# CRIMNAL & CIVIL PROCESS

**What is law?**

A rule established by authority, society or custom based on reason as quoted:

"Law is nothing but reason and that what is not reason is not law."

It is the conduct of an individual enforced by the court of law. Law is an elusive term defying a comprehensive definition; Law means any rule of action. It ranges from scientific laws to religious laws, international law, etc.

The law on the basis of its source is divided into two types

A. Common Law

1. Any unwritten & generally applied system of law based on conduct, decisions, usage and customs
2. The community in which somebody lives controls the conduct of an individual
3. It is universally applicable e.g. Penchyet & Jerga system)

B. Statute Law

Made by the legislative body of the representative Govt. or order by a ruler (*In Pakistan the statute law is notified in extra ordinary gazette of Govt. & later published in a book.*

Statue Law is of Two Types

1. Civil Law
2. Criminal Law

The civil law provides remedies for personal suffering or private rights of individual. It is code of behavior for better society. It does not concern with community as a whole e.g.

1. Divorce cases
2. Industrial Injuries
3. Medical negligence

The criminal law involves Crimes & its Punishment. It is body of law, which exists for better Government of persons within the state. It includes all offenses against the law, personal conduct observed by all & total prohibition of some act or even omission is enforced by punishment for better Government e.g.

1. Road accident
2. Murder

The purpose of criminal law is to safeguard the interest of community maintain a proper order & peace in society. Its contravention is punished with fine, imprisonment or death. Islamic law is based on teaching of Holy Quran & Sunnah. It can both be criminal & civil. It is provided in the constitution of Islamic Republic of Pakistan that all existing laws shall be brought in conformity with the Holy Quran & Sunnah.

Courts of law are the places where people bring their grievances against others for justice. When a person is accused of a breach of criminal law or contract, complaint is brought before a court for trial. A judge presides over the hearing and records all the evidence in writing presented to him by both the parties. He finally concludes the proceeding giving his decision in writing. His conclusion is called judgment.

**What is Justice?** :

The maintenance or administration of what is just, especially by the impartial adjustment of conflicting claims or the assignment of merited rewards or punishments. Conformity to truth and reality in expressing opinions and in conduct; fair representation of facts respecting merit or

demerit; honesty; fidelity (faithfulness to loyalty); as, the justice of a description or of a judgment.

Judicial System is the system of law courts that administer justice and constitute the judicial branch of government. The purpose of judicial system/ legal system is to provide a system for interpreting and enforcing the laws. The legal system provides a systematic, orderly, and predictable mechanism for resolving disagreements

Functions of judicial system are that in order to do its job; any such system must perform three closely connected, but nevertheless distinct, functions:

Judicial Function is the core of any legal system. In its judicial function, a legal system adjudicates disputes, issuing a decision as to how the disagreement should be settled.

Adjudication (Arbitration, negotiation),
Legislation,
and Execution

The purpose of the legislative function is to determine the rules that will govern the process of adjudication. Judicial Function is the core of any legal system. In its judicial function, a legal system adjudicates disputes, issuing a decision as to how the disagreement should be settled. Legislation tells judicial function how to adjudicate. Finally, the purpose of the executive function is to ensure, first, that the disputing parties submit to adjudication in the first place, and second, that they actually comply with the settlement eventually reached through the judicial process. In its executive function the legal system may rely on coercive force, voluntary social sanctions, or some combination of the two. The executive function gives a legal system its & quot; teeth, & quot; providing incentives for peaceful behavior; both domestic law enforcement and national defense fall under the executive function.

Pakistan judicial system stems directly from the system that was used in British India as on independence in 1947, the Government of India Act 1935 was retained as a provisional Constitution. As a consequence, the legal and judicial system of the British period continued, of course, with due adaptations and modifications, where necessary, to suit the requirements of the new Republic. Pakistan is an Islamic republic. Islam is the state religion, and the Constitution requires that laws be consistent with Islam. The criminal court is located in the district of each province. This court has power to change criminal to death punishment. , the criminal courts comprise of Session Judge, Additional Session Judge and Judicial Magistrate Class I, II & III.

Criminal Justice refers to the agencies of government charged with enforcing law, adjudicating crime, and correcting criminal conduct. The criminal justice system is essentially an instrument of social control: society considers some conducts so dangerous and destructive that it either strictly controls their occurrence or outlaws them outright. It is the job of the agencies of justice to prevent these behaviours by apprehending and punishing transgressors or deterring their future occurrence. Although society maintains other forms of social control, such as the family, school, and church, they are designed to deal with moral, not legal, misbehaviour. It is only the criminal justice system in a legal system which has the power to control crime and punish criminals.

The main objectives of the criminal justice system can be categorized as follows:

i. Prevent the occurrence of crime.
ii. Punish the transgressors and the criminals.
iii. Rehabilitate the transgressors and the criminals.
iv. Compensate the victims as far as possible.
v. Maintain law and order in the society.

vi. Deter the offenders from committing any criminal act in the future.

Pakistani courts can, and do impose the death sentence, as well as imprisonment, forfeiture of property, and fines. Imprisonment is either "rigorous"--the equivalent of hard labor for up to fourteen years--or "simple"--confinement without hard labor. Another form is "banishment," which involves serving in a maximum security prison for periods of seven years to life. In February 1979, Zia ul-Haq issued new laws that punished rape, adultery, and the "carnal knowledge of a virgin" by stoning; first time theft by amputation of the right hand; and consumption of alcohol by eighty lashes. Stoning and amputation, it should be noted, had not been carried out as of early 1994--at least not outside of the tribal area where tribal custom, rather than the Pakistani penal code, is the law of the land.

Article 45 of the constitution bestows on the president the right to grant a pardon or to remit, suspend, or commute any sentence passed by any court. There are also legal provisions for parole. In principle, articles 9 through 13 of the constitution and provisions of the codes guarantee most of the same protections that are found in British and United States law. These rights include, for example, the right to bail and to counsel, the right of habeas corpus, the right of cross-examination, the right of representation, the right of being informed of charges, the right of appeal, and the right of the prevention of double jeopardy. The code contains copious provisions for punishment of crimes against the state or against public tranquility. These crimes extend to conspiracy against the government, incitement of hatred, contempt or disaffection toward a lawfully constituted authority, unlawful assembly, and public disturbances. Punishments range from terms of imprisonment to life in prison or death. In most instances, a person apprehended appears before a magistrate or assistant commissioner, who decides on bail; the magistrate may also try less serious cases. Serious cases are tried before the sessions courts, which can award punishments up to death. The provincial high court hears appeals and automatically reviews any conviction involving the death penalty. The highest level of appeal for criminal cases is the federal Supreme Court. Under the Suppression of Terrorist Activities (Special Courts) Act of 1975, the government established special courts to try cases involving crimes of a "terrorist" nature (for example, murder and sabotage). In 1987 another ordinance was passed establishing Speedy Trial Courts, which were empowered to hand down a death penalty after a three-day trial in which almost no adjournments were permitted. The jurisdictional authority of both kinds of courts was amended in 1988, but they have continued to operate. In 1991 the Speedy Trial Courts were given new jurisdictional authority to try particularly heinous crimes under the constitution's Twelfth Amendment. These courts handle cases that attract widespread public attention, especially those dealing with murder and drug offenses and in which the government believes that justice must be meted out rapidly. Only one appeal is permitted. In 1990 special "accountability" courts were set up to try individuals from Benazir's first administration who were charged with corruption. In late 1993, Benazir announced that her government would stop referring new cases to the special courts and would allow the constitutional authority for these courts to lapse in 1994. The court system and the provisions of criminal law do not extend into the tribal areas along the Afghan border. These areas are administrated by political agents who work with tribal leaders to maintain law and order according to tribal standards.

Juvenile court tries the cases of .children below 15 years. They are kept at reformatory jail upto 18 years and Capital Punishment is not awarded. Anti terrorist courts hear cases regarding terrorism. The family courts decide the cases like divorce and family disputes. Labors courts deal

with the labor disputes. Military courts deals with all of the army cases. Service tribunals deal with service matters of the civil servants.

**The Pakistan Penal Code, 1860**

The Pakistan Penal Code usually called PPC is a penal code for all offences charged in Pakistan. It was originally prepared by Lord Macaulay with a great consultation in 1860 on the behalf of the Government of British India as the Indian Penal Code. After the partition of India in 1947, Pakistan inherited the same code and subsequently after several amendments in different governments, it is now mixture of Islamic and English Law.

In criminal laws Pakistan Penal Code, defines the offences and provides their punishments, while criminal procedure code, laid down the procedure for hearing, and punishing or acquitting an accused, as the case may be. Pakistan has an extensive penal code of some 511 articles, based on the Indian Penal Code of 1860, extensively amended during both the pre-independence and the post-independence eras, and an equally extensive Code of Criminal Procedure. Numerous other laws relating to criminal behavior have also been enacted. Much of Pakistan's code deals with crimes against persons and properties--including the crime of *dacoity* (robbery by armed gangs) and the misappropriation of property.
Outside the scope of the Penal Code, there are special and local laws that come within the purview of criminal law. The special laws deal with special type of offences which though envisaged in the Penal Code, do not guarantee adequate punishment or speedy trial. Instances include anti-corruption laws, laws to protect women from torture or attack etc. Local laws relate primarily to municipal laws that seek to ensure prevention of civic offences.

**Important Features of PPC**

**Jurisdiction**
Section 1. Title and extent of operation of the Code. This Act shall be called the Pakistan Penal Code, and shall take effect throughout Pakistan.

- Section 4

The provisions of this Code apply also to any offence committed by:-

- (1) any citizen of Pakistan or any person in the service of Pakistan in any place without and beyond Pakistan;
- (4) any person on any ship or aircraft registered in Pakistan wherever it may be.

Explanation: In this section the word "offence" includes every act committed outside Pakistan which, if committed in Pakistan, would be punishable under this Code. The **Hudood Ordinance** was a law in Pakistan that was enacted in 1979 as part of the military ruler Zia-ul-Haq's Islamization process, and replaced/revised in 2006 by the Women's Protection Bill.

The Hudood Law was intended to implement Islamic Shari'a law, by enforcing punishments mentioned in the Quran and sunnah for *Zina* (extramarital sex), *Qazf* (false accusation of zina), Offence Against Property (theft), and Prohibition (the drinking of alcohol).

The ordinance has been criticized as leading to "*hundreds of incidents where a woman subjected to rape, or even gang rape, was eventually accused of Zina*" and incarcerated, and defended as punishment ordained by God and victim of "extremely unjust propaganda".

Extension of Code to extraterritorial offences.

**Punishments**

- Section 53.

The punishments to which offenders are liable under the provisions of this Code are:

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

(ii) Simple;

- Ninthly, Forfeiture of property;
- Tenthly, Fine

First five punishments are added by amendments and are Islamic Punishments.

**Law code**

For married Muslims, the maximum punishment for *zina* is death by stoning, or for unmarried couples or non-Muslims, 100 lashes. In practice, only imprisonment has ever been enforced, because the maximum punishments require four eyewitnesses or above.

The maximum punishments for drinking alcohol is 80 lashes. Theft carries a maximum punishment of amputation of the right hand.

**Controversy**

The ordinance is mostly criticized for equiparating the crime of zina (adultery) and zina bil-jabr (rape). As for the zina, a woman alleging rape is required to provide four adult male eye-witnesses. Actually, in many cases the failure to find such proof of the rape places the woman at risk of prosecution for zina. Moreover, to prove rape the female victim has to admit that sexual intercourse had taken place. If the alleged offender, however, is acquitted for want of further evidence the woman now faces charges for either adultery, if she is married, or for fornication, if she is not married. According to a report by the National Commission on Status of Women (NCSW) "an estimated 80% of women" in jail in 2003 were there as because "they had failed to prove rape charges and were consequently convicted of adultery."

Stories of great personal suffering by women who claimed to have been raped appeared in the press in the years following the passing of the Hudood ordinances. The case of Safia Bibi is one of this: a blind girl victim of a rape who was prosecuted for the crime of zina because of her illegitimate pregnancy, while the rapist was acquitted. The case appealed many protests from Pakistani activist and lawyer and from the international organizations. The appeal sentence of the Federal Shariat Court let cleared the girl of the accusation of zina.

The evidence of guilt was there for all to see: a newborn baby in the arms of its mother, a village woman named Zafran Bibi. Her crime: she had been raped. Her sentence: death by stoning. Now Ms. Zafran Bibi, who is about 26, is in solitary confinement in a death-row cell.Thumping a fat red statute book, the white-bearded judge who convicted her, Anwar Ali Khan, said he had simply followed the letter of the Koran-based law, known as hudood, which mandates

punishments."The illegitimate child is not disowned by her and therefore is proof of zina," he said, referring to laws that forbid any sexual contact outside marriage. Furthermore, he said, in accusing her brother-in-law of raping her, Ms. Zafran had confessed to her crime.
However, Mufti Taqi Usmani, an instrumental figure in making the law, has stated:If anyone says that she was punished because of Qazaf (false accusation of rape) then Qazaf Ordinance, Clause no. 3, Exemption no. 2 clearly states that if someone approaches the legal authorities with a rape complaint, she cannot be punished in case she is unable to present 4 witnesses. No court of law can be in its right mind to award such a punishment.

**Revision of ordinance**

In 2006, then President Pervez Musharraf again proposed reform of the Ordinance. On November 15, 2006, the Women's Protection Bill was passed in the National Assembly, allowing rape to be prosecutable under civil law. The bill was ratified by the Senate on 23 November 2006, and became law after President Musharraf signed it on 1 December 2006.

The reforms have come under considerable opposition from Islamist groups in Pakistan, who insist that law should stay in Sharia form. Other legal experts have claimed that the original law was not as unbalanced as its opponents claimed, or that the reforms will be impossible to enforce.

In Pakistan, the present criminal justice system is primarily based upon the codified penal and procedural laws designed by the British masters in the colonial era of British Indian history. It includes the Criminal Procedure Code of 1898 and Penal Code of 1860. Since these criminal laws did not provide for any concept of restorative justice we have not inherited a system having any such provisions. Our system is still based upon the accusatorial principle i.e. the state is a party in any criminal transaction. Punishment of the offender as a rule has been provided as the only penalty for the criminals instead of extending any relief/remedy to the victim. It truly speaks of the underlying objective that the state is interested in maintaining ‘order’ and writ of the state in the society instead of taking care of the victim.

**Statutes**

However in the course of development, Pakistan as a country tried to improve the inherited criminal laws to make them more consistent with and beneficial for the society. In brief, these codified changes are:

**Qisas and Diyat Ordinance**

“Crime of retribution and compensation *(Diyah)* involve homicide, bodily injury or other forms of harm committed against the physical security of the person. Homicide is of three categories: - It may be premeditated, involuntary, or voluntary. Only pre-meditated homicide involves a penalty under the law of Qisas. Qisas refers to a specified punishment in Quran and Sunnah. They are labeled as such because the punishment imposed is either a just-retributive penalty equivalent to the injury inflicted on the victim, or takes the form of pecuniary compensation (Diyat) for the victim’s injuries. Diyat is imposed only if just retribution is not executable or the victim waives his right to demand it. The decision whether or not to prosecute rests with the victim and his relatives. In the event of a conviction they have the choice between the sanction of retribution or exacting compensation or pardoning the offender altogether. In the last event

the court reserves power of discretionary punishment of the offender. The Quran has described a very important principle of civil law, i.e. equality of men and the necessity of awarding proportionate punishment to all offenders, without distinction, unless and until the offender is pardoned by the relatives of the victim under circumstances that are expected to lead to improvement of conditions.

The Islamic law of just-retribution provides a very effective and practical means to put a stop to murder and safeguard human life. A man who shows a callous disregard for the life of a fellow-person loses his right to live. The option to pardon allowed to the heirs of the slain person, should not be regarded as likely to encourage murder, for such option is not synonymous with exemption from punishment as in ordinary circumstances the murderer will have to pay the blood-money. Moreover, the would-be murderer possesses no means to know that the heirs of the person whose murder he contemplated will actually be persuaded to pardon him; so the fear of capital punishment will always be there to deter him from the commission of the crime. Again, pardon or remission is permissible only where the circumstances are such that the pardon or remission is likely to improve conditions and bring about good results for all parties concerned.

To prevent crime, Islam really aims at the elimination of the conditions that cause it. It seeks to remove the very root-cause of all crimes by working a complete moral reformation in man. But it does not remain content with that. It also prescribes deterrent laws in conformity with the dictates of reason, justice and humanity.

The individualization of punishment under Islamic law is fundamental, whether as to *Hadd, Qisas* or *Tazir*. The Diyah, by contrast, is not strictly punishment, but is in the nature of compensation, which must be paid to the victim as reparation for injury. It is sometimes confused with punishment because the amount of compensation is specified in advance. That practice is evidence of the firm adherence to the principle.

*Difference between Qisas and Revenge*

There is a difference between Qisas and Revenge. In revenge, the punishment inflicted on the offender is neither equal nor similar and sometimes innocent people can become a victim of revenge. While in qisas the equality of quantum of crime and of punishment is strictly adhered to. The law requires that a person shall not inflict a greater degree of harm than that which has been inflicted. If equality in awarding punishment by way of qisas is not practicable or possible then some other punishment is awarded. Secondly the process of revenge goes on between strong and weak while qisas is awarded by the order of the court and the entire community is under an obligation to help the victim until qisas is executed.

*Preference of Diyah over Qisas*

As between Qisas (just-retribution) and Diyah (blood money), the Quran clearly indicates the preference for the Diyah and forgiveness. Islam recommends reconciliation in murder cases so that peace and tranquility emerges ultimately. Murder is a compoundable offence under the existing law.

Thus, the combination of Diyah and forgiveness produces a powerful material and spiritual inducement to forsake *Qisas* as retaliation. Consequently, one must interpret the crimes of *Qisas* as being based on a general deterrence policy which recognizes the victim's sense of vindictiveness against his aggressor, while limiting the consequences of the penalty to the harm done and establishing the alternative remedies of victim compensation or outright forgiveness.

*Qisas in Hurt Cases*

The law includes many detailed provisions regarding cases of hurt and "Itlaf" (total or partial damage to any limb or organ of the body) and has provided for "Arsh" "Zaman" and "Diyah" as various modes of compensation.

In cases where extreme punishment of *Qisas* is not an adequate relief, *Diyah* is payable according to the yardstick fixed by law. At times, the full amount of compensation in the form of Diyah is payable to the aggrieved whereas, at other occasions, only a proportionate amount of Diyah is recoverable. If, for instance, the sole organ or limb of a person is totally damaged due to the act of an individual and he is deprived of making use thereof permanently, the full amount of Diyah would be recoverable. The cutting off of the nose etc. of an individual can be quoted as an instance. If both organs or limbs like hands, eyes, feet are damaged, full compensation in the form of Diyah would be payable but if one of the two is damaged then proportionate Diyah to the extent of one-half would be payable. This principle would follow in other cases as well.

It should be noted that in certain circumstances, a fine could only be imposed if the damage caused is of a negligible extent. If a person has, for instance, six fingers of a hand and damage is caused totally or partially to the sixth additional finger, no compensation in the form of Diyah can be recovered. But the aggrieved person can only approach the court that shall award him reasonable compensation by imposing a fine on the offender. Similarly, if certain damage is caused to a sexual organ of an impotent male person, the victim can only be compensated by way of payment of a fine because it cannot be said that he suffered an irreparable loss.

The fact cannot, however, be lost sight of that in certain cases a larger amount of compensation by way of Diyah can also be granted if the damage caused is of an extensive nature. If, for instance, one of the teeth out of 32 teeth is initially damaged but the said damage has also adversely affected the remaining 31 teeth, the offender must compensate the victim for the damage caused partially to the said 31 teeth.

*Other Expenses Recoverable*

It would be an injustice to the victim, if he is not awarded compensation for the injuries sustained, but rather left to expend his own money on the treatment of the inflicted injuries. The present law is not oblivious to the practical difficulties and the hardships of the victim and has specifically provided that the victim must be given adequate relief and compensation for the following: -

1. Hospital expenses. Pain and suffering caused by the injury and
3. Pecuniary loss.

*Provision for Negligent Driving*

Negligent Driving and other rash acts causing hurt entail criminal punishment under the law besides
"Arsh" and "Daman" specified for the offence.

*Aaqilah*

Sometimes an offender may be helped by his community to pay the blood money. When death has been caused by negligence or mistake, Aaqilah of the offender i.e. those who have a common interest with the offender arising out of their profession or simple neighborhood or the merchants, who occupy premises in the same market, must pay the blood money to heirs of the deceased. The reason is that it is the duty of the person's Aaqilah to watch over his conduct and the law presumes that the wrongdoer would not have acted in the way he did, unless they neglected their duties. In this way his community has been burdened with the so-called light penalty.

*Qasamah*

To prevent crime and making every locality conscious of being a helping hand in the overall objective of good order in society another novel concept has been introduced by the law, which is called "Qasamah". It is a general term for oath. As *Qasamah* means, "to divide", we seem to have here the usual transition between the meanings to cut and to decide so that *Kasam*' would be the deciding, strong word. If a dead body is found in a certain locality with signs of foulplay on it the heirs of the deceased are entitled to select a maximum of fifty inhabitants from the place to take an oath that none of them killed him. If they take the oath then the competent court of jurisdiction has the discretion to nominate several or all of the inhabitants for the payment of blood money. Whoever refuses to take the oath shall be kept in simple imprisonment until the time of his confession, or his willingness to take the oath, or disclosure of information pertaining to the real murderer. Similarly, if a dead body is found at the door of a man's house he will take the oath and if he swears that he did not kill him, then the court will decide as to whom is liable for the payment of Compensation.

*Ghurrah*

Ghurrah (compensation) is due in the case of destruction of an embryo or a fully formed child still-born as a result of assault suffered by the mother during her pregnancy. Thus the law provides an effective remedy in case of injury to unborn children. From the above discussion, it is vividly clear that the Penal law of the country has provided ample opportunities of compensatory justice to the victim in the shape of Qisas, Diyat, Arsh, Zaman, Aaqila,
Qasamah and Ghurrah. As mentioned earlier no homicide, hurt, injury or damage remains uncompensated, but despite the prevalent law, the ideal results in the area of restorative justice are yet to be achieved.

**Criminal Procedure Code, 1898.**

The main object of Criminal Procedure Code is thus to supplement the Pakistan Penal Code, by rules of procedure with a view to prevent offences and bring offender to justice. The object of the code is clear from its preamble, the code intended to consolidate and amend the laws relating to the criminal procedure. The purpose of Criminal Procedure Code is to provide machinery for the punishment of offenders against the substantive criminal law embodied in Pakistan Penal Code. It can be concluded that Criminal Procedure Code is a procedural law and substantive law, describes the formation of criminal courts, its procedure as well as classification and powers of criminal courts. The Penal Code, on the other hand, is concerned with defining the nature of an offence and if proved in a duly constituted court of law, the punishment that it entails. This is the broad distinction between the adjective law and the substantive law.

The Code of Criminal Procedure provides rules or procedures for (i) preventing offences, and (ii) bringing the offenders to justice for committing offences defined in the Penal Code or any special or local laws if no procedure is provided in such laws. It also specifies the classes of courts and their jurisdiction in which offenders may be prosecuted. It prescribes the procedures which are to be followed by various courts in an inquiry, trial or any other proceedings.

It would, however, be correct to say that the Code of Criminal Procedure contains certain provisions which are in the nature of substantive law, such as aid and information to the

magistrates, the police and persons making arrests, processes to compel production of documents and other movable property and the discovery of persons wrongfully confined, preventive action of the police, the maintenance of wives and children, directions in the nature of Habeas Corpus and disposal of property.

The Penal Code, on the other hand, is concerned with defining the nature of an offence and if proved in a duly constituted court of law, the punishment that it entails. This is the broad distinction between the adjective law and the substantive law.

It is the general presumptions in law that everyone is sane and responsible for his action. Everyone is innocent unless & until proved guilty. If there is any reasonable doubt, about the allegation, the case shall be resolved in favor of the accused.

There are some general presumptions in law that any child below 7 is not liable to be punished. Child between 7 to 12 is punished if court thinks that he can understand the nature & consequences of his act.

**FIR**

The whole criminal process is set in motion by lodging of First Information Report (FIR). FIR is a written document prepared by the police when they receive information about the commission of a cognizable offence. It is a report of information that reaches the police first in point of time and that is why it is called the First Information Report. It is generally a complaint lodged with the police by the victim of a cognizable offence or by someone on his/her behalf. Anyone can report the commission of a cognizable offence either orally or in writing to the police. Even a telephonic message can be treated as an FIR. It is a duty of police to register FIR without any delay or excuses. Non-registration of FIR is an offence and can be a ground for disciplinary action against the concerned police officer.

**Cognizable Offence:**

A cognizable offence is one in which the police may arrest a person without warrant. They are authorized to start investigation into a cognizable case on their own and do not require any orders from the court to do so.

**Non-cognizable Offence:**

A non-cognizable offence is an offence in which a police officer has no authority to arrest without warrant. The police cannot investigate such an offence without the court's permission.

**Why is FIR important?**

FIR is a very important document as it sets the process of criminal justice in motion. It is only after the FIR is registered in the police station that the police start investigation of the case. According to Articles 21, 22, 23, 25, 49, 50 of Qanoon-e-Shahadat Order 1984, FIR is a relevant fact.

**Who can lodge FIR?**

Anyone who knows about the commission of a cognizable offence can file an FIR. It is not necessary that only the victim of the crime should file an FIR. A police officer that comes to know about a cognizable offence can file an FIR himself/herself. You can file FIR if:
a. You are the person against whom the offence has been committed.
b. You know yourself about an offence, which has been committed.
c. You have seen the offence being committed.

The police may not investigate a complaint even if you file an FIR, when:

1. The case is not serious in nature.
2. The police feel that there is not enough ground to investigate.
3. The police resources are already over-committed in investigating more serious offences. However, the Police must record the reasons for not conducting an investigation and in the latter case must inform you (Section 157 of the Code of Criminal Procedure, 1898).

What is the procedure of filling FIR?

The procedure of filing an FIR is prescribed in Section 154 of the Code of Criminal Procedure, 1898. It is as follows:

I. When information about the commission of a cognizable offence is given orally, the police must write it down.
II. It is your right as a person giving information or making a complaint to demand that the information recorded by the police is read over to you.
III. Once the police have recorded the information in the FIR Register, the person giving the information must sign it.
IV. You should sign the report only after verifying that the information recorded by the police is as per the details given by you.
V. People who cannot read or write must put their left thumb impression on the document after being satisfied that it is a correct record.
VI. Always ask for a copy of the FIR, if the police do not give it to you.
VII. It is your right to get a copy of FIR free of cost.

**What should you mention in the FIR?**

1. Your name and address;
2. Date, Time and Location of the incident you are reporting;
3. The true facts of the incident as they occurred, including the use of weapons, if any;
4. Names and description of the persons involved in the incident;
5. Names and addresses of witnesses, if any.

**Things you should NOT do:**

1 Never file a false complaint or give wrong information to the police. You can be prosecuted under law for giving wrong information or for misleading the police (Section 182 of the Pakistan Penal Code, 1860).
2 Never exaggerate or distort facts.
3 Never make vague or unclear statements.
4 One who refuses to sign his statement of FIR can be prosecuted under section 180 of Pakistan Penal Code, 1860.
5 One who lodges a false charge of offence made with intent to injure a person can be prosecuted under Section 211 of Pakistan Penal Code, 1860.

**What can you do if your FIR is not registered?**

No police officer has the authority to refuse registration of a case. In case a crime is reported and a case is not registered, the person who reports the crime must inform the Sub-Divisional Police Officer or the Superintendent of Police or the District Police Officer responsible for the area.
You can also file an application under Sections 22-A & 22-B Criminal Procedure Code 1898 before the Sessions Judge as Justice of Peace for seeking a direction to the Police for registration of FIR or file a private complaint.

**What if we delay in lodging FIR**
The longer the delay, the stronger the suspicion. That the case is false wholly or in material particulars, so the delay should satisfactorily be explained.

(1) Care should always be taken that the names of witnesses are mentioned in F.I.R. if the names of P.Ws do not appear in it and they are examined later on, the presumption is that they were not present at the spot and have been procured later on.

1. Physical condition of the informer (DOC).

2. Psychological condition of the informer (DOC).

3. Natural calamities (Both).

4. Distance of place of occurrence (Both).

5. Ignorance of law of informer. (DOC).

6. Late detection of commission of crime (DOC).

7. Due to threat, promise and undue influence (DOC).

8. Economic & social and undue influence (DOC).

9. Dispute over the jurisdiction of Police Station (DOP).

10. Uncertainty of place of occurrence due to continuous offence (DOP).

11. Shortage of staff (DOP).

12. Unavoidable departmental formalities (including delay due to opinion of experts) (DOP).

Reasons of delay should be explained in the FIR.

(2) Care should be taken that all the material facts are mentioned in FIR (as much available at that time).

(3) Names of the accused persons should occur in FIR and their parts also. (If information is available at that time).

(4) It is not necessary to put up or cite all the P.Ws. in court.

**What could be possible reasons of Delay?**

Note: Reasons of the delay on the part of complainant is mentioned as "DOC". Reasons of the delay on the part of police/ is mentioned as "DOP".

Performa
For Registration of
FIRST INFORMATION REPORT
(Under Section 154 Cr.P.C.)

1. Complainant / Informant:
(a) Name .....…
(b) Father's/Husband's Name .....…
(c) Address

(d) Phone number and Fax;
(e) E-mail:

2. Place of Occurrence:

In case, outside the limit of this District, then Name of District and State ……

3. Date and Time of occurrence:
4. Nature of offence (e.g. Theft, burglary, snatching…)
Description of Stolen property (If any):

5. Details of known/suspected/unknown accused with full particulars:

6. Contents of the complaint (in brief):

**Law and Principles of Criminal Justice**

There is no cavil to this proposition of law that three corner principle of criminal jurisprudence are well settled.

1. That it is the duty of the prosecution to prove the case against accused and the weakness of the defense shall not strengthen the prosecution case. Accused is most favorite child of law and every benefit of doubt goes to him regardless of the fact whether he has contain any such plea or not:–

2008 SCMR 1080

2. Accused must be presumed to be innocent unless he is proved to be guilty. The onus of the prosecution never shift, the basic principle, was laid down of the criminal justice in famous case reported in PLD 1953 F.C 93 burden of general issue always on prosecution accused burden not as heavy as that on the prosecution accused failing to prove special pleadings, but succeeding in raising reasonable doubt, entitled to be acquittal whole of the evidence to be looked into entirety and not merely special pleading of accused irrespectively of prosecution evidence no conflict between Section 105 and principle laid down in Wool Minton's case (LR. 1935 ACP 462).

"Per Abdul Rashid, C.J. Section 105 of the Evidence Act has been enacted in order to make it clear that it is not the duty of the prosecution to examine all possible defence that might be taken on behalf of the accused, and to prove that none of those defence would be of any assistance to him. The principles laid down in Wool Minton's case are applicable with full force in Pakistan in spite of the provisions of Section 105 of the Evidence Act.

(PLD 1953 F.C. 93)

The burden of proof in evidence proceedings always on the prosecution. The burden as it has been called of establishing a case whether by preponderance of evidence or beyond a reasonable doubt and the burden of proof in the sense of introducing evidence. The phrase has been used in the first sense in Article 117 and second sense in Article 118 of the Qanoon-e-Shahadat. It is in this sense that the burden of proving the guilt of a person charged with an offence is on the prosecution and it is in this sense that the accused has a right to silence has relevance. Because the prosecution bear the burden of proving guilt they should discharge it without assistance from the defendant. The initial burden is in the prosecution to frame its case beyond reasonable doubt and that accused is not required to prove his innocence. PLD 1994 S.C. 856).

Sections 302/324/337-A (ii)/34 P.P.C., application of evidence — Guidelines — Defence plea — Practice and procedure–All the factors favouring belief in the accusation must be placed in juxtaposition to the corresponding factors favouring the plea in defence and the total effect should be examined in relation to the question, viz. is the plea/version raised by the accused satisfactorily established by the evidence and circumstances in the case appearing — If the answer be in the affirmative, then the Court must accept the plea of the accused and act accordingly—If the answer to the question be in the negative, then the Court will not reject the

defence plea as being false, but will go a step further to find out whether or not there is yet a reasonable possibility of defence plea/version being true — If the Court finds that although the accused has failed to establish his plea to the satisfaction of the Court, yet his plea might reasonably be true, even then the Court must accept his plea and acquit or convict him accordingly 2008 SCMR 1565 at Page 1571.

In criminal case, it is the duty of the Court to review the entire evidence that has been produced by the prosecution and the defence. It, after on examination of the whole evidence the Court is of the opinion that there is reasonable possibility that the defence put forward by the 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.

(PLD 1956 F.C. 93)

This principle was followed and applied in Nadeem-ul-Haq Vs. State (1985 S.C.M.R. 510) and in the case of Rab Nawaz Vs. State (PLD 1994 S.C.856)

Mere non-acceptance of an accused person's special pleading will not justify his conviction of the offence charged, or such as might have been charged.

Criminality is never to be presumed so strong is this presumption of innocence of the accused that in order to rebut it, the crime must be brought home at an accused beyond reasonable doubt and the graver the crime, the greater will be the degree of doubt that is reasonable.

It is better that ten guilty person's acquired rather than one innocent person be convicted. In this context is useful to refer to the well known passage in the judgment of Lord Chancellor in the case of Wool Minton V/s Director of Public Prosecution:-

Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the Prosecution to prove the prisoner's guilt subject to that what I have already said as to the defence of in saintly and subject also to any statutory exception if at the end of and on the whole of the case, there is a reasonable doubt created by the evidence given by either the prosecution or.the prisoner, as to whether the prisoner killed the deceased with a malicious intention the prosecution has not made out the case and the prisoner is entitled to an acquittal.

To speak with Vicount Simon held, miscarriage of justice may arise from the acquittal of the guilty no less then from the connection of the innocent, therefore, our rules of criminal justice reminded the Court of their solemn duty on the one hand to punish a crime and on the other hand to find and punish the real offender so that no innocent life is extinguished or impaired.

It is well settled law that the strong suspicion against accused cannot take place of the legal proof. The primary object of criminal trial is to ensure fair trial. A fair trial has naturally two objects in view. It must be fair to the accused and must fair also to the prosecution the trial be judged of this due point of view.

The Cardinal Rule of the Administration of Justice is that the prosecution must prove the guilt of accused and that the accused need not prove any thing. He is entitled to stand on the innocent which the law imputes to him till it is displaced. The burden resting on the prosecution never shifts, even if the defence of the accused is palpably false, the prosecution must establish beyond all reasonable doubt that no other alternative than the truth of the prosecution story will explain the facts. It is true that the Court is required to come to the decision on the whole of the evidence that has been laid before it and on the plea of the accused. When the prosecution has made out a case against the accused, the plea and defence of the accused may have any of the three results, namely, it may convince the Court of the innocence of the accused or if may cause the Court to doubt in which case the accused would be entitle to acquittal, or it may, and sometimes does strengthen the case for the prosecution. But it does not mean that when the prosecution evidence is found to be false and raddled with defect and the prosecution has not of itself discharged the burden the Court can look to the plea of the accused and his evidence to see whether there are material available to bolster up the case for the prosecution, or the add weight and reliability to the prosecution witnesses where none exists.

In a criminal case there are always two version of the case, on version is forwarded by the prosecution and the other is taken by the accused in the plea of innocent. There is no cavil to this proposition of law when there are two version, the version put forward by the accused it was accepted. If it is reasonable and probable.

Where there are two conclusions reasonably possible, one compatible with innocence and the other with guilt, the presumption of innocence must prevail.

The law says that if two possible views can be taken on the facts of the case the accused must be given benefit of doubt; a view favourable to the accused has to be adopted. It was irreversibly held by the superior Court.

“It is no doubt a matter of great regret that a foul could be blooded and cruel murder should go unpunished. There may be an element of truth in the prosecution story against the accused. Considering as a whole, the prosecution story may be true but between, may be true and must be true, there is inevitably a long distance to travel and the whole of the distance must be covered by the prosecution by legal reliable and unimpeachable evidence before an accused can be convicted in a criminal case suspicion, however strong, cannot take the place of proof”

The question arises what is a reasonable doubt according to Lord Darling, “A reasonable doubt means this, and it does not mean that it is disagreeable to you, it does not mean that by some possible hypothesis you can arrive at that conclusion. There hardly anything of which a rally subtle and imaginary person cannot honestly bring himself to doubt. But it means that you say that you are convinced, unless when you consider the facts you have a reasonable doubt as to whether the matter is proved or whether it is not a reasonable doubt in this sense, it is the kind of doubt no such a reasonable doubt as in the day time, when you are about your business, would lead you to say, 1 cannot make up my mind about it.”

It is not mere a possible doubt because everything relating to human affairs on depending upon moral evidence is open to some possible or a minor doubt in the word Lord Kenyouns advice.

“If the scale of evidence hanging anything live even, to throw into them, some grains of mercy, or as it more commonly put to give the prisoner the benefit of any reasonable doubt. In other words it must be substantial doubt, it must arise from the evidence or from the lack of want of insufficiency of evidence for the State, it cannot be reasonable doubt where it is based primarily on the argument of counsel the basic concept of the theory of benefit of doubt that it should not be artificial it must be based on the evidence on record. A reasonable doubt is one which arose from a consideration of all evidence in fair and reasonable way. A doubt is not a reasonable that, in case of overwhelming or strong evidence, assume that the accused may be possibly true. It is not out of place to mention that doctoring of contributory defence a good defence in civil law has no place in criminal law. It is no defence is criminal case.

Accused succeeding in creating doubt about the guilty needless to establish his guilt (PLD 1961 LAHORE 137) as noted above.

It is settled principle of law that benefit of doubt must be given to-accused (NLR 2007 Cr.LJ. 34).

It would always be given to accused (2007 S.C.M.R. 486) every doubt is required to be resolved in favour of the accused under the law. (2008 YLKR – January 206 Kar)

**The direct and circumstantial evidence**

Supreme Court of Pakistan in a series of decisions has consistently held that when a case rests upon circumstantial evidence such evidence must satisfy the following tests:-

(1) The circumstance from which an inference of guilt is sought to be drawn must be cogently and firmly established.

(2) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.

(3) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime has committed by the accused and none else, and

(4) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation on any other hypothesis than that of the guilt of the accused and such evidence should not only be consistently with his innocence.

When in a case of circumstantial evidence there is no chain of evidence so complete as to say that in all human probability the murder of the deceased must have been committed by the accused persons or any of them, then conviction is not sustainable.

When Defence Plea appeared to be reasonable-prosecution failed to prove its case against accused beyond reasonable doubt and would be entitled to benefit of doubt as of right and as a matter of grace

2008 SCMR 6.

1985 SCMR 510.

1986 SCMR 721.

1993 SCMR 417—1628.

PLD 1999 Lahore 56.

**Eye witnesses found to have falsely impleaded five out of eight accused.**

Effect: Conviction of remaining three accused could not be based on the same evidence without independent corroboration

2008 S.C.M.R. 6

PLD 1975 S.C. 586

1999 S.C.M.R: 697

1995 S.C.M.R. 599

It has been held by this Court time and again that in heinous crimes leading to loss of human life without any legal justification and brutal killing at the whims of unscrupulous criminals, evidence should be brought with great care and caution. That while deciding the criminal case Court showed ignore the technicalities gather examine her evidence in a depict and pedantic money. 2008 SCMR 33 and PLD 1991-1

**Guidelines**

Corroboration is only rule of caution and not a rule of law if the eye witnesses' account is found reliable and trustworthy, then there is hardly any need to look for any corroboration.

2008 S.C.M.R. 784

Medical evidence or expert opinion has always been related to be conformity in nature. Medical evidence cannot establish the presence of accused in the occurrence weapon of offence used or injury caused to deceased by him (2008 S.C.M.R. 1086)

It is the medical expert which can opine that a specific injury was infected which kind of weapon. 2005 SCMR 1086.

While deciding the criminal case Court should ignore the technicalities rather examine the evidence in a dynamic and pedantic manner.

From the perusal of the Constitutional and legal provisions and pronouncements by the esteemed judges, the development trend is evident and some of the principles deducible therefrom are that,—

(i) Where the High Court has, on appeal, reversed and order of acquittal of and accused person and sentenced him to death or to transportation for life or imprisonment for life, the appeal lies before Supreme Court as of right under Article 185(2)(a) of the Constitution of Islamic Republic of Pakistan. Provision of a separate procedure for that purpose under Order XXII of the Supreme Court Rules, 1980, is a strong indicator in this regard. This itself is indicative of the importance and significance of acquittal which places the matter on different footing than others.

(ii) Supreme Court has every right of examining evidence in a criminal appeal if the interest of justice so demand for which purpose each case will have to be adjudged upon its on facts and circumstances and in case the Court reaches the conclusion that the person has been dealt with in violation of the accepted principles of the administration of criminal justice then "no technical hurdles should be allowed to stand in its way of doing justice and seeing that injustice is not perpetuated or perpetrated by the decisions of the Courts below".

(iii) As an ultimate Court, Supreme Court must give due weight and consideration to the opinions of the Courts below and normally the findings should not be interfered where the same "are reasonable and were not arrived at by the disregard of any accepted principle regarding the appreciation of evidence". But where defect is discovered about tenability of finding in that case it should be open to the Court to come to its own in dependent finding upon re-examination of the evidence untrammeled by the opinions of the Courts below.

(iv) The position of the trial Court being close to the scene of occurrence and familiar with ways and practices of the people involved having the benefit of recording evidence of witnesses, watching their demeanor, view formed by the said Court should not be disregarded lightly.

(v) The benefit of any reasonable doubt must go to the accused person but where the conclusion about such a doubt leading . to acquittal is wholly illogical or unreasonable, the sane can be reversed by the higher Court.

(vi) While giving the benefit of all doubts to the accused, the Court has still to discharge the onerous function of not allowing an offender to escape justice.

(vii) The benefit of doubt if any cannot be given to the prosecution.

(viii) Mere suspicion howsoever strong or possible is not sufficient to justify conviction and all circumstances sought to be relied upon for basing conviction upon circumstantial evidence must be established beyond doubt.

(ix) Straining of evidence either in favour of the prosecution or in favour of the accused should neither be countenanced nor encouraged.

(x) While examining the views expressed by the Courts below in should be seen that the findings are not based on mere assumptions and conjectures.

(xi) The acquittal should not be interfered with, merely on the ground that another possible view of the evidence-was available.

(xii) It is the fundamental duty of the prosecution to prove the guilt to the hilt and not of the accused to prove his plea of defence to the hilt and that the weakness or falseness of the defence plea is not to be taken into consideration while awarding punishment.

(xiii) That the Court is to appraise evidence without being swayed away emotionally as accused is presumed to be innocent, until the guilt is proved against him by producing evidence of incriminating nature to connect him with the commission of crime beyond shadow of reasonable doubt.

(xiv) The principle that if a witness is not coming out with the whole truth his evidence is liable to be discarded as a whole is not that absolute and stand modified as his testimony will be acceptable against one set of accused, though rejected against the other subject to the rider that it must get independent corroboration on material particulars from credible evidence based on the principle of "sifting chaff out of grain". PLD 2009 SC 709.

**Qanun-e-Shahadat Order 1984**

The **Qanun-e-Shahadat Order 1984** is very important piece of legal document in Pakistan. It repealed the **Evidence Act of 1872**. Qanun-e-Shahadat Order was made law by President Zia-ul-Haq in 1984. It governs the law related with evidence in all law courts of Pakistan. The Qanun-e-Shahadat 1984 is an objective law. It is the compendium of rules of procedure/practices according to which the court is to record evidence of the parties. It prescribes rules, methods with regard to evidence of parties. This order except with few exceptions, and the repealed Evidence Act, 1872 are subjectively the same but objectively they are poles apart. It is an admitted position that all Articles or the Order 1984 are substantially and subjectively mere reproduction of all sections of the repealed Act with exceptions of Article 3, Article 4 to 6(with reference to Hudood), addition of Article 44 and addition of a proviso to Article 42 if compared with corresponding sections of the repealed Act. Similarly the term "Qanun-e-Shahadat" is only an Urdu or Arabic translation of English term "Law of Evidence". The significant change made in the **Qanun-e-Shahadat** is that "Courts-Martial" covered under the Army Acts besides a tribunal or other authority exercising judicial or quasi judicial powers or jurisdiction have been included. The repealed **Evidence Act, 1872** was applicable to "affidavits" but in the **Qanun-e-Shahadat Order, 1984**, affidavits are not immune from its application. Only the proceedings saved are the proceedings before an Arbitrator, the reason thereof is obvious that award, if any, announced by the Arbitrator is subject to strict scrutiny under the Arbitration Act, 1940.
The **Object of Qanun-e-Shahadat Order** is evident from its preamble which has never been the object of the repealed Evidence Act. With reference to the preamble, Intention of object of introduction this Order, as stated therein, is to bring the all laws of evidence in conformity with the injection of Islam as laid down in the Holy Quran and Sunnah. As interpretation of all articles of Qanun-e-Shahadat must be done in conformity with the injection of Islam as laid down in the

Holy Quran and Sunnah instead of adopting old interpretation of the repealed Evidence Act, 1872. However, principles of Islamic Law of evidence so long as they are not codified or adopted by Qanun-e-Shahadat, 1984 are not per se applicable Order apply to all judicial and quasi judicial proceedings. All technicalities have to be avoided and callas for doing substantial justice between parties are to be heeded. The Tribunals especially in cases where they are required to adjudicate upon the civil rights of the parties are under an obligation to act judicially and are bound to follow the fundamental rules of evidence and fair play which are embodied in the principles of natural justice. They are required to give an opportunity to the party affected, make some kind of inquiry, and give a hearing and to collect evidence, if any. Considering all the facts and circumstances bearing on the merits of the controversy before any decision is given by them. There are the essential elements of a judicial approach to the dispute. Prescribed forms of procedure are not necessary to be followed provided in coming to the conclusion these well-recognized norms and principles of judicial approach are observed by the tribunal. Jurisdiction of a court within whose territorial limit, cause of action or part thereof would arise cannot be contracted out by parties.

Circumstantial Evidence means a combination of fact creating a network from which, there is no escape for the accused, because a fact's taken as a whole do not admit any influence, but the guilt of accused. In other words the circumstance as a whole must be thoroughly inconsistent with the hypothesis or the innocence of accused.

**"Distinction between Direct and Circumstantial Evidence"**

The destination between direct and circumstantial evidence which logically flows from a long catena of cases decided by the Supreme Court as well as the other High Courts can be summarized as under:–

1. Direct evidence is that which goes to the very root of point, such as the evidence of witness who actually saw the commission of offence, whereas circumstantial evidence is evidence which without going directly to prove the existence of a fact, give rise to the logical inference that such fact does not exist.
2. What is meant by direct evidence and by circumstantial evidence is that as proof one goes directly to establish the culpability of the accused person in the commission of offence, the other brings guilt home to him, by placing circumstances from which the inference is absolutely irristable that the accused has committed the offence.
3. Circumstantial Evidence ordinarily means a fact from which some other fact is inferred, whereas, direct evidence means testimony given by a person as to what he has himself perceived by his own senses. Circumstantial Evidence means is the testimony of witness to other fact, the fact other than those in issues which are course relevant facts from the which the fact in issue may be inferred. As to admissibility both forms of evidence stand on the same footing, and the testimony whether the factum probandum' or the 'facts probatia' is equally as original and direct. Chief Justice Abbot observed! "In a great portion of trials as they occur in practice, no direct proof that the party accused actually committed the crime is or can be given; the man who is charged with the theft is rarely seen to break the house or take the goods: in case of murder, it rarely happens that the eye of any witness sees the fatal blow struck, or the poisonous ingredient pured into the cup."

The fundamental principal is that the inculpatory facts must be absolutely incompatible with the innocence of accused. The following rules covering admissibility and use of circumstantial can be enumerated:–

1. The facts alleged as the basis of any legal inference must be clearly proved and indubitably connected with the factum probandum.
2. The burden of proof is always on the party which asserts the existence of any fact which inference legal accountability.
3. In all cases whether direct or circumstantial evidence, the best evidence must be adduced which the nature of case admits.
4. In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.
5. If there be any reasonable doubt of guilt of accused, he is entitled as of right to be acquitted.

Broadly speaking the circumstances evidence based on last seen, extra judicial confession, recovery of stolen goods, waj taker evidence, recovery of incriminating material, that is weapon of offence, pointation of dead body at instance of accused, recovery of articles belonging to deceased.

There is no cavil to this proposition of law, that extra judicial confession last seen evidence, waj taker evidence, merely recovery at the instance of accused always considered to be weakest type of evidence but they are cases in which conviction of accused upheld by the superior courts on the extra judicial confession, last seen evidence, recovery of weapon of offence, it depends upon facts and circumstances of each case.

However in the following cases the murder charge has been established:–

(i) The deceased wearing golden ornaments went to the house of the accused to buy pan which she usually did.
(ii) A half chewed pan was recovered from the dead body concealed under water.
(iii) The accused sold a valuable ornament shortly after the murder which the deceased was wearing whom she went to the house of accused for the last time.
(iv) The accused was murdered within a few hours after she had left for the house of accused.
(v) The accused kept a cash, Rs.1485 in an obscure place.

Circumstantial evidence comes into prominence in all such cases as the same constitutes the means for tracing out the real culprits and enabling their conviction in such case which would have otherwise gone unpunished. Such evidence, it may be noted, it may be as convincing as direct evidence, and the cumulative effect of such evidence may be an overwhelming proof of guilt.

**Principles applicable in appreciating circumstantial evidence and in adopting such evidence as the sole basis of conviction**

The principles to be followed in weighing and appreciating circumstantial evidence and in adopting such evidence as the sole basis of conviction are now well-settled by judicial pronouncements. In this connection reference may be made at the very outset to the following observations of Lord Coleridge in his summing up to the Jury in the trial of Dikman:

“Now circumstantial evidence varies infinitely in its strength in proportion to the character and variety, the cogency, the independence of one from, another, of the circumstances. I think one might describe it as a network of facts cast round the accused man. That network might be a mere gossamer thread as light and unsubstantial as the very air itself. It may vanish at a touch. It may be that as strong as it is in part, it leaves great gaps and holes through which the accused I entitled to pass in safely. It may be so close, so stringent, so coherent in its structure that no efforts on the part of the accused can break through. It may come to nothing. On the other hand it may be absolutely convincing. If we find a variety of circumstances all pointing in the same

directions, convincing in proportion to the number and variety of circumstances, and they are independent of one another, although each separate piece of evidence standing by itself may admit of innocent interpretation yet the cumulative effect of such evidence may be an overwhelming proof of guilt."

Reference may now be made to the decision of the Supreme Court in Hanumant Govind's case as the principles laid down in this case have been followed in subsequent decisions:

*Per MAHAJAN, J. (para 10, p.345, AIR) 1952 SC 343.*

"… In dealing with circumstantial evidence the rules specially applicable to such evidence must be borne in mind. In such cases there is always the danger that conjecture and suspicion may take the place of legal proof and therefore it is right to recall the warning addressed by Baron Alderson to the jury in Reg v. Hodge' where he said:

"The mind was apt to take a pleasure in adapting circumstances to one another, and even in starting them a little, if need be, to force them to from parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."

It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first place be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

**"Case Law"**

In the following cases, conviction based on last seen evidence, extra-judicial confession was upheld:–

(i) Ss.302. 364-A & 201–Constitution of Pakistan (1973), Art. 185(3)—Deceased was last seen with the accused before he was found missing–Prosecution witness before whom the accused had made extra-judicial confession had supported the prosecution case in unequivocal terms who had no malice, ill-will or animosity against the accused to falsely implicate him in the case–Accused had pointed out the place where he had thrown the deceased in the canal and had led to the recovery of the shirt of the deceased which had further corroborated the prosecution case–Courts below had correctly appreciated the evidence on record–Impugned judgment was based on good reason and the law laid down by Supreme Court and was not open to any exception–Leave to appeal was declined to accused accordingly. [p.207] A, B & C (2004 SCMR 204).

(ii) 2002 P.Cr.LJ Page 551

(iii) 2002 MLD Page 1027

(iv) 2001 YLR Page 1924

(v) 2001 SCMR Page 1914

(vi) 2004 P.Cr.LJ Page 1479

In the following cases the (order of superior courts) conviction was set aside:-

(i) Extra-judicial confession 2008 SCMR 841

Judicial confession: Judicial Confession of the accused had been recorded more than eleven months of the occurrence, although he was not stated to be absconder. Acquitted by the High Court–Leave refused. 2008 SCMR 329.

(ii) Confession–Acceptance and rejection of confession statement as a whole where there was no other ocular or circumstantial evidence was available.
(iii) 2008 MCD 74
(iv) 2004 SCMR 1808
(v) 1989 SCMR 61
(vi) NLR 2005 Page 782
(vii) 2005 PCr.LJ Page 1044
(viii) 2007 P.Cr.LJ Page 1605
(ix) 2000 YLR Page 803
(x) 2003 YLR Page 1481

**"Conclusion"**

The generally in trial of cases exclusively triable the Court of sessions the following circumstances are treated as incriminating circumstances connecting the accused with the crime or bridging the missing gap, chains or link between the accused and the crime:–

(i) 111 will between the victim and the accused.
(ii) Concealing the clothes of deceased.
(iii) When victim was last seen with the accused.
(iv) Absconding of the accused.
(v) Recovery of blood stained clothes.
(vi) Presence of blood stained earth.
(vii) Recovery of dead body at the instance of accused.
(viii) Strongly revengeful motive.
(ix) Recovery of blood stained weapon from the accused.
(x) Extra judicial confession of accused.

When the circumstantial evidence is consistent with two theories, one favourable and the other unfavourable to the accused, the theory favourable to the accused must be accepted. Items taken individually and separately may not exclude possibility of innocence, but taken collectively may establish guilt of the accused.

Circumstantial evidence like all other evidence must satisfy the reliability test. Each of the circumstances on which reliance is to be placed must be fully established.

The chain of evidence furnished by the circumstances, that is the totality of the circumstances, must be so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused; the same should be wholly inconsistent with the innocence and consistent only with the hypothesis of the guilt of the accused. In deciding the question of sufficiency of the evidence, the Court has to consider the cumulative effect of all the proved facts and whether the combined effect of all these facts taken together establishes the guilt of the accused, "though each separate piece of evidence standing by itself may admit of innocent interpretation". The principle that the inculpatory facts must be incapable of explanation of any hypothesis other than guilt of the accused does not mean that any extravagant hypothesis would be sufficient to sustain the principle. The hypothesis must be a reasonable one. See the decision in the case of Goginda Reddy and the case of State of Madhya Pardesh v. I.B.S. Prasada Rao, noted hereafter).

If the circumstances are consistent both with the innocence of the accused and his guilt, the accused is entitled to benefit of doubt.

In appreciating circumstantial evidence the Court must have due regard to the warning given in Hanumant Govind's case (already noted above) about guarding itself against straining the facts

for making them a connected whole or supplying some link which is missing or taking for granted any fact without proof.
In a case in which only circumstantial evidence is available, the question of motive and opportunity to commit the crime may be strong enough for committing the crime and also opportunity for committing the same, the circumstances which have been established may be considered alongwith the explanations, if any, given by the accused, for determining if the chain of evidence is so complete as to show that, within all human probability, the crime must have been committed by the accused. The absence of proof of motive, however, is not by itself a sufficient ground for rejecting the circumstantial evidence, if that evidence convincingly leads to the conclusion of guilt of the accused. This matter has been further dealt with in the Chapter on "Motive" (Chapter XIII) and reference has been made therein to cases of conviction circumstantial evidence alone without proof of motive.

## CIVIL PROCESS

**Civil Procedure Code** Any person adversely affected by the action or threat of another as to his right to property or status is required to get the dispute decided through the civil court by presenting a plaint before it and obtaining a decree, and at times to execute the decree if his adversary does not comply with it. In entertaining and deciding a suit or proceedings the civil court follows the procedure laid down in the **Code of Civil Procedure 1908.**

The Code, in addition to the rules in 155 sections, contains provisions regarding jurisdiction of civil court, stay of suit, *res judicata*, place of suing, institution of suits, summons to the defendants and witness, judgment and decree, interest, costs, compensatory cost, execution of decree and order, limitation of time for execution of decree, arrest and detention of defendant or judgment debtor in civil prison, attachment and sale of property, issue of commission, suits by or against the government or public officers in their official capacity, suits by aliens and by foreign states, suits by or against foreign rulers, ambassadors and envoys, interpleader suits, special cases for the opinion of court, suits relating to public nuisance and public charities, supplemental proceedings appeal from decree or order, references to High Court , reviews of decree or order, revisions to the High Court , special provisions relating to the High Court , rules in the first schedule and other provisions regarding rule making, and miscellaneous provisions such as exemption from personal appearance, arrests, language of subordinate courts, amendments of judgments, decrees or orders, extension of time, miscellaneous proceedings, inherent power of the court etc.

Rules contained in the first schedule of the Code of Civil Procedure provide detailed provisions regarding parties to the suit, frame of suits, recognized agents and advocates, institution of suits, issue and service of summons, pleadings, plaint, written statement and set off, appearance of parties and consequence of non-appearance, examination of parties by the court, discovery and inspection, admissions, production and return of documents, framing of issues and determination of suit on issues of law or on issues agreed upon, disposal of the suit at the first hearing,

summons and attendance of witnesses, adjournments, hearing of suit and examination of witnesses, affidavits, judgment and decree, execution of decrees, and orders by delivery of property, attachment and sale of property and other modes, death, marriage and insolvency of parties and substitution of parties, withdrawal and adjustment of suits, payment into court, security for cost, commissions to examine witnesses, for local investigations, to examine accounts, and to make partition, suits by or against government or public official in their official capacity, suits by or against military or naval men or airmen, suits by or against corporations, suits by or against firms and persons carrying on business in names other than their own, suits by or against trustees, executors and administrators, suits by or against minors and persons of unsound mind, suits by paupers, suits relating to mortgage of immovable property, interpleader suits, special cases, summary procedures on negotiable instruments, arrest and attachment before judgment, temporary injunctions and interlocutory orders, appointments of receiver, appeals from decrees, appeals from orders, pauper appeals, references, reviews, miscellaneous provisions, and provision relating to High Court and Small Cause Courts.

A suit or proceedings is regulated by the aforesaid provisions of the Code of Civil Procedure and the provisions of the Qanun–e- Shahdat Order and Limitation Act. Unless a lawyer is conversant with the aforesaid provisions he cannot successfully file and proceed with or defend a civil suit, nor can a judge properly adjudicate the same. Civil suits and proceedings cannot be started and proceeded with or defended by a layman as the rules of procedure of civil cases is full of technicalities for which a competent lawyer fully conversant with the rules of procedure is to be engaged.

The Civil Procedure Code (C.P.C.) is to regulate the functioning of civil courts. CPC lays down the rules in which a civil court is to function, which may be summed up as follows:

- Procedure of filing the civil case.
- Powers of court to pass various orders.
- Court fees and stamp involved in filing of case.
- Rights of the parties to a case, viz. plaintiff and defendant
- Jurisdiction and parameters within which the civil courts should function.
- Specific rules for proceedings of a case.
- Right of Appeals, review

**Essentials of a suit**. The main essentials of a suit are as under:

**(1)** **The parties:** In every suit there is at least one plaintiff and one defendant. There may of course, be more than one plaintiff or more than one defendant if more persons are affected by the transaction out of which the cause of action arises.

**(2)** **Cause of action:** Bases of a suit are the causes of action by which is meant the circumstances leading to a suit. Cause of action consists of every fact which is necessary

to be proved to entitle the plaintiff to a decree. There cannot be a suit without cause of action. Further, a cause of action must be antecedent to a suit. In other words, no suit can be filed unless a cause of action has arisen.

**(3)** **Subject-matter:** The subject-matter means the right of property which is in dispute. The object of the suit is to have a adjudication upon the rights of the parties with regard to the subject-matter in dispute.

**(4)** **Relief:** The object to the plaintiff in a suit is to leave a particular relief. The relief claimed should be specially stated in the plaint, if a person is entitled to more than one relief in respect of the same cause of action he must claim all the relief. He can of course reserve his right to sue separately in respect of one or more relief's but that can be done only with the leave of the court.

**Different stages of a suit**: Following are the different stages of a suit.

**(1)** **Institution of a suit:**The suit is instituted by presenting a plaint to the court or to such officers as the court appoints on this behalf. On such presentation the plaint is scrutinized to satisfy that it shows a cause of action, the relief claimed, sufficiency of court-fee limitation and the jurisdiction of the court. When the court is satisfied on the points noted above it admits the plaint and registers and numbers it.

**(2)** **Issue and service of summons:** After admission of the plaint summons are issued to the defendants with a copy of plaintiff requiring him to appear and written reply the claim of the plaintiff.

**(3)** **Written statement:** When service of summons is effected on the defendant he appears before the court on the date fixed and files a written statement of his defence dealing with each allegation of the plaint and admitting or denying each allegation.

**(4)** **Discovery:** Every party is entitled to know the nature of his opponent's case and he is to obtain admission from his opponent. The process by which the admissions are obtained is technically termed as discovery.

**(5)** **Issue:** When the defendant has filed written statement and discovery has been made on behalf of the parties, issues are framed. The court examines the plaint. The written statement and strike issues which in other words mean points in dispute.

**(6)** **Evidence:** After framing the issues the evidence of the parties is recorded according to the issues framed. The party on whom lies the onus of proof begins the evidence and the evidence of the opposite party is taken afterwards.

**(7)** **Arguments:** After taking the evidence the arguments of the parties are heard by the court.

**(8)** **Judgment:** After hearing the arguments of both the parties the court either pronounces the judgment at once or it reserves the judgment which is delivered later on the same day or other day so fixed.

**(9)** **Decree:** After the judgment has been announced, a decree drawn in favour of the successful party.

**10.** **Execution:** Execution is the final stage of a suit. By execution is meant the process by which a decree is satisfied. The execution is initiated on the application of the successful party.

**Pleadings**

"Pleading" shall remain plaint or written statement.

No party could be allowed to make out a case for which no foundation was laid in pleadings. Point requiring factual inquiry, if not raised in written statement defendant could not be permitted to lead evidence in respect of that point and if through oversight evidence was brought on record, same could not be considered. Party was not permitted to deviate from his pleadings not could the court set up a different plea for a party and decide the suit on that basis much less at appellate stage.

**Pleading to State Material Facts and Not Evidence**

Every pleading shall contain and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, and the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs numbered consecutively-dates, sums and numbers shall be expressed in figures.

Pleading of the parties has to contain only material facts and are not required to contain the gist of evidence and names of witnesses.

Plaintiff should state such facts in the pleadings which may put the defendant on his guard and tell him to meet them when the case comes on trial. Every pleading should contain only a statement in a concise form of the material facts on which the party relies for his claim or defence as the case may be. Pleading should not contain the evidence through which such material facts are to be proved.

**Forms of Pleading**

The forms in Appendix A when applicable, and where they are not applicable forms of the like character, as nearly as may be, shall be used for all pleading.

**Particulars To Be Given Where Necessary**

In all cases in which the party pleading relies on any misrepresentation fraud, breach of trust, willful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items of necessary) shall be stated in the pleading.

**Further and Better Statement or Particulars**

A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just.

Plaintiff could not be non-suited merely on ground that other details of time and place to Talabs, and names of witnesses, etc. had not been specifically mentioned in plaint. If defendants had any difficulty in filing their written statement, they could apply to Trial Court for further and better particulars. Plaintiff could not be non-suited in such circumstances.

**Condition Precedent**

Any condition precedent the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be; and, subject thereto, and averment of the performance or occurrence of all conditions shall be implied in his pleading.
Giving a detailed narration of the evidence in pleadings was not required as the same was likely to be produced during recording of evidence. Mere mentioning of material facts in the pleadings was sufficient regarding which the parties were required to produce their evidence at the trial stage.

**Departure**

No pleading shall, except by way of amendment, raise any new ground of aim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

**Denial of Contract**

Where a contract is alleged any pleading, a bare denial of the same by the opposite-party shall be construed only as a denial of fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract.

Question of fact having been expressly and unequivocally admitted in the pleadings, would not require any proof.

**Effect Of Document To Be Stated**

Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof unless the precise words of the document or any part thereof are material.

**Malice, Knowledge, etc.**

Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out of circumstances from which the same is to be inferred.

**Notice**

Wherever it is material to allege notice to a person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, are material.

Plaintiff had to mention in the plaint that such notice was given and the details of the notice need not be described.

**Implied Contract, Or Relation**

Wherever any contract or any relation between any person is to be implied from a series of letters or conversations or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.

**Presumption of Law**

Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied (e.g. consideration for a bill of exchange where the plaintiff sues only on the bill and not for the considerations as a substantive ground of claim).

**Pleading To Be Signed**

Every pleading shall be signed by the party and his pleader (if any) provided that where a party to pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf.

Signing and verification of plaint. Provisions in O. VI, Rr, 14 15 & 17, C.P.C. with regard to signing and verification of plaint were mere mater of procedure and if a plaint was not properly signed or verified, but was admitted and entered in the register of suit, in it would not case to be

a plaint and the suit could not be said not be have been instituted merely because of existence of mere defects or irregularities in the matter of signing and verification of the plaint. If defect in regard to the signature, verification or presentation of the plaint were cured on day subsequent to the date of filing the suit, date of institution of the suit or the date from which an amendment took effect, would not depend on the discretion of the court.

**Verification of Pleadings**

(1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified (on oath or some affirmation) at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the same.

(2) The person verifying shall specify, by reference to the numbered paragraph of the pleading, what he verifies of his own knowledge and what he verifies upon information reviewed and belief to be true.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

**Signing and Verification of Plaint**

Provisions in O. VI, Rr. 14, 15 & 17 C.P.C. with regard to signing and verification of plaint were mere matter of procedure and if a plaint was not properly signed or verified, but was admitted and entered in the register f suit, it would not cease to be a plaint and the suit could not be said not be have been instituted merely because of existence of mere defects or irregularities in the matter of signing and verification of the plaint. If defect in regard to the signature, verification or presentation of the plaint were cured on day subsequent to the date of filing the suit, date of institution of the plaint was not to be changed to be subsequent date. Data of institution of the suit or the date from which an amendment took effect, would not depend on the discretion of the court.

**Model Suit**

IN THE COURT OF SENIOR CIVIL JUDGE, LAHORE.

Civil Suit No._____/2005

**A** son of Muhammad Anwar resident of 10 Lawrence Road, Lahore.

……..PLAINITFF

VERSUS

1. **B** S/o Muhammad Sultan. R/o of 10 Lawrence Road, Lahore.

2. **C** D/o Muhammad Sultan R/o 10 Lawrence Road, Lahore.

3. **D** D/o Muhammad Sultan R/o 10 Lawrence Road, Lahore.

4. **E** D/o Muhammad Sultan R/o 10 Lawrence Road, Lahore.

5. **F** D/o Muhammad Sultan R/o 10 Lawrence Road, Lahore.

6. **G** D/o Muhammad Sultan R/o 10 Lawrence Road, Lahore.

……DEFENDANTS

**SUIT FOR SPECIFIC PERFORMANCE OF AGREEMENT TO SELL DATED: 06-11-2004 WITH PERMANENT INJUNCTION AND POSSESSION.**

Respectfully Sheweth,

1. That the defendants are owners of property No. S-51-R-10 A11/RH measuring 10 Marlas 78 Sq.ft. situated at 10 Lawrence Road, Lahore, consisting of three Rooms, Kitchen and a Bathroom, having Electricity and Water Connection Installed therein. The suit property

was originally owned by the father of defendants vide Permanent Transfer Deed dated: 20-08-1969, who died on 09-04-1991 leaving behind the defendants as his only legal heirs.

2. That after death of father of defendants, the suit property has been validly transferred in the name of all the defendants in the record of Excise and Taxation Department, Lahore.

3. That all the defendants entered into an agreement to sell dated: 06-11-2004 with plaintiff. The total consideration was agreed as Rs: 2700,000/- (Twenty Seven Lac) out of which Rs:300,000/- (Three Lac) were paid by the plaintiff to the defendants as earnest money in cash before witnesses at the time of execution of the agreement to sell by the parties.

4. That the time for completion of the sale transaction was fixed as 01-06-2005. Therefore, the plaintiff purchased the requisite stamp papers for registration of agreement to sell in his favour, got an application for appointment of local commissioner for registration of sale deed, signed by the defendant No.1 and resultantly the permission was granted by the Sub Registrar Data Gunj Bukhsh, Town, Lahore on 30-05-2005 to execute the sale deed through local commissioner.

5. That after completion of all these formalities, the plaintiff contacted the defendants to execute sale deed in his favour after receipt of balance consideration of Rs:2400,000/- (Twenty Four lac) and also served a legal notice dated:31-05-2005 requiring the defendants to execute sale deed in favour of plaintiff after receipt of balance consideration and through this notice the plaintiff fixed the time on which the parties to the agreement were requested to be present at the suit property (property subject matter of the said sale transaction) as 3:00 pm. However, when on 01-06-2005 the plaintiff arrived at the suit property with witnesses for the requisite purpose only the defendant No.1 was present there and he told about the rest of defendants that they for some personal reasons are not

present at the suit property and he requested for the extension of time till 5-06- 2005. Thereupon the plaintiff contacted the defendant No. 2 to 6 who also requested for grant of further time till 5-06-2005, for doing the needful, which the plaintiff agreed to, as all the defendants are neighbours of plaintiff and had good terms with him.

6. That on 05-06-2005 when at the agreed time i.e. 5:00 PM the plaintiff arrived at the suit property then again only the defendant No.1 was present there who asked the plaintiff to make payment of the entire balance consideration to him only then the defendant No.1 will execute the sale deed, which demand the plaintiff refused to accept. The plaintiff told the defendant No.1 that the plaintiff will make payment in presence of all the defendants and the plaintiff requested for execution of the sale deed at same time in true legal manner. Thereafter, the plaintiff contacted the defendants No. 2 to 6 who also said that the payment of balance consideration may be made to them collectively to the exclusion of defendant No.1, thereupon they all are ready to execute the sale deed. However, the plaintiff requested all the defendants to resolve their personal disputes with each other and told them that the plaintiff has no concern with the same. The plaintiff further requested all the defendants to specifically perform the aforementioned agreement to sell and execute the sale deed in favour of the plaintiff on receipt of the balance consideration, thereupon the defendants again asked for further extension of time up 8-06-2005 so that they can sought out the dispute between them . It is also pertinent to point out that on the request of defendants the earnest money was paid to them collectively by the plaintiff in cash and it was mutually agreed that the balance consideration will also be paid in cash; therefore the plaintiff was having the balance consideration ready in cash before the date fixed for completion of the sale transaction.

7. That on 8-06-2005 the plaintiff contacted the defendants along with balance consideration in cash but they once again did not agree to execute the sale deed in favour of the plaintiff after receipt of balance consideration collectively. Due to this refusal on the part of the defendants the plaintiff got prepared a Pay Order No.0181144 from First Women Bank Ltd. 26 The Mall, Branch, Lahore, of balance consideration of Rs:2400,000/-(Twenty Four lac) in the names of all the defendants and also served a final legal notice dated:08-06-2005 upon defendants jointly as well as separately calling upon the defendants for execution of sale deed in favour of plaintiff after receipt of balance consideration up till 15-06-2005. However, the defendant No.1 refused to receive the legal notice and the same was returned back to the plaintiff un-served, which is appended herewith. Thereafter the plaintiff contacted the defendant No.1 personally and asked him for execution of the sale deed in his favour till 15-06-2005. It is also pertinent to mention that the plaintiff has come to know that the defendant No.1 out of greed is trying to sell out the suit property to some other person at a higher price, whereas the rest of the defendants are also not ready to complete the sale transaction as was agreed upon.

8. That on 15-06-2005 at 3:00 pm the plaintiff again visited the property in question for the said purpose, however the defendants have flatly refused to execute the sale deed in favour of the plaintiff after receipt of balance consideration as was agreed between them vide agreement to sell dated:06-11-2004

9. That the plaintiff was ready and willing to perform his part of the contract all the time by making the payment of the balance consideration to the defendants and is still ready for the same as he has even got prepared the Pay Order No.0181144 First Women Bank Ltd. 26

The Mall, Branch, Lahore but the defendants have refused to perform their part of the contract without any genuine cause, hence the present suit.

10. That the cause of action accrued in favour of the plaintiff and against the defendants firstly on execution of the agreement to sell dated:06-11-2004 and receipt of earnest money by the defendants, then on 01-06-2005 when the defendants did not turn up to perform their part of the contract then on 05-06-2005 when the defendants again did not turn up for the said purpose, then on every occasion when the defendants refused to execute the sale deed in proper peaceful manner and finally on 15-06-2005 when the defendants finally refused to execute the sale deed in favour of the plaintiff.

11. That the suit property is situated at Lahore the parties to the suit are also permanent residents of Lahore, therefore the Civil Courts at Lahore got the jurisdiction to adjudicate upon the present suit.

12. That the value for the purposes of court fee and jurisdiction is fixed at Rs:2700,000/- and the maximum court fee of Rs:15,000/- has been affixed on the plaint.

In view of above submissions it is most humbly prayed that a decree for Specific Performance of the agreement to sell dated:06-11-2004 may kindly be passed in favour of the plaintiff and against the defendants and thereby the defendants may kindly be directed to execute the sale deed in favour of plaintiff after receipt of balance consideration with respect to the aforementioned suit property.

It is further prayed that the defendants may kindly be restrained permanently from alienation of the suit property to any person other than plaintiff in any manner whatsoever and

they may further be permanently restrained from encumbering the suit property in any manner whatsoever.

It is further prayed that the costs of the suit may also be granted to the plaintiff.

Any other relief which this Hon'ble Court may deem fit and proper in the circumstances of the case may also be granted to the plaintiff.

**PLAINTIFF**

**THROUGH:**

**COUNSEL**

**VERIFICATION:**

Verified on oath at Lahore this 16th day of June 2005 that the contents of the plaint from para No.1 to 9 are true to the best of my knowledge and those of remaining paras No.10 to 12 are correct to the best of my belief and information received in this behalf.

**PLAINTIFF**

IN THE COURT OF SENIOR CIVIL JUDGE, LAHORE.

In re:

A Vs. B etc.

(Suit for Specific Performance of agreement to sell dated: 06-11-2004 with Permanent Injunction)

**APPLICATION UNDER ORDER 39 RULE 1 & 2 READ WITH SECTION 151 CPC FOR GRANT OF TEMPORARY INJUNCTION.**

Respectfully Sheweth,

1. That the petitioner/plaintiff has filed the above tiled suit in which no date of hearing has yet been fixed.
2. That the contents of the accompanying suit may kindly be read as an integral part of this application in view of which the petitioner/plaintiff has a good prima facie arguable case in his favour which is likely to be decreed in his favour.
3. That the balance of convenience also lies in favour of petitioner, in granting ad interim injunction to him.
4. That if the respondents/defendants are not restrained from alienation/transfer of the suit property and form encumbering the suit property, during the pendancy of the accompanying suit then the petitioner is bound to suffer an irreparable loss and injury, not redress-able in terms of money.

In view of above submissions it is most humbly prayed that the respondents may kindly be restrained during pendencey of the above titled suit to alienate the suit property to anyone whosoever and restrained from encumbering the same in any manner whatsoever.

Any other relief which this Hon'ble Court may deem fit and proper in the circumstances of the case may also be granted to the Petitioner.

**PETITIONER/PLAINTIFF**

**THROUGH:**

**COUNSEL**

IN THE COURT OF SENIOR CIVIL JUDGE, LAHORE.

In re:

A Vs. B etc.

(Suit for Specific Performance of agreement to sell dated:06-11-2004 with Permanent Injunction)

(Application under Order 39 rule 1 & 2 read with Section 151 CPC for grant of Temporary Injunction)

***AFFIDAVIT OF*** ***A son of Muhammad Anwar resident of 10 Lawrence Road, Lahore.***

I the above named deponent do hereby solemnly affirm and declare as under;

1. That the petitioner/plaintiff has filed the above tiled suit in which no date of hearing has yet been fixed.
2. That the contents of the accompanying suit may kindly be read as an integral part of this application in view of which the petitioner/plaintiff has a good prima facie arguable case in his favour which is likely to be decreed in his favour.
3. That the balance of convenience also lies in favour of petitioner, in granting ad interim injunction to him.
4. That if the respondents/defendants are not restrained from alienation/transfer of the suit property and form encumbering the suit property, during pendencey of the accompanying suit then the petitioner is bound to suffer an irreparable loss and injury, not redress-able in terms of money.

**DEPONENT**

**VERIFICATION:**

Verified on oath at Lahore this 16th day of June 2005 that the contents of my above affidavit are true and correct to the best of my knowledge and belief and nothing has been concealed from this Hon'ble Court.

**DEPONENT**

## Interim Injunction

**Relevant Provision:**

Order 39 rule 1 & 2 C.P.C.

Courts can grant injunction to foster the cause of justice even if the case does not strictly fall within the provisions. An injunction is a judicial process where whereby a party is ordered to do or to refrain from doing a particular act, and as such can either be mandatory or prohibitory in nature. **PLD 1975 Lah. 126**. Injunction

**Nature of Injunction**

By its nature an injunction is a preventive on prophylactic remedy for purpose of preserving the status quo, or the subject matter of the suit pending the determination of the suit, or to prevent a party from being permanently deprived of relief. It must not create a totally new state of things. It should not be used for restoring status quo ante, but in proper case this can be ordered. Where the court has power to grant the main relief, then as a necessary incident and corollary thereof, the power to grant relevant ad interim relief till the decision of the main case also vests in the court. The court can also vary or modify such an interim order. But this is not necessarily so in the case of special tribunals. The court cannot order possession to be restored by injunction, unless possession has been obtained in violation of an order of a court.

**In pending matter**

A temporary injunction can only be granted in a pending case. A court cannot grant an injunction after the suit has been disposed of, or dismissed in default. But where a restoration application is pending, an injunction can be issued under the inherent power. Interim orders have at times been allowed to continue to have effect after disposal of the main proceedings. In the exercise of constitutional jurisdiction interim orders have at times been issued so as to have effect even after the disposal of the proceedings.

**When Issued**

An injunction will only be issued if the circumstances mentioned in rule 1 Order 39 CPC are attracted, i.e. as a step in aid of, or to restrain or prevent waste, damage, alienation, sale, removal or disposal of property. **PLD 1995 Lah. 117.** Even where this is so, it is discretionary with the court to grant an injunction. An Interim injunction can be granted even if the case does not fall within the four corners of the provisions. An application for injunction can be made by the plaintiff s well as by the defendant, against a party to the suit or any judicial proceedings, and not against a stranger. An injunction against a person in his official capacity should name the person concerned.

**Situation Requisite for Grant of Interim Injunction**

The following situations must be attracted before an injunction can be granted by a court:-

The property in dispute in the suit should be in danger of being wasted, damaged or alienated by any party to the suit, or

The property in dispute in the suit should be in danger of being wrongfully sold in execution of a decree; or

The defendant should be threatening or intending to remove or dispose of the property with a view to defraud his creditors.

**Property in dispute in the suit is in danger of being wasted etc.**

The term "property in dispute" refers to property which is the subject matter of the suit. There should be a danger of its being wasted etc. by a party to the suit. Where the plaintiff makes out a prima facie case for possession, the defendant may be restrained from wasting or using the property. The court can restrain alienation notwithstanding the doctrine of *lis pendens*. Even where the principle of *lis pendens* applies, a temporary injunction can be issued. However, even where injunction is refused, the principle of transfer pendent elite will be fully applicable.

**Wrongfully sold in execution of a decree**

As long as a decree is binding upon a party, proceedings for its enforcement cannot be said to be wrongful. However, a decree can be assailed in a suit either by a person who is not a party t it or person who was party thereto on the ground of fraud or absence of jurisdiction. The clause also applies where the property is not liable to be sold under that particular decree, as for instance, where the property of a person other than the judgment debtor is being sole.

**Disposal to defraud creditors**

The property being disposed of may be movable or immovable property. An injunction on this basis can even be granted in money suits. The intention to defraud has to be proved. An injunction does not run with the property but only birds the owner.

**Stay or judicial proceedings**

Except for the purpose of preventing multiplicity of proceedings, an injunction cannot be issued by a civil court to study judicial proceedings or to stay proceedings in superior courts. Such injunctions are issued in the exercise of inherent jurisdiction and not, except in case of execution proceedings.

**Discretionary**

Jurisdiction is of an equitable character and an applicant is required to satisfy the court's conscience whether injunction should issue or not. Although the issuance of an injunction should issue or not. Although the issuance of an injunction is discretionary with the court, yet the principles governing the exercise of such discretion are fully settled. The considerations enumerated in Section 56 of the Specific Relief Act are applicable. Where a permanent injunction cannot be given, temporary injunction will not be issued. Where perpetual injunction can be granted, there is no reason why a temporary injunction should be refused. One of the objects of injunction is to preserve the status quo.

**Conditions**

The following are the factors to be considered whilst determining the question of granting a temporary injunction.

The prima facie existence of a right in the applicant and its infringement by the respondent or the existence of a prima facie case in favour of the applicant.

The irreparable damage or injury will accrue to the applicant if the injunction is not granted.

That the inconvenience which the applicant will undergo from withholding the injunction will be comparatively greater than that which is likely to arise from granting it, or in other words the balance of inconvenience should be in favour of the applicant.

**Prima facie case**

The applicant is to prove the prima facie existence of the right claimed in the suit and also its infringement. The court need not closely examine the merits of the case, nor is the applicant to be required to establish his legal title. It is sufficient if the applicant is able to establish an arguable case, or show that the nature and difficulty of the question is such that an injunction should issue, or in other words if the evidence were to remain as it is, the applicant should be able t show that he will get a decision in his favour, and that this case is not bound to fail on account of some apparent defect in it, the petitioner should show that a serious question is to be tried in the suit. The petitioner should show that there are substantial questions to be investigated and that status quo should be preserved. Where the impugned order is prima facie ultra-vires injunction ought to be allowed. The respondent is not duty bound to bring necessary material to disprove the applicant's case. Where an objection to the maintainability of the suit is raised, it is necessary for the court to determine upon it. For this purpose the pleadings, documents and affidavits have to be examined and the matter has to be determined on the basis of the record then existing.

**Irreparable damage injury**

The term does not refer to damage which cannot be physically repaired but to such material injury as cannot be adequately compensated. As such where pecuniary compensation is an adequate relief, injunction will not be granted. Damages as an alternate relief are relevant only where the granting of an injunction would be oppressive to the defendant. Where irreparable loss is not in doubt, an injunction should not be refused merely for the reason that plaintiff should be compensated if the plaintiff ultimately successful. If an order prima facie is ultra-vires, non-issuance of an injunction would be oppressive to the plaintiff. Injunction may also be granted where the damage or injury has not yet accrued but where it will follow inevitably. Inconvenience by itself is not enough for purposes of granting an injunction. In order to obtain temporary injunction the petitioner must show that irreparable injury will accrue to him if the injunction is not granted, and that there is no other remedy available to avoid the apprehended injury, and the court would never be able to restore status quo.

**Balance of Inconvenience**

The court is required to balance the inconvenience and see whether the applicant will suffer more inconvenience by the withholding of the injunction than that which the respondent would be the granting of it. The court is required to weight the mischief to either party i.e., to the petitioner if refused and the respondent if allowed, and will grant the injunction only if the balance is in favour of the petitioner. Normally the balance lies in favour of continuation of a state of things, s for instance, to protect the possession of a party. In addition the petitioner is required to establish a prima facie case in his favour. Mere inconvenience is not enough.

A person cannot be restrained from doing a lawful act, unless it is an actionable wrong. Mere apprehension of breach of peace cannot by itself justify the issuance of an injunction. Injunction ought not to be issued to restrain elections, or to prevent an elected person from assuming his functions, or to prevent a person from taking part in an election, or to specifically enforce licenses, or to the effect that a contract still subsists or to force the employer to retain an employee, or to prevent implementation of an order reverting a government servant, or to prevent a breach of contract when it has already taken place, or where there has been acquiescence to the act complained against, or to prevent a municipality from demolishing a dilapidated building.

**Effect of Injunction**

An injunction only acts on the parties to the suit. Alienation of property contrary to the order of injunction is valid, though the party can be punished for disobedience. However, courts can grant what are known as a marvel injunction to restrain the disposal of property and its removal out of the country. In this respect an injunction differs in its effect from an attachment; for alienation contrary to the attachment is voidable.

**Breach or violation of injunction**

The parties to a suit are bound to obey the orders of a court so long as they remain in force, unless it has been issued by a court not having jurisdiction over the matter. Breach, of an undertaking can also be punished. The state can also be proceeded against for breach of injunction. Non obedience of a mandatory injunction before the time fixed is not contempt. An order directing reinstatement in service cannot be carried out in an instant. Event an order which may be considered to be wrong by a party is to be obeyed, and the remedy lies in an appeal to have the order vacated. No executive functionary or any other person howsoever high he may be can intervene to prevent obedience of the order of a court. Where a party disregards or disobeys an injunction whether it is right or wrong, it shall be liable to proceedings in contempt, regardless of whether the order was later withdrawn or discharged, or the suit disposed of. A person not a party to the suit, who disobeys an injunction order, can be proceeded against for contempt. There is a difference between committing a person for disobedience of an injunction and for contempt. Restoration of possession can also be directed.

## APPEALS

An appeal is preferred by filing the memorandum of appeal. Such memorandum may be signed by the appellant or his pleader. It may be noted that a plaint must be signed by the party but it is not so in the case of memorandum of appeal. The memorandum of appeal should contain the grounds of appeal, or, the objections on which the appeal is founded. It should be accompanied by a copy of decree and a copy of the judgment on which such decree is based. When a memorandum of appeal is admitted, the Appellate Court or the proper officer of the court endorses thereon the date of presentation and registers the appeal in a book to be kept for the purpose, which is called the register of appeals.

The memorandum of appeal, when not properly drawn up may be rejected or returned to the appellant for the purpose of being amended within a specified time.

After admission of appeal in the manner noted above the court may if it so desires require the appellant to furnish security for costs of the respondent. The court shall reject the appeal in case security is demanded and not furnished. The court then fixes a day and hears the appellant or his pleader and if it is of the opinion that the appeal is not based upon sufficient grounds it may dismiss it summarily without calling upon the other party.

Where the appeal is not dismissed, the Appellate Court sends notice of the appeal to the court from whose decree the appeal is preferred, and notice of the date fixed for hearing is served on the respondent or his pleader.

After this the appeal is heard accordingly and disposed off.

**Powers of Appellate Court:** Under Section 107, C.P.C. an Appellate Court may—

(1) determine the case finally, if the evidence upon the record is sufficient to enable it to pronounce judgment;

(2) remand the case to the court from whose decree the appeal is preferred, if that court has disposed of the suit on a preliminary point, and the Appellate Court

holds that the decision of the lower court on that point is wrong. After the case is remanded the lower court should proceed with the trial on the other issues or such as the Appellate Court may direct it to try and then determine the case;

(3) frame, additional issues and refer them for trial to the court from whose decree the appeal is preferred, if that court omitted to try any issue essential to the right decision of the suit. The lower court should then proceed to try the issue together with its findings thereon and the reason thereof, either party may then file in the Appellate Court a memorandum of objection to any finding and that court will then proceed to determine the appeal;

(4) take additional evidence or require such evidence to be taken by the court from whose decree the appeal is preferred, if (a) that court has refused to admit evidence which ought to have been admitted, or if (b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any substantial cause. Where the Appellate Court directs that the lower court should take additional evidence it should send it when taken to the Appellate Court who will then determine the appeal.

**SECOND APPEAL**

The provisions regarding second appeal are contained in Section 100, 101 and 102, Civil Procedure Code which provide that.

Save where otherwise expressly provided in the body of this code or by any other law for the time being in force, an appeal shall lie to the High Court from any decree passed in appeal by any court subordinate to a High Court, or any of the following grounds namely:-

(1) the decision being contrary to law or to some usage having the force of law;

(2) the decision having failed to determine some material issue of law or usage having the fore of law;

(3) a substantial error or defect in the procedure provided by this code or by any other law for the time being in force, which may possible have produced error or defect in the decision of the case upon the merits.

An appeal may lie under this section from an appellate decree passed *ex parte.*

No second appeal shall lie except on the grounds mentioned in Section 100.

No second appeal shall lie in any suit of the nature cognizable by courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees.

Thus it is clear that a second appeal lies on one or more grounds mentioned in Section 100.

A court of first appeal is competent to enter into questions of fact; and decide whether the findings of facts by the lower court are or are not erroneous. But a court of second appeal is not competent to entertain questions as to the soundness of a finding of fact by the court below.

There is no jurisdiction to entertain a second appeal on the ground of erroneous finding of facts, however gross the error may seem to be.

A second appeal will not lie because some portion of the evidence might be contained in a document or documents and the first Appellate Court has made a mistake as to its meaning.

A second appeal will be where the decision of the lower Appellate Court is contrary to law.

When the question is one of a right construction of a document of title, or of a legal inference from a document, the question is one of law, and a second appeal will lie.

When the finding of fact is based partly on conjectures and partly on misunderstanding of the evidence, a second appeal lies.

The High Court has jurisdiction under this section to set aside the decree of the trial Judge in favour of the plaintiff, affirmed on the facts by the first Appellate Judge, on the ground that the evidence taken showed that the true question of fact which had not been considered and as to which no issue had been framed should have been answered in favour of the defendant.

An Appellant should not be allowed to set up a new case in second appeal.

The High Court will entertain in second appeal a point of law although it has not been raised in any of the lower courts, provided the point of law arises on the findings of the lower court or on the issues as framed and on the evidence already record.

**APPEALS TO SUPREME COURT.**

An appeal from a judgment, decree or final order of a High Court shall be to the Supreme Court.

(1) if the amount or value of the subject matter of the dispute in the court of first instance was and also in appeal is (unless varied by an Act of Parliament) fifty thousand rupees or upward and the judgment, decree or final order appealed from has varied or set aside the judgment, decree, or final order of the court immediately below; or

(2) if the judgment, decree or final order involves, directly or indirectly, some claim or question respecting property of the like amount or value and the judgment, decree or final order appealed from has varied or set aside the judgment, decree or final order of the court immediately below; or

(3) if the High Court certifies that the case involves a substantial question of law as to the interpretation of the constitution.

The Supreme Court in appeal usually does not interfere with the finding of fact arrived at by the courts below unless something substantial is shown to persuade it to go behind the finding of fact arrived at by such courts. Finding of fact cannot be reserved unless it is vitiated by misreading of evidence or non-consideration of material evidence. Where finding is not vitiated by such a defect, it is not to be interfered with by the Supreme Court. PLD 1982 S C (A J & K) 76.

Whether a person is an affected person by construction of a Dam, it is not a question of law but purely a question of fact and requires proof alleged any other fact and the decision on the

factual issue cannot be allowed to be challenged for the first time before the Supreme Court. **PLD 1982 SC (AJK) 62.**

**Raising of question of estoppel:** Appellant stands estopped to raise a factual point abandoned in the lower court. 'Estoppels' in the sense in which the term is used I the English Legal Phraseology or m alters of infinite variety and are by no means confined to the subjects which are dealt with a Chapter VII of the Qanu-e-Shahadat Order, 1984. A man may be estopped not only from giving particular contention but also from doing any act or relying on any particular argument or contention which the rule of equity and good conscious prevents him using as against this opponent. **PLD 1982 SC (AJ&K) 62.**

**Bar of certain appeals:** Notwithstanding anything contained in Section 109, no appeal shall lie to the Supreme Court—

(1) from the decree or order of one Judge of a High court or of one Judge of a Division Court, or of two or more Judges of such High Court, or of a Division court, constituted by two or more Judges of such High Court, where such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the judges of the High Court at the time being; or

(2) from any decree from which under Section 102 no second appeal lies.

Section 112 of the Civil Procedure Code provides that nothing contained in this Code shall be deemed--

(a) to affect the powers of the Supreme Court under Article 191 or any other provision of the constitution, or

(b) to interfere with any rules made by the Supreme Court and for the time being in force, for the presentation, or to appeals to the court, or their conduct before that court.

Nothing herein contained appeals to any matter of criminal or admiralty or vice-admiralty jurisdiction, or to appeals from orders and decrees of prize courts.

The right to appeal to the Supreme Court from a judgment, decree or final order in a civil proceeding is now expressly given to the constitution.

## REVIEW

### Introduction:

The remedy by way of review is quite different in its scope and applicability. Review is a judicial reexamination for the purpose of correction in such cases, where appeal does not lie, the court may grant the review. The grounds of review is narrow than grounds of appeal. An application for review lies in same court, which passed the decree, or made the order. A review can be made by the same court on the grounds of clerical, arithmetical mistake or error apparent on the face of record.

2. **Relevant Provisions:** Section 114, 152, Order 47 Rule 1 to 9 of CPC.

3. **Meaning:**
   (i) To reexamination judicially or administratively
   (ii) Review means the reexamination of a decree or order passed by the court.
   (iii) Review means judicial reexamination or reconsideration of matter.

4. **Definition:**
   (i) When a decree is passed or order is made by a court and a person is aggrieved by that decree or order then that person aggrieved may apply in same court to reexamination the decree or order. This is called as review.
   (ii) It is the power of the same court that has decided the case originally to review and rechecked its decision.

5. **Object of review:**
The main aim of the power of review is to enable correction of errors.

6. **Scope of see 114:**
The H.C. may subject to the conditions and limitations review its judgment in all cases except where an appeal from a decree or order founded upon that judgment is allowed under the code and has been preferred.
But a court cannot review its earlier order unless satisfied that material error manifest of the face of the order, undermines its soundness or results in miscarriage of justice.
The power of review is exercised by the (same) court which passed the order or decree.

7. **Who can apply for Review?**
Any person who have been a party to the order and aggrieved can apply for review. Even a legal representatives of a party or persons represented by a party can apply for review.

8. **Pre-condition for application of Review:**
Following condition must be fulfilled for application of review.

**(i) Decree or order from which no appeal preferred:**
Any person considering himself aggrieved by an order or decree from which an appeal is allowed, but no appeal has been preferred may apply for review.

**(ii) Decree on order from which no appeal is allowed:**
Any person considering himself aggrieved by a decree order from which no appeal is allowed may apply for review.

**(iii) Decision on a reference from a court of small causes:**
Any person considering himself aggrieved by a decision on a reference from a court of small causes may apply for review.

**9. To whom application for review may be made:**
An application for review of a decree or order of a court shall be made only to the judge who passed the decree or order. Even the legal representative of a party or persons represented by a party can apply for review.

**10. Grounds of review:**
The court may grant the review on following grounds.

**(i) Discovery of new and important matter of evidence.**
The discovery of new and important matter or evidence is a good ground for review.
**Conditions**: The following conditions must be fulfilled.

(a) That such discovery after exercise of due diligence was not within the knowledge of a party at the time of decree was passed or order made.

(b) Such discovery could not be produced by such party at the time the decree was passed or order made.

**(ii) Mistake or error apparent on the face of the record**

Mistake or error apparent on the face of record is a good ground for review.

Such mistake should be apparent on the face of the record. i.e. it should be self evident from a perusal (carefully examine) of the records itself. It should not be require extra evidence to establish.

(i) Judgment delivered without notice to the parties
(ii) An order for the arrest of a woman in execution of a decree for money
(iii) Failure to apply a law which is applicable.

**(iii) Any other sufficient reasons:**

Such reasons should be analogous to the other grounds specified in rule.

**Instances of sufficient reasons:**

(1) A party not having been given a fair opportunity for producing evidence.
(2) Omission to consider important facts on records
(3) Clarification by superior court of an earlier judgment
(4) Error of law in judgment
(5) Misapprehension regarding contents of a document

**11. Rejection of application:**

Where it appears to the court that there is not sufficient ground for a review. It shall reject the application. In such case, where application is heard by more than one judge and court is equally divided the application by court may reject.

**12. Order of rejection not appealable:**

An order of the court rejecting the application shall not be appeal but an order (may be rejected) granting an application may be, if there is sufficient ground.

**13. Right of review when available:**

The right to claim review of any decision of a court of law, like the right of appeal is a substantive right and not a mere matter of procedure. A review is not available unless the power of review has been conferred by the law. The operation of section 114 CPC has been subjected to such conditions and limitations as may be prescribed.

**14. Suo Motu power of court to review**

The code does not corner court any general power of reviewing their decisions suo motu. The power arises only on an application by the person aggrieved.

There is no power of review unless specifically granted by the statute which created by the tribunal. There are however two exceptions.

1. When the order is a nullity
2. Where there are clerical or similar mistakes, the correction of which does not involve any review of the decision on merits.

**15. Conclusion:**

Sec 114 of the code enumerates the general power of a court to review its orders, and is subject to the provisions of order 47. By virtue of section 117, this section also applies to the high court in the exercise of its appellate jurisdiction.

## REVISION

**Relevant provision**: Section 115 CPC

Revision means re-examination of cases which involve the illegal assumption, non-exercise or irregular exercise of Jurisdiction.
Revisional jurisdiction does not confer any substantive right, and the right of revision is merely a privilege granted to a party. In Revision the court can interfere, if the case brought before it is a decided case by subordinate court, and when the same is not appealable. If this condition is fulfilled, the revisional court may interfere to check, where the subordinate court has:
(a) exercised a jurisdiction not vested in it, or
(b) failed to exercise a jurisdiction vested in it, or
(c) acted in exercise of its jurisdiction illegally or with material irregularity.

**Difference between appeal and revision:**

Basic difference between an appeal and a revision is that appeal is a right of party, but revision is a discretionary power of court. An appeal is continuation of the proceedings, in effect the entire proceedings are before the appellate court and it has power to review the evidence subject to statutory limitations prescribed. But in the case of a revision whatever powers the revisional authority may or may not leave, it has no power to review the evidence unless the statute expressly confers on it that power.

# THE LAW OF CONTRACT IN PAKISTAN

The general law of contract in Pakistan is contained in the Contract Act 1872 which is the main source of law regulating contracts in Pakistan. English decision's (where relevant) are also cited in the courts.
It determines the circumstances in which promise made by the parties to a contract shall be legally binding on them. All of us enter into a number of contracts everyday knowingly or unknowingly. Each contract creates some right and duties upon the contracting parties. Contract Act deals with the enforcement of these rights and duties upon the parties.
The Act defines "contract" as an agreement enforceable by law. The essentials of a (valid) contract are:
(a) Intention to create a contract;
(b) Offer and acceptance;
(c) Consideration;
(d) Capacity to enter into a contract;
(e) Free consent of the parties;
(f) Lawful object of the agreement;
Writing is not essential for the validity of a contract, except where a specific statutory provision requires writing. An arbitration clause must be in writing.

## Definition

Section 2(h) of the Act defines the term contract as "any agreement enforceable by law". There are two essentials of this act, agreement and enforceability.

Section 2(e) defines agreement as "every promise and every set of promises, forming the consideration for each other."

Again Section 2(b) defines promise in these words: "when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. Proposal when accepted becomes a promise."

## Essential Elements of a Valid Contract

According to Section 10, "All agreements are contracts, if they are made by the free consent of the parties, competent to contract, for a lawful consideration with a lawful object, and not hereby expressly to be void."

Essential Elements of a Valid Contract are:

1. Proper offer and proper acceptance. There must be an agreement based on a lawful offer made by person to another and lawful acceptance of that offer made by the latter. Section 3 to 9 of the Contract Act, 1872 lay down the rules for making valid acceptance.
2. Lawful consideration: An agreement to form a valid contract should be supported by consideration. Consideration means “something in return” (quid pro quo). It can be cash, kind, an act or abstinence. It can be past, present or future. However, consideration should be real and lawful.
3. Competent to contract or capacity: In order to make a valid contract the parties to it must be competent to be contracted. According to section 11 of the Contract Act, a person is considered to be competent to contract if he satisfies the following criterion:
    - The person has reached the age of majority.
    - The person is of sound mind.
    - The person is not disqualified from contracting by any law.
4. Free Consent: To constitute a valid contract there must be free and genuine consent of the parties to the contract. It should not be obtained by misrepresentation, fraud, coercion, undue influence or mistake.
5. Lawful Object and Agreement: The object of the agreement must not be illegal or unlawful.
6. Agreement not declared void or illegal: Agreements which have been expressly declared void or illegal by law are not enforceable at law; hence does not constitute a valid contract.
7. Intention to Create Legal Relationships
8. Certainty, Possibility of Performance
9. Legal Formalities

## Types of Contracts

### On the basis of Validity:

1. Valid contract: An agreement which has all the essential elements of a contract is called a valid contract. A valid contract can be enforced by law.
2. Void contract [Section 2(j)]: A void contract is a contract which ceases to be enforceable by law. A contract when originally entered into may be valid and binding on the parties. It may subsequently become void.
3. Voidable contract [Section 2(i)]: An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of other or others, is a voidable contract. If the essential element of free consent is missing in a contract, the law confers right on the

aggrieved party either to reject the contract or to accept it. However, the contract continues to be good and enforceable unless it is repudiated by the aggrieved party.
4. Illegal contract: A contract is illegal if it is forbidden by law; or is of such nature that, if permitted, would defeat the provisions of nay law or is fraudulent; or involves or implies injury to a person or property of another, or court regards it as immoral or opposed to public policy. These agreements are punishable by law. These are void ab-initio.
"All illegal agreements are void agreements but all void agreements are not illegal."
5. Unenforceable contract: Where a contract is good in substance but because of some technical defect cannot be enforced by law is called unenforceable contract. These contracts are neither void nor voidable.

**On the basis of Formation:**

1. Express contract: Where the terms of the contract are expressly agreed upon in words (written or spoken) at the time of formation, the contract is said to be express contract.
2. Implied contract: An implied contract is one which is inferred from the acts or conduct of the parties or from the circumstances of the cases. Where a proposal or acceptance is made otherwise than in words, promise is said to be implied.
3. Tacit contract-Tacit contracts are implied contract in itself. e.g. Taking ticket in the bus, during journey..
4. Quasi contract: A quasi contract is created by law. Thus, quasi contracts are strictly not contracts as there is no intention of parties to enter into a contract. It is legal obligation which is imposed on a party who is required to perform it. A quasi contract is based on the principle that a person shall not be allowed to enrich himself at the expense of another.

**On the basis of Performance:**

1. Executed contract: An executed contract is one in which both the parties have performed their respective obligation.
2. Executory contract: An executory contract is one where one or both the parties to the contract have still to perform their obligations in future. Thus, a contract which is partially performed or wholly unperformed is termed as executory contract.
3. Unilateral contract: A unilateral contract is one in which only one party has to perform his obligation at the time of the formation of the contract, the other party having fulfilled his obligation at the time o the contract or before the contract comes into existence.
4. Bilateral contract: A bilateral contract is one in which the obligation on both the parties to the contract is outstanding at the time of the formation of the contract. Bilateral contracts are also known as contracts with executory consideration.

**Offer**

Proposal is defined under section 2(a) of the Contract Act, 1872 as "when one person signifies to another his willingness to do or to abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal/offer". Thus, for a valid offer, the party making it must express his willingness to do or not to do something. But mere expression of willingness does not constitute an offer. An offer should be made to obtain the assent of the other. The offer should be communicated to the offeree and it should not contain a term the non compliance of which would amount to acceptance.

**Offer and acceptance**

It is an essential ingredient of a contract, that there must be a offer and its acceptance. If there is no offer, there is no contact, because there is no meeting of minds. Again, if there is an offer by

one party, but it is not accepted by the other party or if the ostensible acceptance of the offer is defective, then also, there is no agreement and therefore no "contract".
These propositions may appear to be elementary. A large bulk of commercial litigation, however, requires the parties to deal with the basic questions, which are:
(a) Whether there has there been an offer at all in the particular case, or whether there is something less than an offer;
(b) If there is an acceptance; whether it is in the proper form;
(c) Whether there has been an acceptance of the offer;
(d) Whether the acceptance has been communicated to the offeror.

**Classification of Offer**

1. General Offer: Which is made to public in general.
2. Special Offer: Which is made to a definite person.
3. Cross Offer: Exchange of identical offer in ignorance of each other.
4. Counter Offer: Modification and Variation of Original offer.
5. Standing, Open or Continuing Offer: Which is open for a specific period of time.

The offer must be distinguished from an invitation to offer.

**Invitation to offer**

An invitation to offer is only a circulation of an offer; it is an attempt to induce offers and precedes a definite offer. Acceptance of an invitation to an offer does not result contract and only an offer emerges in the process of negotiation. A statement made by a person who does not intend to bound by it but, intends to further act, is an invitation to offer.

**Concept of offer**

An offer (or a "proposal") is not defined by statute. It is generally understood as denoting the expression, by words or conduct, of a willingness to enter into a legally binding contract as soon as it has been accepted, usually, by a return promise or an act on the part of the person (the offeree), to whom it is so addressed.
An acceptance, in relation to an offer, is a final and unqualified expression of assent to the terms of the offer.
Offer, followed by acceptance, is an "agreement", if an agreement is enforceable by law; it is a "contract".

**Offer by and to whom**

An offer must be made by a person legally competent to contract or on his behalf, by someone authorised by him to make the offer. It is usually made to a person (or to a number of persons), but it can be made to the entire world, as happened in Carlill v. Carbolic-Smoke Ball. Co., [(1893) 1 QB 256: (1881-94) All ER 127]. In that case, the defendants (manufacturers of medicinal smoke balls) promised to pay £100 to anyone who, after having bought and used their smoke balls, caught influenza. Plaintiff did so and caught influenza. Plaintiff was held entitled to recover. It was no defence that there was no particular individual to whom the announcement was addressed. Such contracts are sometimes called "unilateral contracts" – not a very happy term, because a contract can never be "unilateral". There must be two parties. It is really a case of innumerable offers, made to all potential readers of the announcement.

**Statements which are not offers**

Every statement of intention is not an offer. A statement must be made with the intention that it will be accepted and will constitute a binding contract. Following are not offers:–
(a) Statement made during negotiation, without indicating that the maker intends to be bound without further negotiation.

(b) A statement which invites the other party to make an offer (e.g., a notice inviting tenders).
(c) Statement of lowest price. [Harvey v. Facey, (1893) A.C. 552]. It is regarded as an invitation to make offers. [Re Webster (1975) 132 CLR 270 (Australia)].
(d) Display of goods in a ship with price tags. (It is merely an invitation to make an offer, so that the trader may not accept the offer, if the price is incorrectly marked. [Fisher v. Bell, (1960) 3 All ER 731].

**Intention to be bound**

A definite intention to be bound is highlighted in Gibson v. Manchester City Council, [(1979) 1 All ER 192]. In 1970, M adopted a policy of selling council houses to tenants. In February, 1971, the City Treasurer wrote to G, stating that council "may be prepared to sell the house to you at £2,180 (freehold)". The letter asked G to make a formal application. This he did, and the council took the house off the list of council-maintained properties. Before the completion of the normal process of preparation and exchange of contracts when property is sold, control of the council changed hands and the policy of selling council houses was reversed. The new council decided only to complete those transactions where exchange of contracts had already taken place. In the UK Court of Appeal, it was held (by a majority) that a contract had been made between G and M. Lord Denning suggested that "there is no need to look for strict offer and acceptance" in every case; a price had been agreed and the parties intended to carry through the sale. However, the House of Lords held that the February letter was (at the most) an "invitation" of treat. G's application was an offer and not an acceptance. (Informal agreements for the sale of houses are not likely to be held as binding contracts, because, otherwise, buyers may find themselves committed before securing mortgage finance).

**Termination of offer**

Some parties clearly indicate that their statements or documents do not constitute offers, e.g., estate agents."These particulars do not form, nor constitute any part of an offer, or a contract, for sale". Until an offer is accepted, it creates no legal rights and it may be terminated at any time in a variety of ways. Principal modes of termination of an offer are:
(a) by the offeror revoking (or withdrawing) it before acceptance;
(b) by the offeree rejecting the offer outright or by making a counter-offer;
(c) by lapse of time, if the offer is stated to be open only for a fixed time;
In Great Northern Rly. Co. Ltd. v. Witham, [(1873) LR 9 CP 16]. Great Northern Railway advertised for tenders for the supply of such stores as they might require for one year. W submitted a tender to supply the stores in such quantities as Great Northern Railway might order from time to time and his tender was accepted. Orders were given for some time, but eventually W given an order which he refused to carry out. It was held that W was in breach. A tender of this kind was a standing offer which was converted into a series of contracts as Great Northern Railway made their orders. W might revoke his offer for the remainder of the period covered, but must supply the goods already ordered. Revocation of an offer is effective, only when communicated to the offeree.

**Acceptance**

According to Section 2(b), "When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted."
Rules:
1. Acceptance must be absolute and unqualified.
2. Communicated to offeror.
3. Acceptance must be in the mode prescribed.

4. Acceptance must be given within a reasonable time before the offer lapses.
5. Acceptance by the way of conduct.
6. Mere silence is no acceptance.

**Quality of acceptance**

Acceptance of an offer must be absolute and must correspond with the terms of the offer. This rule a key constituent of the basic premise, does not always accord with the realities of complex business contract negotiations today. Such negotiations may indeed proceed through a series of proposals, counter-proposals, withdrawals, variations and qualifications, before agreement (or otherwise) is reached. When parties carry on lengthy negotiations, it may be hard to say exactly when an offer has been made and acceptance. Butler Machine Tool Co. Ltd. v. The Ex Cello Corp. (Eng) Ltd. (1979) 1 WLR 401]. The court must look at the entire correspondence to decide whether an apparently unqualified acceptance did, in fact, conclude the agreement.

A conditional offer, if accepted, must be accepted along with all the conditions.

However, in regard to international agreements governed by the U.N. Convention on contracts for international sale of goods, there is a slight qualifications, in as much as, article 19 of the Vienna Convention provides that non material variations between offer and acceptance do not make a difference.

**Lawful Consideration**

According to Section 2(d), Consideration is defined as: "When at the desire of the promisor, the promisee has done or abstained from doing, or does or abstains from doing, or promises to do or abstain something, such an act or abstinence or promise is called consideration for the promise."

In short, Consideration means *quid pro quo* i.e. something in return.

An agreement must be supported by a lawful consideration on both sides.

The consideration or object of an agreement is lawful, unless and until it is- 1.forbidden by law, or 2.is of such nature that ,if permitted ,it would defeat the provisions of any law ,or 3.is fraudulent ,or involves or implies injury to the person or property of another ,or 4.the court regards it as immoral ,or opposed to public policy. 5. consideration may take in any form-money, goods, services, a promise to marry, a promise to forbear etc.

**Competent To Contract**

Section 11 of Contract Act specifies that every person is competent to contract provided:

1. He should not be a minor i.e an individual who has not attained the age of majority i.e. 18 years.
2. He should be of sound mind while making a contract. A person with unsound mind cannot make a contract.
3. He is not a person who has been personally disqualified by law.

A person is competent to contract if, at the time of making it, he is of sound mind, major and not disqualified from contracting under law. Where he has not attained the age of 18 years (or being under a court of wards, has not attained the age of 21 years), he cannot contract. Agreements made by minors are void. Minors cannot, on attaining majority, ratify agreements entered into during their minority. But if a minor makes a fraudulent misrepresentation about his age and obtains a loan, he can be required (at the discretion of the court) to refund it or to make compensation for it. An unadjudged lunatic can enter into a valid contract during lucid intervals. A corporation can contract subject to limits imposed by its documents of incorporation.

**Free Consent**

According to Section 13, " two or more persons are said to be consented when they agree upon the same thing in the same sense (*Consensus-ad-idem*).

A consent is said to be free when it not caused by coercion or undue influence or fraud or misrepresentation or mistake.

As a rule, an agreement without "consideration" is void. The Act contract defines "consideration" as follows:

"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstains from doing, something, such act, abstinence, or promise is called a consideration for the promise."

A mere promise to give a donation, either orally or in writing is not enforceable. Settlement of bona fide but doubtful claims involves a bargain between the contracting parties and is, therefore, based on consideration. Money is not the only form of consideration. A consideration may consist sometimes in the doing of a requested act, and sometimes in the making of a promise by the offeree. Forbearance to sue at the promisor's desire constitutes good consideration.

Consideration is not required for a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor or something which the promisor was legally compellable to do. It is also not required for a written and signed promise by the debtor (or his duly authorised agent) to pay a time-barred debt to the creditor.

**Consent**

When consent of a party to a transaction is procured by coercion, undue influence, fraud or misrepresentation, the agreement is voidable at the option of the party whose consent was so procured. Cases of undue influence arise where the transaction is ex facie unconscionable and one party was in a position to dominate the will of the other. Where parties are bound by a fiduciary relationship, (as in the case of father and son, doctor and patient, master and servant, advocate and client), the law protects the weaker party, throwing on the other party the burden of proving that no undue influence was exercised.

Mutual mistake in respect of material facts in the formation of a contract renders the agreement void. A unilateral mistake, however, does not render an agreement void. Nor does a mistake of law affect its validity.

**Elements Vitiating free Consent**

1. Coercion (Section 15): "Coercion" is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.
2. Undue influence (Section 16): "Where a person who is in a position to dominate the will of another enters into a contract with him and the transaction appears on the face of it, or on the evidence, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in the position to dominate the will of the other."
3. Fraud (Section 17): "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto of his agent, or to induce him to enter into the contract.
4. Misrepresentation (Section 18): “causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement".
5. Mistake of fact (Section 20): "Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void".

**Revocation of offer**

A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards. An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

A proposal is revoked -

(1) by the communication of notice of revocation by the proposer to the other party;

(2) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;

(3) by the failure of the acceptor to fulfill a condition precedent to acceptance; or

(4) by the death or insanity of the proposer, if the fact of the death or insanity comes to the knowledge of the acceptor before acceptance.

**Unlawful agreements**

An agreement, whose consideration or object is unlawful, is void. The consideration or object of an agreement is unlawful, if it is forbidden by law or it would defeat the provisions of any law or is fraudulent, or involves or implies injury to the person or property of another or the court regards it as immoral or opposed to public policy.

A party to an illegal agreement who has advanced money under it to the other party is entitled to recover it, if the illegal purpose has not been partly or wholly carried out.

Agreements in restraint of marriage, trade and legal proceedings are void. The seller of the good-will of a business may, however, validly agree with the buyer to restrain from carrying on a similar business within specified local limits, provided the limits are reasonable.

**Persons bound by the contract**

Promises bind the promisors and in case of death of promisor (before performance) their legal representatives, unless there is contract to the contrary, or the nature of the contract is such that it depends upon the personal qualifications of any party.

**Performance and frustration**

There are special provisions dealing with the case where time is the essence of contract. In commercial contracts, it is better to provide specifically that time is of the essence. A contract is validly discharged by faithful performance, by release or remission by the promisee, by "frustration" (under law) or by "Novation" (by agreement).

Frustration occurs when unexpected developments subsequent to the making of the contracts render performance impossible. Novation occurs when the old agreement is replaced by a new agreement.

**Subsequent events and frustration**

If, subsequent to the making of the contract, some event happens, which the parties could not control so that the agreement cannot be performed, the contract is said to be frustrated, because the contract then becomes impossible of performance. Frustration may occur by a change in the law, destruction of the subject-matter, supervening incapacity of the contracting party to perform the contract or fundamental change in circumstances after the contract is made. Mere strike, lock-out in the factory, rise in price of the contracted goods or other commercial difficulties does not, as such, render the contract "impossible" of performance.

Introduction of the permit system by statute does not absolve the promisor from supplying the goods. He must make reasonable efforts to procure the permit to fulfill his agreement. Change in market conditions also does not justify a supplier in demanding a price higher than that stipulated, unless there is an "escalation" clause.

Frustration leads to automatic termination of the contract, and exempts the parties from performance or further performance of the contract without rendering any of them liable for damages. Where, however, any party has received any benefit under the agreement, he must restore it or make compensation for it to the other party.

**Agency**

In law, the relationship that exists when one person or party (the principal) engages another (the agent) to act for him, e.g. to do his work, to sell his goods, to manage his business. The law of agency thus governs the legal relationship in which the agent deals with a third party on behalf of the principal. The competent agent is legally capable of acting for this principal vis-à-vis the third party. Hence, the process of concluding a contract through an agent involves a twofold relationship. On the one hand, the law of agency is concerned with the external business relations of an economic unit and with the powers of the various representatives to affect the legal position of the principal. On the other hand, it rules the internal relationship between principal and agent as well, thereby imposing certain duties on the representative (diligence, accounting, good faith, etc.).

Under section 201 to 210 an agency may come to an end in a variety of ways:

(i) By the principal revoking the agency – However, principal cannot revoke an agency coupled with interest to the prejudice of such interest. Such Agency is coupled with interest. An agency is coupled with interest when the agent himself has an interest in the subject-matter of the agency, e.g., where the goods are consigned by an upcountry constituent to a commission agent for sale, with poor to recoup himself from the sale proceeds, the advances made by him to the principal against the security of the goods; in such a case, the principal cannot revoke the agent's authority till the goods are actually sold, nor is the agency terminated by death or insanity. (Illustrations to section 201)

(ii) By the agent renouncing the business of agency;

(iii) By the business of agency being completed;

(iv) By the principal being adjudicated insolvent (Section 201 of Contract Act. 1872).

The principal also cannot revoke the agent's authority after it has been partly exercised, so as to bind the principal (Section 204), though he can always do so, before such authority has been so exercised (Sec 203).

Further, as per section 205, if the agency is for a fixed period, the principal cannot terminate the agency before the time expired, except for sufficient cause. If he does, he is liable to compensate the agent for the loss caused to him thereby. The same rules apply where the agent, renounces an agency for a fixed period. Notice in this connection that want of skill continuous disobedience of lawful orders, and rude or insulting behavior has been held to be sufficient cause for dismissal of an agent. Further, reasonable notice has to be given by one party to the other; otherwise, damage resulting from want of such notice, will have to be paid (Section 206). As per section 207, the revocation or renunciation of an agency may be made expressly or impliedly by conduct. The termination does not take effect as regards the agent, till it becomes known to him and as regards third party, till the termination is known to them (Section 208).

When an agent's authority is terminated, it operates as a termination of subagent also (Section 210).

**Remedies for breach of contract**

The principal remedies for breach of contract are:

(a) damages;

(b) specific performance of the contract; and

(c) injunction.

When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, being loss or damages which naturally arose in the usual course of things from such breach or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss of damage sustained by reason of the breach.

The same principle applies for determining damages for breach of an obligation arising from quasi-contract.

In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account. This is referred to, as the duty to mitigate.

Illustration

A stipulation for increased interest from the date of default may be regarded as a stipulation by "way of penalty", if the amount is excessive. The court is empowered to reduce it to an amount reasonable in the circumstances.

**Specific performance and injunctions**

In certain special cases dealt with in the Specific Relief Act, 1877, the court may direct against the party in default "specific performance" of the contract, that is to say, the party may be directed to perform the very obligation which he has undertaken, by the contract. This relief is awarded only in exceptional cases.

That Act also deals with permanent injunctions. Temporary injunctions are governed by the provisions of order of the Code of Civil Procedure, 1908.

# AGREEMENT TO SELL

**THIS AGREEMENT TO SELL** is made at Lahore on this 28th day of March, 2008

BETWEEN

**Mr. Muhammad Munir** son of Mian Rasheed Akhtar resident of House No.26-Kaghan Street, F-8/4, Islamabad (hereinafter called the "first party" or seller which expression shall be taken to mean and to include his legal heirs, successors-in-interest, administrators and assigns) of the **First Part;**

AND

**Henry Joseph Charles** son of W. S. Charles resident of Shadab Colony opposite Nishtar Colony, Ferozpur Road, Lahore (hereinafter called the "Second party" or Purchaser which expression shall be taken to mean and to include his legal heirs, successors-in-interest, administrators and assigns) of the **Second Part;**

**WHEREAS** the first party is the absolute and exclusive owner of a Plot of Land No. 68-B, Block C-III, Gulberg-III, Lahore along with a house built on it and utility connections of electricity, water supply, Sui gas and Telephone, measuring One Kanals Seven Marla and One Hundred Sixty Five Sq. Ft. (01-Kanal, 07-Marla, 165-Sft.) vide letter No. CE-234-594 dated 14-06-2004 issued by the Deputy Director Land Development, Lahore Development Authority, Lahore and vide letter No. TPG-5203/24 dated 12-01-2004 issued by Chief Metropolitan Planner, Lahore Development Authority, Lahore which is bounded as under:

***EAST;*** *bounded by property owned by Amjad.*

***WEST;*** *bounded by property owned by Saleem.*

***NORTH;*** *bounded by Street 20 Ft Wide.*

***SOUTH:*** *bounded by Government Public School.*

(hereinafter referred to as the **Property**).

**WHEREAS** the first party is desirous of selling the said property and the second party is willing to purchase the same on certain terms and conditions which the parties wish to reduce in writing as under:

1. The sale price of the said property agreed between the parties is Rs.22,000,000/- (Rupees Twenty Two Million only) the half of which comes to Rs.11,000,000/- (Rupees Eleven Million only).
2. The second party has paid a sum of RS. 2,000,000/-(Two Million only) *through Pay Order No14673 dated 28.03.2008 drawn on First Women Bank, The Mall, Branch, Lahore* as earnest money to the first party in the following manner:

The second party has contented and agreed to disburse the balance sale price/amount of RS. 20,000,000/- (Rupees Twenty Million only) on or before 13-05-2008 and the transfer/Identification in the LDA record shall be executed/ done at the time of receiving balance amount on closing date i.e. 13-05-2008 in the name of the second party or in the name of the person to whom he may desire. The time is the essence of the contract.

3. The first party would be under legal obligations to sell the property to the second party as per terms stated above. If the party of the first party refuses to execute the documents for transfer or identification before the LDA officials and to transfer the property in the LDA record, the party of the second part shall be at liberty to get the same executed/transfer through the court by filing a civil suit for specific performance to the agreement to sell and the party of the second part shall be entitled for the expenses incurred on the litigation.
4. If the second party fails to make the balance payment on or by the closing date, the earnest money shall be deemed to have been forfeited and this agreement shall be deemed to have been cancelled. However, before the cancellation of this agreement the first party has to serve a notice for a reasonable time, for the second party to have the payment made.
5. The first party/sellers declare, represent and warrant that he is the absolute and exclusive owner of the Property, having good, proper, complete and marketable title therein as specified above, and that no other person possesses any title, right or interest therein, and that the property is free from all and/or any encumbrances, mortgages, claims, charges, liens, pledges, tenancies whatsoever, including without limitation, claims, taxes, cesses, rates, bills of amenities or any other levy, duty or charge and that the first party has the lawful power, authority and right to alienate, transfer, sell and convey his right in the Property without any inducement, undue influence, coercion and in utter sanity, as herein covenanted. The first party/sellers covenant that he has a clear title in the Property in the records and registers maintained by the Lahore Development Authority, Department of Property Tax, and he has deposited all dues, fee and other relevant charges of the concerned Departments including building period etc. and in case of any default the first party shall be under legal obligation the pay the same before the closing date.
6. The first party/sellers do hereby covenant that he shall be under legal obligation to support the title once conveyed to the Vendee/second party over the Property and shall be responsible for the reimbursement of the entire consideration price, expenses, losses etc., in case the aforesaid Property remains un-transferred, un-enjoyed or occurs to turn out of the possession of the second party/purchaser because of default/ defect in title of the first party/seller in the Property at any stage in future.
7. The first party shall hand over the vacant possession of the property to the second party at the time of full and final payment of sale price. It is also made clear that the second party shall give clear boundary walls of the property after properly bifurcation.
8. The first party shall hand over to the second party all documents, papers and instruments and things, in original, relating to the Property and their respective title therein simultaneously upon the execution of Sale deed/transfer and all up-to-date receipts, evidencing payment of all dues, charges, cesses, rates, assessments, rentals and the like.
9. The first party shall by the closing date, execute all such documents and papers and do every other reasonable act, deed or thing whatsoever necessary or required by the first

party so as to completely and /or more perfectly and effectively secure, assigns, transfer and convey the said property to the second party and shall in this regard, sign all necessary documents and applications for mutation and transfer of the same in the record of any Government Departments, Authority or Agency as may be reasonably required.

10. All expenses of transfer of property included cost of stamp papers, transfer fee, C.V.T. etc. shall be borne by the party of the second party;

**IN WITNESS WHEREOF** above mentioned parties have put their signatures on the date place and the year mentioned above.

**EXECUTANTS**

| ***First party/Sellers*** | ***Second Party/Purchaser*** |
|---|---|
| _____ | _____ |
| **Mr. Muhammad Munir** | **Henry Joseph Charles** |
| NIC No.61101-1468642 | NIC No35201-5514630-5 |

***WITNESSES:***

| | |
|---|---|
| 1._____ | 2._____ |
| Name:_____ | Name:_____ |
| Son of:_____ | Son of:_____ |
| Address:_____ | Address:_____ |
| _____ | _____ |
| NIC No:_____ | NIC No: _____ |

# LAW OF TORTS

A tort (originally from the Old French, meaning "wrong", from medieval Latin tortum, also meaning "wrong", past participle of torquere "to twist") is a wrong that involves a breach of a civil duty owed to someone else. It is differentiated from criminal wrongdoing which involves a breach of a duty owed to society, and also does not include breach of contract.
Tort cases may comprise such topics as auto accidents, false imprisonment, slander and libel, product liability (such as defectively designed consumer products), and environmental pollution (toxic torts).

A person who suffers legal damage may be able to use tort law to receive damages (usually monetary compensation) from someone who is responsible or liable for those injuries. Generally speaking, tort law defines what a legal injury is and what is not. A person may be held liable (responsible to pay) for another's injury caused by them. Torts can be classified in a number of different ways; one is to distinguish according to degree of fault, so that there are intentional torts, negligent torts, and strict liability torts.

For example, Alice throws a ball and accidentally hits Brenda in the eye. Brenda may sue Alice for losses occasioned by the accident (such as the cost of medical treatment and lost pay due to missing work), as well as for punitive damages. Whether or not Brenda wins her lawsuit depends on whether she can prove Alice engaged in tortious conduct. Here, Brenda would try to prove that Alice had a responsibility not to harm people and failed to exercise the responsibility which a reasonable person would render in throwing the ball. This is an example of the negligence.
In much of the Western world, the measure of tort liability is negligence. If the injured party cannot prove that the person believed to have caused the injury acted with negligence (lack of reasonable care), at the very least, tort law will not compensate (pay) the victim. However, tort law also recognizes intentional (purposeful) torts and strict liability torts, which apply when the person accused of committing the tort satisfied certain standards of intent (meaning) and/or performed certain types of conduct.

In tort law, injury is defined broadly. Injury does not just mean a physical injury, such as where Brenda was struck by a ball. Injuries in tort law reflect any invasion of any number of individual interests. This includes interests recognized in other areas of law, such as property rights. Actions for nuisance (annoying or hurting) and trespass (unlawful entering) of land can arise from interfering with rights in real property. Conversion law and trespass to chattels (personal property) can protect interference with movable property. Interests in prospective (possible future) economic advantages from signed agreements can also be injured and become the subject of tort actions. A number of situations caused by parties in a contractual (written agreement) relationship may still be tort rather than contract claims, such as breach of duties.
Tort law may also be used to compensate (pay) for injuries to a number of other individual interests that are not recognized in property or contract law. This includes an interest in freedom from emotional distress, privacy interests, and reputation. These are protected by a number of torts such as Intentional infliction of emotional distress, privacy torts, and defamation/slander (destruction of a reputation). Defamation and privacy torts may, for example, allow a celebrity to sue a newspaper for publishing an untrue and harmful statement about him. Other protected

interests include freedom of movement, protected by the intentional tort of false imprisonment which is when you are arrested without cause.

The equivalent of tort in civil law jurisdictions is delict. The law of torts can be categorised as part of the law of obligations (duties), but unlike voluntarily assumed obligations (such as those of contract, or trust), the duties imposed by the law of torts apply to all those subject to the relevant jurisdiction. To behave in tortious manner is to harm another's rights, body, property or other rights. One who commits a tortious act is called a tortfeasor.

**Distension Between Law of Tort, Criminal Law and Contract Act**

**1. Introduction**

Tort is breach of some civil duty independent of contract for which compensation may be recoverable. If there is an injury for which no compensation is recoverable is not tort. The law of tort is based on common law. It is still growing. It is not the part of statue law.

**2. Meaning**

The word tort is derived from Latin word "Tortum" which means to twist or 'conduct' which is twisted.

**3. Definition**

**Salmond:**According to Salmond Tort is a civil wrong for which the remedy is a common law action for Unliquidated damages, and which is not exclusively the breach of a trust or other merely equitable obligation.

**Oxford Dictionary:**Tort is a private or civil wrong.

**Philip James:**Tort is a private or civil wrong independent of contracts for which appropriate remedy is an action for unliquidated damages.

**4. Distension Between Tort And Contract:**

**I. As To Rights:**

Law of tort protects right in rem available against the whole world.

Law of contract protects rights in personam which means against a particular individual.

**II. As To Damages:**

In tort, damages are unliquidated.

In contract damages are liquidated.

**III. As To Consent:**

Tort is always inflicted against consent of the person.

Contract is always founded on consent of a person.

**IV. As To Codification:**

Law of tort is not codified.

Law of contract is codified.

**V. As To Fixation of Right And Duties:**

Rights and duties are fixed by law in law of tort.

Rights and duties are fixed by parties in contract.

**VI. As To Defence:**

In law of tort necessity is a defence.

In contract, necessity is no defence.

**VII. As To Doctrine Of Vicarious Liability:**

Principle or doctrine of vicarious liability applies.

Principle or doctrine of vicarious liability does not apply.

**VII. As To Limitation:**

Limitation of time is one year in tort.

Limitation of time is three years in contract.

**IX. As To Position Of Minor:**

In law of tort a minor person can sue and can be sued.

In contract a minor person cannot sue and cannot be sued.

**5. Distinguish Between Law Of Tort And Criminal Law:**

**I. As To Parties:**

In tort parties are known as plaintiff and defendant.

In criminal law, parties are known state and accused.

**II. As To Punishment:**

Tort feasor has to pay damages.

Criminal are sent to prison.

**III. As To Procedure:**

In tort, proceedings are regulated by civil procedure code 1908.

Proceedings are regulated by the criminal procedure code 1898.

**IV. As To Intention:**

Intention is not relevant in tortiuous act.

Intention is always relevant in criminal act.

**V. As To Defence:**

Necessity is a defence in tortiuous act.

Necessity is not a defence in criminal act.

**VI. As To Compromise:**

In tort, compromise is permissible.

Compromise is not permissible in criminal law.

**VII. As To Proceedings:**

Proceedings are conducted by injured person in law of tort.

Proceedings are conducted by the state in criminal law.

**VIII. As To Codification:**

Law of tort is not codified.

Codified in Pakistan Penal Code.

**IX. As To Position Of Minor:**

A person under seven year is tortuously liable in tort.

A person under seven year is not criminally liable

Tort law is a streamline of law which covers issues of civil wrongs like defamation, trespassing and the other actions involving law violations. In case a person has undergone a physical, legal or any economic harm then he can a file a suit under the tort law. If the suit is valid and the defendant of the case loses the case then in such a case the complainant can be compensated with the damages for the loss which he has faced. The majority of the tort cases are handled with the regional, state civil codes and these laws specify the limits on the damages and the limitation of the tort cases. The tort laws are categorized on three broad classes viz: negligent torts, intentional torts and the strict liability torts. Negligent torts are the cases which occur due to negligent behavior and the failure to perform any task with due diligence. An example of the negligent tort can be when a person in the course of playing cricket cracks down the glass of the living room of an apartment. The unethical medical practices and any other forms of professional negligence fall under the category of negligent torts. The second categorization of tort law viz intentional tort is the wrong which have an intentional attempt to harm the other person. Examples of the intentional tort are defamation, fraud and false imprisonment. The strict liability torts are the wrongs specific to the products offered by a company, for example consider the fact if you have purchased a peeler and operated it according to the instructions as give and on operation the peeler has cut down your hand, this is an example of the strict liability tort. The tort law encompasses issues like misbehavior such as noise pollution, etc. In some places the issues which are considered very important these days that is the industrial pollution and the release of toxins are also covered under the tort laws, these cases are referred to as “toxic torts”. These toxic torts are used to file cases against the companies and the industrial units who are not adhering to the emission of pollution levels. The other kind of tort is the nuisance torts which are quite challenging cases to handle as the word nuisance and its definition varies from person to person. It can be understood from the above definition that the tort law do not necessarily cover the physical damages caused to person but they also cover cases of economic nature for which the opposite party has to pay the compensation based on the damages which had occurred. It also covers issues which have been causing damage to the reputation of the people.

*Tort is civil wrong which prejudicially affect a person in some legal or private right* ( Ratan Lal)

Simply tort means wrong or mistake which is done without contract. For example you are going

in a market , in your hand there is some things whose are made of glass, suddenly a person touch your hand and at the result of this act the glass make things broken, in this case you can apply to court and get suitable relief which may be two types:

you get original thing
you get money equal to loss

**Tort in Islam**

Islam is in favours of tort. Islam religion base on tit for tat. Islam says eye for eye, nose for nose, lose for lose, money for money.

Remember tort is linked with civil cases not criminal cases. The basic purpose of tort is to make situation in which the loss of affeted person is recover by giving suitable compensation.

*The world suffers a lot. Not because of the violence of bad people, but because of the silence of good people* (Napoleon)

Torts is basically civil wrong and not a crime and is different from breach of contract. It affects right in rem and not in personam. It usually results in damage for which damages are rewarded. Keep one thing in mind that damage here means violation of some legal right and not any other; though a person might not have suffered any physical injury and just legal right is violated so here it will be falling within the category of torts.....

Tort law: an overview

Torts are civil wrongs recognized by law as grounds for a lawsuit. These wrongs result in an injury or harm constituting the basis for a claim by the injured party. While some torts are also crimes punishable with imprisonment, the primary aim of tort law is to provide relief for the damages incurred and deter others from committing the same harms. The injured person may sue for an injunction to prevent the continuation of the tortious conduct or for monetary damages.

Among the types of damages the injured party may recover are: loss of earnings capacity, pain and suffering, and reasonable medical expenses. They include both present and future expected losses.There are numerous specific torts including trespass, assault, battery, negligence, products liability, and intentional infliction of emotional distress.

Torts fall into three general categories: intentional torts (*e.g.*, intentionally hitting a person); negligent torts (*e.g.*, causing an accident by failing to obey traffic rules); and strict liability torts(*e.g.*, liability for making and selling defective products). Intentional torts are those wrongs which the defendant knew or should have known would occur through their actions or inactions. Negligent torts occur when the defendant's actions were unreasonably unsafe. Strict liability

wrongs do not depend on the degree of carefulness by the defendant, but are established when a particular action causes damage.

There are also separate areas of tort law including nuisance, defamation, invasion of privacy, and a category of economic torts. Tort law is state law created through judges (common law) and by legislatures (statutory law).

Definition from Nolo's Plain-English Law Dictionary

An injury to one person for which the person who caused the injury is legally responsible. A tort can be intentional -- for example, an angry punch in the nose -- but is far more likely to result from carelessness (called "negligence"), such as riding your bicycle on the sidewalk and colliding with a pedestrian. While the injury that forms the basis of a tort is usually physical, this is not a requirement -- libel, slander, and the "intentional infliction of mental distress" are on a good-sized list of torts not based on a physical injury. A tort is a civil wrong, as opposed to a criminal wrong.

**Negligence**

Negligence is a tort which depends on the existence of a breaking of the duty of care owed by one person to another. One well-known case is *Donoghue v. Stevenson* where Mrs. Donoghue consumed part of a drink containing a decomposed snail while in a public bar in Paisley, Scotland and claimed that it had made her ill. The snail had not been visible, as the bottle of beer in which it was contained was opaque. Neither the friend who bought the bottle for her, nor the shopkeeper who sold it, were aware of the snail's presence. The manufacturer was Mr. Stevenson, whom Mrs. Donoghue sued for damages for negligence. She could not sue Mr. Stevenson for damages for breach of contract because there was no contract between them. The majority of the members of the House of Lords agreed (3:2 ratio) that Mrs. Donoghue had a valid claim, but disagreed as to why such a claim should exist. Lord MacMillan thought this should be treated as a new product liability case. Lord Atkin argued that the law should recognise a unifying principle that we owe a duty of reasonable care to our neighbors. The elements of negligence are:

- Duty of care by the defendant to the plaintiff
- Breach of that duty by the defendant
- Harm in fact suffered by the plaintiff
- Defendant's breach being a cause of that harm

**Statutory torts**

A statutory tort is like any other, in that it imposes duties on private or public parties, however they are created by the legislature, not the courts. One example is in consumer protection, with the *Product Liability Directive* in the European Union, where businesses making defective products that harm people must pay for any damage resulting. Liability for bad or not working

products is strict in most jurisdictions. The theory of risk spreading provides support for this approach. Since manufacturers are the 'cheapest cost avoiders', because they have a greater chance to seek out problems, it makes sense to give them the incentive to guard against product defects.

One early case was *Cooke v Midland Great Western Railway of Ireland*, where Lord Macnaughton felt that children who were hurt while looking for berries on a building site should have some compensation for their unfortunate curiosity. Statutory torts also spread across workplace health and safety laws and health and safety in food produce.

**Nuisance**

Legally, the term “nuisance” is traditionally used in three ways: (1) to describe an activity or condition that is harmful or annoying to others (example- indecent conduct, a rubbish heap or a smoking chimney); (2) to describe the harm caused by the before-mentioned activity or condition (example- loud noises or objectionable odors); and (3) to describe a legal liability (responsibility) that arises from the combination of the two. The law of nuisance was created to stop such bothersome activities or conduct when they unreasonably interfered either with the rights of other private landowners (example- private nuisance) or with the rights of the general public (example-public nuisance).

The tort of nuisance allows a claimant (formerly plaintiff) to sue for most acts that interfere with their use and enjoyment of their land. A good example of this is in the case of *Jones v Powell* A brewery made stinking vapors which wafted onto neighbors' property, damaging his papers. As he was a landowner, the neighbor sued in nuisance for this damage. But Whitelocke J, speaking for the Court of the King's Bench, said that because the water supply was contaminated, it was better that the neighbor's documents were risked. He said "it is better that they should be spoiled than that the common wealth stand in need of good liquor." Nowadays, interfering with neighbors' property is not looked upon so kindly. Nuisance deals with all kinds of things that spoil a landowner's enjoyment of his property.

A subset of nuisance is known as the rule in *Rylands v. Fletcher*, where a dam burst into a coal mine shaft. So a dangerous escape of some hazard, including water, fire, or animals means strict liability in nuisance. This is subject only to a remoteness cap, familiar from negligence when the event is unusual and unpredictable. This was the case where chemicals from a factory seeped through a floor into the water table, contaminating East Anglia's water reservoirs.

Free market environmentalists would like to expand tort damage claims into pollution (example- toxic torts) and environmental protection.

**Defamation**

Defamation In the "McLibel case" two were involved in the second-longest case in UK history for publishing an article criticizing McDonald's restaurants.

Defamation is tarnishing the reputation of someone; it is in two parts, *slander* and *libel*. Slander is spoken defamation and libel is printed and broadcast defamation, both share the same features. Defaming someone entails making a factual assertion for which evidence does not exist. Defamation does not affect or hinder the voicing of opinions, but does occupy the same fields as rights to free speech in the First Amendment to the Constitution of the United States, or the European Convention of Human Rights's Article 10. Related to defamation in the U.S. are the actions for misappropriation of publicity, invasion of privacy, and disclosure. Abuse of process and malicious prosecution are often classified as dignitary torts as well.

**Intentional torts**

Intentional torts are any intentional acts that are reasonably foreseeable to cause harm to an individual, and that do so. Intentional torts have several subcategories, including torts against the person, including assault, battery, false imprisonment, intentional infliction of emotional distress, and fraud. Property torts involve any intentional interference with the property rights of the claimant(plaintiff). Those commonly recognized include trespass to land, trespass to chattels(personal property), and conversion.

**Economic torts**

Economic torts protect people from interference with their trade or business. The area includes the doctrine of restraint of trade and has largely been submerged in the twentieth century by statutory interventions on collective labour law and modern antitrust or competition law. The "absence of any unifying principle drawing together the different heads of economic tort liability has often been remarked upon."

Through a recent development in common law, beginning with "Hedley Byrne v Heller *in 1964, a victim of negligent misstatement may recover damages for pure economic loss caused by detrimental reliance on the statement. Misrepresentation is a tort as confirmed by Bridge LJ in* Howard Marine and Dredging Co. Ltd. v A Ogden & Sons

Modern competition law is an important method for regulating the conduct of businesses in a market economy. A major subset of statutory torts, it is also called 'anti-trust' law, especially in the United States, articles 101 and 102 of the Treaty on the Functioning of the European Union, as well as the Clayton and Sherman Acts in the U.S., which create duties for undertakings, corporations and businesses not to distort competition in the marketplace. Cartels are forbidden on both sides of the Atlantic Ocean. So is the abuse of market power by Monopolists (rich business owners) or the substantial lessening of competition through a merger, takeover, acquisition or concentration of enterprises. A huge issue in the EU is whether to follow the U.S. approach of private damages actions to prevent anti-competitive conduct.

**Vicarious liability**

The word 'vicarious' derives from the Latin word for 'change' or 'alternation' or 'stead' and in tort law refers to the idea of one person being liable for the harm caused by another, because of some legally relevant relationship. An example might be a parent and a child, or an employer and an

employee. You can sue an employer for the damage to you by their employee, which was caused "within the scope of employment." This is called respondiat superior. For example, if a shop employee spilled cleaning liquid on the supermarket floor, and you slipped and fell, suffering injuries, you could sue the employee who actually spilled the liquid, or sue the employers. In the aforementioned case, the latter option is more practical as they are more likely to have more money. The law replies "since your employee harmed the claimant in the course of his employment, you bear responsibility for it, because you have the control to hire and fire him, and reduce the risk of it happening again." There is considerable academic debate about whether vicarious liability is justified on no better basis than the search for a solvent defendant, or whether it is well founded on the theory of efficient risk allocation.

**Defenses**

A successful defense absolves the defendant from full or partial liability for damages.Apart from proof that there was no breach of duty, there are three principal defences to tortious liability.

**Consent**

Typically, one cannot hold another liable in tort for actions to which one has consented. This is frequently summarized by the phrase "volenti non fit injuria" (Latin: "to a willing person, no injury is done" or "no injury is done to a person who consents"). It operates when the claimant either expressly or implicitly consents to the risk of loss or damage. For example, if a spectator at an ice hockey match is injured when a player strikes the puck in the ordinary course of play, causing it to fly out of the rink and hit him or her, this is a foreseeable event and spectators are assumed to accept that risk of injury when buying a ticket. A slightly more limited defence may arise where the defendant has been given a warning, whether expressly to the claimant or by a public notice, sign or otherwise, that there is a danger of injury. The extent to which defendants can rely on notices to exclude or limit liability varies from country to country. This is an issue of policy as to whether (prospective) defendants should not only warn of a known danger, but also take active steps to fence the site and take other reasonable precautions to prevent the known danger from befalling those foreseen to be at risk.

**Contributory negligence**

This is either a mitigatory defence or, in the United States, it may be an absolute defence. When used as a mitigatory defence, it is often known in the U.S. as comparative negligence. Under comparative negligence a plaintiff/claimant's award is reduced by the percentage of contribution made by the plaintiff to the loss or damage suffered. Thus, in evaluating a collision between two vehicles, the court must not only make a finding that both drivers were negligent, but it must also apportion the contribution made by each driver as a percentage, e.g. that the blame between the drivers is 20% attributable to the plaintiff/claimant: 80% to the defendant. The court will then quantify the damages for the actual loss or damage sustained, and then reduce the amount paid to the plaintiff/claimant by 20%. While contributory negligence retains a significant role, an increasing number of jurisdictions, particularly within the United States, are evolving toward a regime of comparative negligence. All but four US states now follow a statutorily created regime of comparative negligence.

Contributory negligence has been widely criticised as being too draconian, in that a plaintiff whose fault was comparatively minor might recover nothing from a more egregiously irresponsible defendant. Comparative negligence has also been criticised, since it would allow a plaintiff who is recklessly 95% negligent to recover 5% of the damages from the defendant, and often more when a jury is feeling sympathetic. Economists have further criticised comparative negligence, since under the Learned Hand Rule it will not yield optimal precaution levels.

**Illegality**

*Ex turpi causa non oritur actio* is the illegality defence, the Latin for "no right of action arises from a despicable cause." If the claimant is involved in wrongdoing at the time the alleged negligence occurred, this may extinguish or reduce the defendant's liability. Thus, if a burglar is verbally challenged by the property owner and sustains injury when jumping from a second story window to escape apprehension, there is no cause of action against the property owner even though that injury would not have been sustained but for the property owner's intervention.

**Remedies**

The main remedy against tortious loss is compensation in 'damages' or money. In a limited range of cases, tort law will tolerate self-help, such as reasonable force to expel a trespasser. This is a defence against the tort of battery. Further, in the case of a continuing tort, or even where harm is merely threatened, the courts will sometimes grant an injunction. This means a command, for something other than money by the court, such as restraining the continuance or threat of harm. Usually injunctions will not impose positive obligations on tortfeasors, but some Australian jurisdictions can make an order for specific performance to ensure that the defendant carries out their legal obligations, especially in relation to nuisance matters.

## THE LIMITATION ACT 1908

**The background**

Statute of limitation prescribes periods during which certain actions can be brought, or certain rights can be enforced, through legal proceedings. After the period of time set out in the applicable statute has run out, no legal action can be brought. The bar created by such a statute is (subject to certain minor relaxations meant for special situations), mandatory, in the sense that hardship in individual cases does not constitute a ground for the court granting a relaxation.

**The juristic rationale**

The juristic rationale justifying such bars rests on several factors. First, the law assists the **wakeful** and not the sleeping or the **indolent**. The maxim is – **lex vigitantibus, non dormentibus, subvenit**. Secondly, after the lapse of a certain period of time, the memory of witnesses may fade; evidence may get lost; and documents may become unavailable. The law

has to take into account all these factors. It therefore discourages the filing of stale claims before the courts.

**Suits and arbitration claims**

Pursuing this general approach, statute of limitation seeks to lay down periods within which suits may be instituted in court on various types of causes of action. And, since the considerations mentioned above are as much valid in regard to claims in arbitration, as in regard to claims in courts of law, the legal system extends the law of limitation to claims in arbitration also.

In Pakistan, statute prescribing the limitation periods within which suits and actions can be instituted is the Limitation Act, 1908. The scheme of the Act is such, that whilst the rules relating to computation of time and regulating the course and manner for providing relief are contained in the main body of the Act (comprising various "sections"), the specific limitation periods within which suits and actions are required to be instituted, are contained in the First Schedule to the Act (comprising several articles).

**Periods of limitation**

In Pakistan, normal limitation period for suits and actions based on contractual causes of action is three years. Certain specific instances are mentioned below:

(a) Article 113 prescribes the limitation period for the specific performance of a contract to be three years, from the date fixed for the performance of the contract, or where no such date is fixed, then, from the date when the plaintiff has notice that performance has been refused.

(b) Article 114 prescribes the limitation period for the rescission of a contract to be three years, from the date on which the facts that entitle a plaintiff to rescind the contract first become known to him.

(c) Article 115 prescribes the limitation period for compensation for the breach of a contract (express or implied), not in writing, which is not registered (and not provided for in any other article). In such a case, the suit for compensation can be brought within a period of three years from the date when the contract is broken, or (where there are successive breaches), from the date when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases.

(d) Article 116 prescribes the limitation period for compensation for breach of a contract in writing, which is registered to be six years. The period of limitation would begin to run from the same date as in the case of a suit brought on a similar contract not registered.

**Relaxation or extension of the period of limitation**

Section 19 of the Limitation Act provides that where, prior to the expiry of the period of limitation prescribed for bringing an action under the Act, there is an acknowledgement of

liability, made in writing and signed by the party against whom the claim is made, a fresh period of limitation will start from the date of such acknowledgement.

The limitation period for a suit is also subject to relaxation, if the defendant has been out of the country. Section 13 of the Act states that in computing the period of limitation, any time spent by the defendant outside of Pakistan shall be excluded.

The limitation period is subject to relaxation, in cases where the plaintiff is subject to a legal disability. Section 6 of the Act provides that where the plaintiff is under a legal disability, the limitation period will start to run from the date the "disability has ceased." For the purposes of section 6, a minor, or an insane person, or an idiot, is a legally disabled person.

Under section 14 of the Act, in computing the period of limitation prescribed by the Act, the time spent by the plaintiff in prosecuting with due diligence another civil proceeding shall be excluded from computation of the limitation period. The proceedings of the other suit should have been founded on the same cause of action and prosecuted in good faith in a court, which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain the claim.

Section 18 of the Act provides that where a person who has a right to institute a suit has, by means of fraud, been kept from the knowledge of such right, the limitation period will commerce when the fraud becomes known to him.

**Disabilites**

Section 6 of the Act provides that if at any time the right of action in respect of any of the causes referred to in sections 6 shall accrue, the person so entitled to sue shall be subject to any of the following disabilities, namely;

(a) infancy,

(b) idiocy,

(c) unsoundness of mind,

(d) lunacy, or

(e) absence beyond the seas,

Then the several grounds of limitation provided in the said sections shall not whichever shall first happen.

The disability therefore must exist at the time when the cause of action first accrues and subsequent disabilities are of no effect, and where a person suffering from on eof the above mentioned disabilities dies, the period of limitation commences to run against him from the date of his death.

**Fraud and Mistake**

Under section 18 prescription does not run in the case of concealed fraud or mistake unitl there is knowledge of the fraud or mistake or until the party defrauded or mistaken might by due diligence have come to know of it, as equitable principles of concealed fraud and mistake apply.

**Date of Institution of the Claim in arbitration**

Provisions of the Limitation Act, 1908 apply to arbitrations as they apply to civil courts, under section 37 of the Arbitration Act, 1940. Under section 37 (3) of the Arbitration Act, 1940, an arbitration shall be deemed to have commenced, when one party to the arbitration agreement serves on the other parties thereto, a notice, requiring the appointment of an arbitrator, or where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring that the differences be submitted to the person so named or designated.

**Other points of special interest**

Under article 178 of the First Schedule to the Limitation Act, 1908, an award under the Arbitration Act, 1940 must be filed within 90 days of the date of service of notice of filing of the award.

**Where Court is closed when period expires**

Under section 4 of the Act Where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court re-opens.

**Extension of period in certain case**

Under section 5 of the Act any appeal or application for 8[a revision or] a review of judgment or for leave to appeal or any other application to which this section may be made applicable 9[by or under any enactment] for the time being in force may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation. ---The fact that the appellant or applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period of limitation may be sufficient cause within the meaning of this section.

**Continuous running of time**

Under section 9 of the Act---Where once time has begun to run, no subsequent disability or inability to sue stops it:

Provided that where letters or administration to the estate of a creditor have been granted to his debtor, the running of the time prescribed for a suit to recover the debt shall be suspended while the administration continues.

**Acquisition of right to easements.**

**Under Section 26 of the Act -**(1) Where the access and use of light or air to and for any building have been peaceably enjoyed therewith as an easement, and as of right, without interruption, and for twenty years, and where any way or watercourse, or the use of any water, or any other easement (whether affirmative or negative) has been peaceably any openly enjoyed by any person claiming title thereto as an easement and as of right without interruption, and for **twenty years**, the right to such access and use of light or air, way, watercourse, use of water, or other easement shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

(2) Where the property over which a right is claimed under subsection (1) belongs to [28][the 29Government], that subsection shall be read as if for the words "twenty years" the words **"sixty years"** were substituted.

Explanation.---Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorising the same to be made.

**Exclusion in favour of reversioner of servient tenement.**

**Under section 27 of the Act--**Where any land or water upon, over or from which any easement has been enjoyed or derived has been held under or by virtue of the interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the period of twenty years in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land or water.