a decree may be stayed under r.8 if that order has been appealed from.

Procedure

14.5 The procedure to be followed on admission of appeal is given in *r.9 — r.15* whilst the procedure of hearing is set out in *r.16—r.29.* It is necessary that these rules be meticulously followed.

Judgment

14.6 Judgment may be pronounced, on the conclusion of hearing, on the same day or on some future day of which notice shall be given to the parties or their pleaders. The judgment shall be in writing and shall state: -

The points for determination.

The decision thereon.

The reasons for the decision.

When the decree appealed from is reversed or varied, the relief to which an appellant is entitled.

At the time of pronouncement, the judgment shall be signed and dated by the judge or the judges concurring therein. *Rules* 32 and 33 explain the power of the Court of appeal and what the judgment may direct. What the dissenting Judge, if any, should do is given in *r.34.*

Judgment must address all grounds

14.7 The appellate court must address every ground set out in the appeal notice. Sometimes, counsel gives up some of the grounds. In such cases it must be recorded in the judgment specifically which grounds in the appeal have not been pressed? If this is not done, complication may then arise in the higher courts. The appellant's counsel may insist that the ground given in the memo of appeal was not attended to because there is no mention thereof in the judgment. It will be difficult for the higher court to determine whether the ground was pressed or given up in the absence of this fact being recorded.

Decree in appeal

14.8 How the decree in appeal should be drawn up is given in *r.35* and *r.36.* A certified copy of the decree should be sent to the Court whose decree has been appealed from *r.37.* Amendments by the concerned High Courts must not be ignored.

Appeals from appellate decrees

14.9 The Rules of O.*XLI* shall apply, so far as may be, to appeals from appellate decrees.

Appeals from orders

14.10 *O.XLIII. r.1. Appeals from Orders:* An appeal shall lie from the following orders under the provisions of section 104, namely:

(a) an order under rule 10 of Order VII returning a plaint to be presented to the proper court;

(b) an order under rule 10 of Order VIII pronouncing judgement against a party;

(c) an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;

(d) an order under rule 13 Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed ex parte;

(e) an order under rule 4 of Order X pronouncing judgment against a party;

(f) an order under rule 21 of Order XI;

(g) an order under rule 10 of Order XVI for the attachment of property;

(h) an order under rule 20 of Order XVI pronouncing judgement against a party;

(i) an order under rule 34 of Order of Order XXI on a objection to the draft of a document or of an endorsement;

(ii) an order under rule 62 or rule 103 of Order XXI relating to the right, title or interest of the claimant or objector in attached property;

(j) an order under rule 72 or rule 92 of Order XXI setting aside or refusing to set aside a sale;

(k) an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit;

(l) an order under rule 10 of Order XXII giving or refusing to give leave;

(m) an order under rule 3 of Order XXIII recording or refusing to record an agreement, compromise or satisfaction;

(n) an order under rule 2 of Order XXV rejecting an application (in an open to appeal) for an order to set aside the dismissal of a suit;

(o) an order [under rule 2, rule 4 or rule 7] of order XXXIV refusing to extend the time for the payment of mortgage money;

(p) orders in lnterpleader suits under rule 3, rule 5 or rule 6 of Order XXXV;

(q) an order under rule 2, rule 3 or rule 6 of Order XXXVIII;

(r) an order under rule 1, rule 2, rule 4 or rule 10 of Order XXXIX;

(s) an order under rule 1 or rule 4 of Order XL

(t) an order of refusal under rule 19 of Order XLI to re-admit, or under rule 21 of Order XLI to re-hear, an appeal:

(u) an order under rule 23 of Order XLI remanding a case, where an appeal would lie from a decree of the Appellate Court;

(v) an order made by any Court other than a High Court refusing the grant of a certificate under rule 6 of Order XLV;

(w) an order under rule 4 of Order XLVII granting an application for review.

14.11 The rules of *O.XLI* apply, so far as may be, to appeals from orders. If the suit is still pending, notice to the respondent or his advocate is necessary as provided in *r.3.* Local amendments must always be followed.

15. Miscellaneous

Death of parties

15.1 O.XXII r.1 The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. In such a case, the legal representatives of the deceased have to be brought on record as a party and then the trial of the suit will proceed. If there is more than one plaintiff and one of them dies, the right to sue does not survive solely in the surviving plaintiff(s), the legal representative of the deceased plaintiff have to be made a party before proceeding with the suit.

15.2 If on the death of one or more defendants the right to sue does not survive against the surviving defendant(s) or the sole defendant or sole surviving defendant dies and the right to sue survives, the court on application made in that behalf shall bring the legal representative of the deceased defendant on record and proceed with the suit. If such legal representatives are not brought on record within the time limited by law and no intimation is given to the court, notwithstanding the death of such defendant(s), the court may, proceed with the suit and pronounce order or judgment, which shall have the same forced and effect as if it had been pronounced before the death took place.

15.3 In case of dispute as to whether any person is or is not a legal representative of the deceased plaintiff or deceased defendant, the court will have to determine this question as a question of fact. A death occurring between the conclusion of a hearing and the pronouncement of judgment will have no effect on the decision in the case.

Marriage of a female party

15.4 Marriage of female plaintiff or defendant shall have no effect on her liability *(r.* 7. *(1)).* However, if her husband is liable by law for the debt of his wife, the decree may be executed against him with the permission of the court and, likewise, if the decree be in her favour the husband may be permitted by the court to execute the decree on her behalf if the husband is by law entitled to the subject-matter of the decree *(r.* 7.(2)).

Plaintiff's insolvency

15.5 The insolvency of a plaintiff in any suit being maintained by his assignee or receiver for the benefit of his creditors will not cause the suit to abate unless such assignee or receiver declines to continue the suit. The procedure to be adopted where the assignee fails to continue the suit or give security as provided in *r.8.(1)* is set out in *r.8.(2).* If a suit is dismissed under *r.8.* a fresh suit cannot be brought on the same cause of action *(r.9.(1)).* However, a legal representative of a deceased party or the assignee or the receiver may, under *r.9.(2),* apply for getting the order or judgment in the case set aside.

Assignment, etc. before final order in suit

15.6 The procedure in case of assignment, creation or devolution of any interest during the pendency of the suit is prescribed in *r.10.* This provision will also be applicable with necessary modification to appeals but not to the proceedings in execution.

Withdrawal and adjustment of suit

15.7 After instituting a suit the plaintiff may be permitted on suitable terms to withdraw his suit or abandon part of his claim as against all or any defendant, if the suit is bound to fail by reason of some formal defect. The court may also permit the withdrawal if there are other sufficient grounds to allow the plaintiff to institute a fresh suit with the same claim or a part thereof. In either case permission may be granted to the plaintiff to institute a fresh suit. If the suit is withdrawn without the permission of the court, the plaintiff is not only liable to pay costs but will also be precluded from instituting a fresh suit. At any rate, the law of limitation will apply to the second suit as if the first suit has not been instituted (O.XXIII).

Compromise

15.8 If the parties to a suit arrive at a lawful compromise, the court shall record the compromise, agreement or satisfaction, and pass a decree in accordance therewith to the extent it relates to the suit *(r.3).* However, this does not apply in any proceedings in execution of a decree or order *(r.4).*

Payment into court

15.9 Sometimes, though very rarely in our country, the defendant wants to deposit into court the money claimed from him or part thereof. The plaintiff may, in such a case, accept the deposit in full or part satisfaction of his claim. If the plaintiff accepts it as satisfaction in full, the court may pronounce judgment accordingly; otherwise for the balance of the claim the trial may proceed. The cost shall be borne by the party, who is most to blame.

Security for costs

15.10 If the plaintiff(s) reside outside Pakistan, the court may ask him/them to furnish security for the costs incurred or likely to be incurred by any defendant. The definition of 'residence outside Pakistan' is given in *O.XXV.r.2.* In case of default, the court may dismiss the suit unless it is withdrawn sooner with the permission of the court. The dismissal may, however, be set aside later but after hearing the other party.

Interpleader suits

15.11 Interpleader suits are very rare. However, when a court faces such situation, *OXXXV* needs to be studied.

Special case

15.12 If there is a difference of opinion between the two honest litigants on a question of fact or law, they may agree to refer such question to a court having jurisdiction in the matter for its opinion. Such an agreement when filed in a court is registered as a suit. It is then heard as if instituted in the ordinary manner. The court may then pronounce judgment after complying with the requirements of OXXXVI. When the judgment is pronounced a decree shall follow.

Arrest and attachment before judgment

15.13 If it is brought to the notice of the court that the defendant in a suit is likely to avoid the process of the court or put the property in dispute beyond the reach of the court, the court may, if so satisfied, arrest the defendant and attach the property in terms of *O.XXVIII.* Such attachment, however, will not affect the rights of the stranger to the suit.

Pauper appeals

15.14 The inquiry into pauperism of the applicant under *O.XLVI* may be made either by the appellate court or, under the orders of the appellate court, by the court from whose decision the appeal is preferred. However, if at a trial the applicant was already declared a pauper, no further inquiry is needed at the appeal stage.

1. Administrative responsibilities of the District Judiciary

Oversight and inspection of their own courts

1.1 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, he 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.

1.2 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 court is that of the presiding officer. He is required to take prompt notice, deal effectively and where he cannot, he should report to the concerned Superior or Authorised Officer.

1.3 On the first working days in the months of February, May and November every judge of the District Judiciary is required to carry out a regular inspect ion of his own court and no judicial work is fixed on those days. 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 Addl. District and Sessions judges passed on to the High Court.

The assessment of training, continuing education and other needs of the District Judiciary.

1.4 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.

Key role **of the District and Sessions Judges**

1.5 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.

Supervision by controlling courts

1.6 District Judges are not responsible merely for the proper distribution of work amongst the courts, and for the disposal of appeals. They are 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.

Financial management & budget

1.7 The presiding officer of every court is responsible for regular inspection of registers and accounts. Money passing though the court must be duly accounted for and should be verified weekly. 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.

1.8 The judges or the courts where empowered or required must attend to timely preparation of budgets of the courts, control expenditure and 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 future

1.9 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.

1.10 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.

Judicial buildings

1.11 Judicial buildings include the District and Sessions Judges Courts, Sessions Houses, Courts of Small Causes and Subordinate Judges Courts and all subsidiary building attached to them. Inspection reports should include the state of the courthouse, whether it is good repair and properly kept and provides adequate accommodation. Library facilities must be inspected and report should cover the catalogue and whether this complies with the minimum prescribed by the High Court.

Facilities for litigants and counsel

1.12 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 are 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.

Interference with judicial discretion or powers

1.13 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.

Trial in family and rent cases

1.14 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 to 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.

Citizen Court Liaison

1.15 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.

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