PESHAWAR HIGH COURT'S RULES OF PROCEDURE

&

KHYBER PAKHTUNKHWA DISTRICT COURTS' RULES AND ORDERS, INSTRUCTIONS, CIRCULARS & STANDING ORDERS.

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FOREWORD

When Mr. Niaz Muhammad Khan asked me to write foreword on the Second Edition of Judicial Estacode, I wrote as under:-

> *"To author a book may not be so big an undertaking in today's context. Learned men write books on the subjects of their interest. Some reproduce the events and incidents they witness from the sidelines, some reproduce the events and the incidents they have been part of. The readers read all this and forget about it. Many learn lessons from these events and incidents. The book under review does not fall in either of these categories. It provides light and guidance to all those who want to do everything by staying within the parameters of law. Many things in the past had been done but without knowing what was the origin of such practice and what was the sanction behind that. Pains, pangs and pines of Mr. Niaz Muhammad Khan have culminated in the compilation of this Code which not only shows the origin of all those acts in practice but also the sanction behind them. Exhaustive efforts have made this code exhaustive enabling the reader to find a ready answer to all the questions which arise in the mind of everyone working in the hierarchy from ministerial staff upto the Chief Justice. A useful compilation tending to benefit all those who are linked with the institution one way or the other including the members of the bar. A commendable effort adding another feather to Mr. Niaz Muhammad Khan's cap."*

2. I thought that Judicial Estacode is a complete document but when I saw the four volumes of Peshawar High Court's and District Court's Rules of Procedure, I realized that the work compiled earlier was just a tip of the iceberg. How large and enormous was the size of the iceberg came to light when I went through the four volumes mentioned above. If one takes

this work as a finished good, he cannot visualize the hardships, the author has faced in compiling them. But when one sees the references made to the centuries old enactments, rules, notifications and documents, etc which are not available even in the archives, he comes to know how gigantic the task was. The indefatigable efforts of the author, made to trace and track down the enactments, rules, notifications, circulars and other documents of similar ilk having fundamental importance in the day to day business of the High Court and District Courts, appear to be unparalleled in the judicial history of Pakistan. This laurel, to his good fortune, came to the lot of Niaz Muhammad Khan alone.

3. Encyclopedic, of course, is the work but what adds to its beauty is that it has been arranged in a chronological order. Think about any conceivable thing regulating the day to day business of the High Court and District Courts, you will find the answer. The reader lawyer, litigant as well as the Judicial Officer dealing with legal or administrative matters shall find, in these volumes, a base to stand upon. Those who want to do everything according to law and rules shall find an arsenal in this work. It is a unique treatise seeing every law, rule and notification etc., relating to Courts in its historical perspective with reference to its origin, growth, form and shape in different times and ages. It will enable all the institutions under the judicial hierarchy and the persons working therein to show the *raison d'etre* for doing what they do. Such a great task would not have been possible without devotion and dedication. This work speaks for itself and the hard work of the author and thus makes both of them memorable today and even in times to come.

Justice Ejaz Afzal Khan
Supreme Court of Pakistan

Dated: 20.08.2015.

NOTE OF THE CHIEF JUSTICE PESHAWAR HIGH COURT

With immense pleasure I add prelude to this monumental work which I have weighed up holistically. This terrific effort by the Compiler enables every one related with the field of applied law to make convenient reference to the Rules and Orders, and Notifications concerning Procedural and Administration Business of the courts in our Province since the year 1901. Hitherto, we didn't have our own Rules and Orders in an orderly and compiled form, notwithstanding that, since inception of the Peshawar High Court in the year 1970, we framed certain new Rules and also brought amendments in the Rules we went by. Working in such unhelpful state of affairs, sans a few judges and lawyers who were aware of our own Rules and amendments, rest would consult off the point codified work and amendments of the Punjab. The High Court was no exception to this mayhem. Be that as it may, the in hand compiled form of documents would thus help us wriggle out of the baffled state of mind and running from pillar to post in search of Rules, which howbeit existed but considered if not , being not around the corner.

Being mindful of the distressful situation, my mind was permeated with the scheme and had the longing of our own Rules in a codified form like other High Courts have, and to make this a doable affair, I constituted a Committee. For sure, this cherished work of codification by *Mr. Niaz Muhammad Khan,* would lend a hand to the committee in suggesting the Rules and amendments we look for this Court. Equally, it would also be of immense help to the legal sorority, and even to the litigant public, and yes courts will be no little beneficiary in making administrative and judicial decisions.

Justice Mazhar Alam Khan Miankhel
Chief Justice

INTRODUCTION

BACKGROUND.

1. With the grace and help of Allah Almighty I have been able to achieve this gigantic task of compiling the relevant subordinate legislation including instructions and circulars issued by the highest courts of the Province and other competent authorities applicable to the proceedings of the Courts of Khyber Pakhtunkhwa. The importance of the compilation needs no emphasis as all the procedural steps and executive business of the Courts are carried out in accordance with the rules and instructions issued by the competent authorities from time to time.

2. But the dilemma with the courts of the Province of Khyber Pakhtunkhwa over the years had been the non availability of the applicable rules, orders, instructions etc which resulted in overall deterioration and degeneration in courts proceedings especially the subordinate courts now commonly called the district courts. The legal fraternity had been striving to find out the relevant rules and instructions whenever needed and nothing could be found but running from pillar to post. Nobody tried to compile the lost legal heritage during the last more than hundred years which brought the situation to complete legal collapse. The institution which is the ultimate custodian of laws was left in bewilderment in operating its own course of action. This ironical situation for courts shall be understood when I shall deal in the following lines as to what was the reason for gradual loss of this legal treasure and the circumstances leading to this colossal damage.

3. It is a matter of common knowledge in legal circle that the main legislation is often followed by subordinate legislation which is more detailed being regulatory in nature. In civil law countries and also in common law countries whenever the parent legislation is altered the normal course is the continuity of delegated legislation so long as the principle of harmony is not violated. This continuity is mainly based on the saving

provision of the new law or in the absence of any saving provision the general laws of interpretation, formal or informal, provide this continuity. That is why we see the latest parent laws being regulated by century old regulatory mechanisms.

4. After the establishment of British rule around 1850 in the sub continent the courts of records were formally established by the promulgation of regular laws with the powers given to highest court in each area to provide for detailed regulatory mechanisms to be followed by the highest court itself as well as the courts subordinate thereto. This power used to be exercised with impunity and with the approval of the executive. Such laws used to be of two kinds i.e. laws establishing courts and laws providing for procedures of courts. Under both kinds of laws such powers of detailed rules of procedure were conferred on the highest court of the area. The former kind of law mainly provided for the administrative rules of procedure in the courts whereas the later for procedural details of courts proceedings.

5. Narrowing the discussion from the whole sub continent as to how the judicature in the rest of the sub continent was established, I would confine myself to the context of the area now forming the Province of Khyber Pakhtunkhwa so as to throw light on the relevancy of the compilation under discussion

6. The area now forming the Province of Khyber Pakhtunkhwa was part of Punjab when the Crown formally took over Punjab in British rule in 1849. Apart from establishing other administrative set up a Judicial Commissioner was also appointed being the highest court of the Province. The other subordinate courts were also established and then in the year 1866, the Court of Judicial Commissioner was replaced by the Chief Court as the highest court of Punjab. The laws of the first kind as discussed in paragraph 4 above establishing the courts were promulgated from time to time and can be summed up as Punjab Courts Act 1865, Punjab Chief Courts Act 1866 and 1877, Punjab Courts Act 1884, 1914 and 1918. The last two Acts were promulgated when present Khyber Pakhtunkhwa was a separate province. Many rules, instructions, orders and circulars were issued under these laws within the given scope and each new law provided for continuity to the existing regulatory mechanism, of course, subject to principle of concordance. After Punjab Courts Act 1884, the last common

law of Punjab and Khyber Pakhtunkhwa, the Province of N-W.F.P. (now Khyber Pakhtunkhwa) was raised in 1901 and the first kind of law establishing the courts as promulgated by this new Province was the N-W.F.P Law and Justice Regulation VII of 1901. This law replaced the Chief Court of Punjab with Court of Judicial Commissioner with other subordinate courts almost the same. This new law also provided continuity to all regulatory structure of courts of Punjab as in force by that time with all just modifications, exceptions and alterations. This kind of laws in this Province after Law and Justice Regulation of 1901 were the North-West Frontier Province Courts Regulation, 1931, the North-West Frontier Province Courts Act 1952 (enacted but not promulgated) and then present Civil Court Ordinance, 1962.

7. The second kind of laws providing for procedure of civil courts were the Code of Civil Procedure (Act VIII of 1859) amended three times in 1860, 1861 and 1874. The second Code was enacted in 1877 (Act X of 1877, as amended in 1878 and 1879). The third Code was enacted in 1882 (Act XIV of 1882) as amended in 1882, 1888, 1892, 1894 and 1895. Then the present Code was enacted in 1908 at the time the Province of present Khyber Pakhtunkhwa had already been established. The laws providing for procedure of criminal courts were Code of Criminal Procedure 1861 as amended in 1869. Another Code was enacted in 1872 and then 1882 and finally the present Code of 1898.

8. The Khyber Pakhtunkhwa shared a common legal heritage with Punjab till 1901. Almost all subordinate legislation concerning the procedure and administrative business of the courts continued to be applied to this Province after 1901. But after 1901 all new laws, rules or amendments made in Punjab had no concern with this Province. The Khyber Pakhtunkhwa introduced its own amendments and framed new rules from time to time after 1901. But since this Province had no codification of its own, the existing codifications of Punjab used to be consulted after 1901 and all new amendments made by this Province used to be pasted in the codifications of Punjab as existed in 1901. This practice continued for a long time after 1901 which resulted in following confusions amongst courts of this Province. The Chief Court of Punjab also issued different amendments in the existing rules and then framed fresh edition of rules and orders in 1911. After the establishment of High Court of

Judicature at Lahore in 1919, another edition was published for Punjab in 1928 followed by fresh editions of 1931 and 1942. But all these editions were for Punjab only having no concern with the Khyber Pakhtunkhwa. As I explained above that in this Province the rules, orders, instructions and circulars of Punjab as existed in Punjab in 1901 and then as amended by the Province itself after 1901 were applicable. But due to non availability of its own codification the legal fraternity by presuming that both the systems were almost the same continued consulting the codifications of Punjab as they were easily available in the market. The amendments of this Province made by the Judicial Commissioner were used to be sent to the courts after 1901 but those were not available in open market. The courts used to file the amendments sent by the Court of Judicial Commissioner and the lawyers were not aware of any such amendments. Only those judges who were fond of keeping themselves current in law and rules used to correctly apply the rules as amended but those who relied only on lawyers followed whatever was presented to them at the bar.

9. This practice continued up to 1955 when a paradigm political shift occurred by abolishing the four existing federating units of West Wing of Pakistan and creating one unit under the name of West Pakistan with Lahore as its capital. The law creating one unit was called Establishment of West Pakistan Act, 1955. A common High Court was raised by the High Court of West Pakistan (Establishment) Order G.G.O. XIX of 1955. All the highest courts in all the federating units including any other Court functioning as High Court in relation to the territories included in West Pakistan ceased to exist. The new High Court of West Pakistan was conferred with the such original, appellate and other jurisdiction and such powers and authority as the Lahore High Court had immediately before the commencement of the G.G.O. XIX of 1955 in respect of the territories in relation to which it exercised appellate jurisdiction (See Article 3 and 9 of the Order and High Court of West Pakistan Notification No. 111 S/IV-A.13, dated Lahore, the 14th October 1955). The result was that the new High Court of West Pakistan followed the rules and orders framed by Lahore High Court in the proceedings of High Court only .The proceedings of subordinate courts in the West Pakistan continued to be governed under the exiting rules and orders of the concerned province or area as were applicable to these courts immediately before 1955 (See High Court of West Pakistan Notification No. 111 S/IV-A.13, dated Lahore, the 14th

October 1955). But when it came to surface that no exhaustive regulatory mechanism existed for subordinate courts in defunct Baluchistan and defunct state of Bahawalpur prior to their abolition, the West Pakistan High Court extended Volumes I, IV & VI to subordinate courts of Quetta Circuit and Bahawalpur Circuit vide Notification No 1930-Genl/IV-A. 13 on 14-2-58.

10. This legal position continued till 1970 when the old political structure was revived after Dacca debacle and the Province of West Pakistan was dissolved through Province of West Pakistan (Dissolution) Order, 1970. On the strength of this law the High Courts (Establishment) Order, 1970 was promulgated by abolishing West Pakistan High Court and establishing three new High Courts namely Peshawar High Court, Lahore High Court and a joint Sindh and Baluchistan High Court (Baluchistan got its own High Court in 1976/77).

11. For all new High courts the same procedure and powers of West Pakistan High Court were reserved by the new Order as were reserved in 1955 for West Pakistan High Court and almost similar language was used in this order as was used in 1955 as detailed in paragraph 9 above. The result was that the procedure and powers of West Pakistan High Court were continued to be enjoyed and exercised by all new High Courts and the subordinate courts were to follow their own rules as existed in their own provinces prior to 1955 with amendments, if any, made up to 1970.

12. As volume V of Lahore High Court prior to 1955 was the regulatory document for High Court only, this Volume became applicable to West Pakistan High Court and then to all High Courts after 1970. After 1970 each High Court continued to make amendments in this volume as applicable to each High Court.

13. The subordinate courts were to continue to apply their own regulatory mechanism as existed in their own defunct provinces in 1955 with amendments, if any, made up to 1970 by West Pakistan High Court in their respective rules etc. But again the issue was non availability of any compilation for subordinate courts in Khyber Pakhtunkhwa Province. Punjab had its own compilation as discussed above prior to 1900 and used to be periodically updated after regular intervals. The Province of Sindh had first a Court of Judicial Commissioner right from 1866 followed by a

Chief Court as established in 1926 replacing the Judicial Commissioner's Court and this Chief Court continued till 1955. This Province had compiled its own rules, instructions etc, for all subordinate courts under the names of Sindh Civil Court Rules and Sindh Courts Criminal Circulars. For Chief Court of Sindh the Sindh Chief Court Rules were also framed but after 1970 the Sindh High Court had to follow volume V of Lahore High Court as explained in paragraph 12 above. In Baluchistan certain volumes of Lahore High Court and for that matter the West Pakistan High Court were extended as discussed in paragraph 9 above. The problem of non availability of the compilation for subordinate courts remained only in the Province of Khyber Pakhtunkhwa.

14. After 1970 the new High Court of Peshawar has been issuing amendments in Volume V from time to time but the non availability of any systematic compilation of rules and orders for subordinate courts lead to much confusion. This confusion went to the extent that during later years even some amendments were carried out in those volumes (other than volume V) of Lahore High Court which were and are not applicable to subordinate courts in Khyber Pakhtunkhwa.

15. When in the year 2003, I was posted at Peshawar High Court in Inspection Team, I though had no concern with rules making but due to my propensity towards legal research I started realizing that some great gap existed in the field of regulatory mechanism for the subordinate courts in Khyber Pakhtunkhwa. This inclination prompted me to learn and go deep into the whole issue. My this realization of non availability of important rules , orders and instructions resulted in compiling a Code under the name of Judicial Estacode in 2006 for preserving some available rules, instructions, orders etc., which were not published in any systematic form till then. I also started research work for compiling the whole rules and orders but due to my postings out of Peshawar in the year 2007/2008, I was left with no facility of library and my work suffered a great pause at that moment of time. Any how I was again posted at the High Court in the same position in late 2009 and my first ambition was to complete my research on this task but due to heavy work load of administrative dispensation I could not devote enough time to the project. However in the meantime I had been able to publish second edition of Judicial Estacode in 2011. During the process of compiling Judicial Estacode I came across with many other

dimensions of the issue which were not known by then, at least, to me. This experience gave me an added impetus to embark upon the completion of the present project and I accelerated my efforts in this direction near the end of year 2011. But again I had to leave the High Court and this journey suffered another halt. At the start of year 2013, I got a posting in ex-cadre at Peshawar and I started work immediately on the project.

16. During my research I first attempted to find out that what were the rules applicable to the then Punjab courts in the year 1901 which were provided continuity by N-W.F.P Law and Justice Regulation of 1901. This search consumed a lot of time as no compilation was available in the High Court. I then had to visit all the old District Libraries in the Province including Peshawar Archives & Public Library and the first success was the disclosure of a published booklet under the name of 'Standing Orders of the Judicial Commissioner, North-West Frontier Province' of the year 1937. The publication was the only attempt during the whole history of the Province which preserved some basic ideas and history of the rules & orders as applicable to this Province. This booklet carried an introduction by Mr. L. Middleton, the then Judicial Commissioner which explained that what were the rules, orders and instructions which were in force in the Punjab of 1901 and continued to apply to the Province of Khyber Pakhtunkhwa and what was the latest position of those rules, orders, circulars & instructions in 1937. In his introduction Mr. L. Middleton expressed his deep desire and concern about non compilation of these regulatory instrument for the Province but then explained that why did they fail to compile their own volumes for the Province by then. This booklet only updated the Circular Orders issued between 1901 to 1937 by the Judicial Commissioner's Court and explained that three volumes of 1901-1902 issued by the then Chief Court of Punjab were applicable to this Province. In the introduction this fact was reiterated that confusion existed about the availability and applicability of the regulatory mechanisms in 1937 and then it was resolved to publish self contained compilation of all relevant rules etc and that the booklet was a step towards that direction of compilation and that till a self contained compilation was published the booklet would serve as stop gap arrangement till then. But no compilation could be published till 1955. This introduction is of great value which is reproduced here in order to give an exact idea of situation as explained by none other than the then Judicial Commissioner himself.

"INTRODUCTION BY JUDICIAL COMMISSIONER"

The North-West Frontier Province was separated from the Punjab with effect from 9th November 1901 and the general control and superintendence of the judicial courts therein then passed from the Chief Court of the Punjab to the Judicial Commissioner.

At the time of separation instructions for the guidance of courts in the Punjab were contained in the second edition of three volumes published under the authority of the Chief Court of the Punjab namely:-

Volume I. Rules and Orders, 1901.

Volume II -Instructions to Judicial Officers, 1901.

Volume III -Circular Orders, 1902.

Prior to the 9th November 1901 the Chief Court of the Punjab had issued eight correction slips to these volumes and thereafter they were adopted, as so amended and so far as applicable, for the guidance of courts in the North-West Frontier Province. The orders, rules and instructions in these three volumes still apply, so far as applicable, to the courts in this Province but have been amended from time to time by correction slips, by circular orders and by rules issued by the Judicial Commissioner.

In the Punjab the three volumes have been superseded by the rules and Orders of the High Court of Judicature, Lahore, but these do not apply to the North-West Frontier Province. It is proposed to publish similar complete Rules and Orders in this Province, but owing to pending constitutional changes which may involve many amendments the present is not a suitable time for their compilation.

The confusion however which exists owing to (1) courts not being in possession of all correction slips, (2) circular orders being very numerous , not being arranged by subjects, and in some cases being obsolete, and (3) certain parts of the original instructions being replaced by rules which were neither published as correction slips nor as circular orders, is such that the Judicial Commissioner has decided to publish the present volume in preparation for the compilation of self-contained standing rules and orders and for the guidance of the courts pending their publication.

The present volume consists of three parts ; the first deals with correction slips, it has not been considered necessary to reprint these as they will be found available in most courts upon search, but complete lists are given arranged both according to date of issue and according to the pages of the original instructions which they modify. Reference to these lists will enable courts to avoid losing sight of amendments when referring to the three original volumes.

The second part reproduces the necessary portions of all circular orders issued since the 9th November 1901 and is preceded by a list of all such orders showing whether they are still in force and if so the paragraph of Part II in which they have been incorporated; these paragraphs do not in all cases reproduce the wording of the original circular orders but do contain all that is necessary for future guidance of the courts, they therefore replace these circular orders and no court need hereafter refer to the original.

The third part contains reference to certain collections of rules with which Judicial Officers should be familiar. These rules have not been re-printed at length but, if necessary, copies can be obtained by application to the Registrar of the Judicial Commissioner's Court.

Peshawar:

The 31st January 1937

L. MIDDLETON,

Judicial Commissioner,

North-West Frontier Province."

17. After reading this introduction I started searching for three volumes mentioned in the same but to my surprise not a single volume was available in the Peshawar High Court. I had to travel far and wide for searching not only these three volumes but the amendments and correction slips mentioned in the above introduction of the Judicial Commissioner. It took almost six months to locate the relevant volumes. For the purpose I had to travel to Lahore many times for consulting library of Lahore High Court and Archives & Public Library of Lahore .The major and old

libraries in our own Province were visited as discussed above includi Government Printing Press, the National Library and Archives Libra Islamabad. Some important missing links were found in British Museu Library which were sent via post. For detailed research as to amendmen introduced in procedural as well as executive and administrative business had to carry out the detail study of all Gazettes of the Province right fro 1911 up to 1955. I had been successful in collecting the complete set first edition of such compilation by the Chief Court of Punjab for the yea 1895 and Chief Court Circular Orders of 1889. Then all the subsequen compilations of Punjab Chief Court and High Court of Judicature at Lahor of 1911, 1928, 1931, 1943 and the important books published by som authors from Punjab have also been collected and thoroughly gone throug by me. The important laws establishing the courts right from 1884 til present were also collected and thoroughly consulted. During the whol period I have been through many ordeals and apt to say the vicissitudes o despair and hopes looming large every day when I had to face new challenges of missing links and then achieving success in locating desired material.

RULES MAKING POWERS

18. As discussed in paragraph 4 and 6 above that there were and still are two kinds of ordinary laws which conferred or confer powers on the highest court of a province or area to frame rules or issue instructions etc. There is no need to repeat the detail of those laws here. The subject of this sub part of introduction is that how and under what powers the highest courts in an area or for that matter the province used to frame rules and subject to what restrictions. Section 14 of the Punjab Courts Act, 1884 conferred powers on the Chief Court to frame rules for those matters only which were mentioned in that section but subject to approval of Local Government. Section 44 of the Law and Justice Regulation of 1901 conferred the said powers on Judicial Commissioner and again subject to approval of Local Government. The Regulation of 1931 did not repeal the whole Regulation of 1901, the same powers of framing rules continued with Judicial Commissioner with same condition of approval from executive. Almost the same pattern is continued by present Civil Courts Ordinance of 1962.

19. In the second kind of laws mentioned in paragraph 7 above the highest courts of the area or province were given such rule making powers. The Code of Civil Procedure, 1882, while conferring powers of rule making on High Courts classified two types of High Courts (whatever the name may be like Chief Court, Judicial Commissioner or High Court). The first type were those High Courts which were established under Statute 24 & 25 Victoria, Chapter 104 (*an Act for establishing High Courts of Judicature in India)* and second type were those High Courts established not under the above mentioned Victoria Statute. The former were given powers to frame rules of its own procedure as well as the procedure of Civil Judicature subject to its superintendence. There was no need of seeking approval of executive by such High Court. But the second type of High Courts like Chief Court Punjab ,Judicial Commissioner Khyber Pakhtunkhwa etc., were to seek approval of the executive The present Civil Procedure Code of 1908 under section 122 empowered a High Court without distinction as above to frame rules regulating its own procedure and the procedure of the Civil Courts subject to its superintendence. Section 126 of this Code makes the approval of the concerned Government a necessary requirement and section 122 further provides for a stage of previous publication and section 127 for final publication. Section 129 of the Code originally was enacted in line with two types of courts as in the Code of 1882 by allowing those High Courts which were established under the Indian High Courts Act, 1861 or for that matter the Letters Patent constituted by His Majesty to frame rules regulating its own procedure in the exercise of its own original civil jurisdiction without any approval of executive. After section 129 of the Code the High Court of Judicature at Lahore could frame its own rules regarding original civil jurisdiction without the approval of executive as this High Court was constituted by Letters Patent of 1919. But the High Court (Judicial Commissioner) in Khyber Pakhtunkhwa could not as it was the creature of no Letters Patent. When in 1955 the West Pakistan High Court was established by abolishing all high courts including High Court of Judicature at Lahore, the new West Pakistan High Court was conferred the same powers as those of High Court of Judicature at Lahore and thereby it was presumed that West Pakistan High Court came at par with High Court of Judicature at Lahore being creature of Letters Patent. With this new situation section 129 had to be amended in 1955 by abolishing the words "constituted by His Majesty by Letters Patent" and again substituting the words "its Letter Patent" for the

words "the Letters Patent establishing it". The result of these amendments in section 129 was that though West Pakistan High Court was not established by Letters Patent but the Letters Patent of High Court of Judicature at Lahore continued to apply after 1955 to this new High Court. And the same Letters Patent continued to apply to all the new High Courts established under the High Courts (Establishment) Order, 1970. Now for the purpose of section 129 of Code of Civil Procedure all High Courts in Pakistan can frame rules without approval but only for regulating its own original civil jurisdiction and no more.

20. In Criminal Procedure section 558 of Code of Criminal Procedure 1882, the same distinction of High Courts established by Royal Charter and others was drawn and both were given powers to frame rules but both subject to approval of Local Government. The difference of powers of High Courts established under Royal Charters and other High Courts as to powers of framing rules was the scope of areas in which both could frame rules. The chartered High Courts were given wider scope of areas to frame rules than other High Courts. Section 554 of present Code of Criminal Procedure 1898, originally retained the difference between chartered High Courts and others but in line with changed legal position as discussed in paragraph 19 this difference was removed in 1955. All the High Courts in Pakistan can now frame rules to the extent allowed under this section and with the previous approval of the concerned Provincial Government.

21. Apart from the ordinary laws discussed above there has been some constitutional instruments including Letters Patent or Indian High Courts Act establishing or reestablishing certain High Courts and also containing provisions for conferring powers of framing rules by such High Courts. In place of Constitution the British India used to be regulated by different Government of India Acts as Constitution from time to time. The Government of India Act, 1915 repealed many prior Government of India Acts and all prior Indian High Courts Acts including Government of India Acts 1833, 1853, 1854,1858,1859,1865,1869 and 1870. The Indian High Courts Acts which were repealed by Act of 1915 were of 1861, 1865, 1911 and 1912. The last such Act was Government of India Act 1935. For our present discussion the last Act of 1935 is relevant. Section 219 of this Act reestablishes the High Courts including Judicial Commissioner's Court of

Khyber Pakhtunkhwa without any discrimination and section 224 allows limited powers to these High Courts to frame rules but subject to approval of Governor. The result was that the powers conferred by section 224 of this Act were in addition to all other powers of rule making conferred by ordinary laws. The Constitution of 1956 also reestablished High Court of West Pakistan under Article 165. The Constitution of 1962 in Article 101 conferred the powers of rule making on High Court to regulate the practice and procedure of the High Court or of any Court subordinate to it but with the approval of Governor. Almost the same wordings continued in Article 204 of the Interim Constitution of 1972. The wordings used in Article 202 of the Constitution of 1973 were somewhat different which are reproduced below.

> "202. Rules *of procedure.-Subject to the Constitution and law, a High Court may make rules regulating the practice and procedure of the Court or of any court subordinate to it."*

This Article has beautifully combined all powers of rule framing available under any law and constitution. The result is that this power is not an independent power but is subject to law which means that all restrictions and procedure of a law shall have to be fulfilled in making rules by a High Court. For example for the rules of the nature of section 122 of the Code of Civil Procedure, 1908, the High Court shall after previous publication frame rules but with the approval of Provincial Government. And if the rules are of the nature mentioned in section 129 of the Code then no need of prior approval of Provincial Government.

22. As dilated upon in paragraph 19 above that apart from Indian High Courts Act or Government of India Acts the chartered High courts used to be established at the wisdom of Crown through Letters Patent. The High Court of Judicature at Lahore was created by a Letters Patent in 1919 and then this Letters Patent was made applicable first to West Pakistan High Court and then to all High Courts of the country. This document i.e., section 27 of Letters Patent also empowered the High Court to make rules and orders in the domain of civil procedure for regulating the practice of the Court and adapting Code of Civil Procedure and other matters mentioned therein. Section 27 of the Letters Patent is reproduced below.

" Civil Procedure

Regulation of proceedings.- 27 And We do further ordain that it shall be lawful for the High Court of Judicature at Lahore from time to time to make rules and orders for regulating the practice of the Court and for the purpose of adapting as far as possible the provisions of the Code of Civil Procedure, being an Act, No V of 1908, passed by the Governor-General in Council, and the provisions of any law which has been or may be made, amending or altering the same, by competent legislative authority of India, to all proceedings in its testamentary, intestate and matrimonial jurisdiction, respectively."

METHODOLOGY OF COMPILATION.

23. When I went through the three volumes I found that if the volumes are published as they are with amendments only it would be another addition to confusion as a great part of text had become obsolete, redundant or repealed by implication due to changed legal position. And the legal fraternity including judicial officers of District Judiciary would not be able to correctly sift the grain from the chaff. Being compiler I had limitations and I could not on my own frame new rules or orders. In this imbroglio I had to find out the way as to how the obsolete, redundant and portions repealed by implication should be done away with. For the purpose I had to seek the help of all those provisions of law which could come in my aid to either substitute the text with new one or to obliterate the obsolete portions being a compiler. It was also a great issue that when an office has been mentioned in the rules, orders or instructions then how could it be substituted with new office, if any, replacing it. The following sections of law were taken help of in tackling the problem.

a. For continuity of subordinate legislation and substitution of all functionaries and offices and repealed laws either express or by implication the new functionaries , offices, laws and the likes are to be inserted like 'Chief Court' with 'Judicial Commissioner' and then 'High Court' being successor in office or 'Local Government' with 'Provincial Government' or 'Punjab' with 'N-WFP' and then 'Khyber Pakhtunkhwa' or 'Financial Commissioner' with 'Board of Revenue or Divisional Commissioner' or a new law in place of repealed law reenacted and

the likes. For this purpose the strength is sought from section 6 of the North-West Frontier Province(now Khyber Pakhtunkhwa) Law and Justice Regulation 1901 read with, section 28 of Civil Courts Ordinance 1962, section 3 of the Code of Civil Procedure 1882, section 157 of the Code of Civil Procedure 1908, section 3 of the Code of Criminal Procedure, 1898, read with section 7,17 ,23 of the West Pakistan General Clauses Act, 1956 and all *pari materia* sections in predecessor laws i.e., the Punjab General Clauses Act 1898 & Khyber Pakhtunkhwa General Clauses Act 1932, Federal General Clauses Act and all provisions of Adaptation Laws [up to Khyber Pakhtunkhwa Laws (Amendment) Act 2011] issued from time to time which provided for continuity of all subordinate legislation with necessary modifications either expressly or by implication.

b. With the aid of these laws and similar other provisions I got the mandate of substitution, alteration, deletion etc, of course, living within the domain of a compiler and not a lawmaker.

c. For further clarification I have given compiler notes (CN) wherever necessary in order to make the text and context in changed legal position clearer and compatible.

d. The following difficulties were faced by me in the whole exercise and it was the most tiring phase of compilation. As explained above that with the change of laws the subordinate legislation continued to operate within permissible limit of harmony. The three volumes were published in 1901-02 when Code of Civil Procedure 1882 was in field. Throughout the three volumes the sections of Code of 1882 have been referred to in hundreds of places. The new Code of Civil Procedure came in field in 1908 and when I was compiling the present project I had to find out that

whether a section of Code of 1882 has any *pari materia* provision in new Code and if not whether the old section could be continued on the touchstone of continuity being in harmony with new scheme. The added difficulty was that the scheme of arrangement of Code of Civil Procedure 1882 was quite different from the present Code. In the Code of 1882 there were no Orders and Rules like the new Code and instead of 158 sections of present Code there were 653 sections. The same was the case with all repealed laws which were referred to in the rules and orders like Punjab Land Revenue Act, 1887 and Punjab Tenancy Act, 1887 as substituted by new laws. Not only this that I faced difficulties in replacing new sections of new laws but in replacing all those sections which have been repealed or substituted in those laws which are still in force.

e. In the matter of Code of Criminal Procedure 1898, the benefit was that all the three volumes were published after the Code of 1898 was enacted but another hurdle which was even greater than the one mentioned above was that the subordinate legislation including executive directions issued there under pertaining to criminal procedure was mainly based on the pattern of committal proceedings which were done away with in 1972 through Law Reforms. Now the continuity of all those subordinate legislation assimilating the committal proceedings could not be continued and it was really a cumbersome task to clear all such subordinate legislation from committal scheme and living within the domain of a compiler being not rule or law maker.

f. Yet another task was to substitute new functionaries under new laws. I tried my best to locate the exact successor keeping in view the overall scheme and roles of predecessor and successor but there were certain

offices which have not been succeeded by providing successor and there I left the old office in tact as I had no other option. An example of this can be given of the office of District and Sub Divisional Magistrates. In all those functions of these offices succeeded under the new laws by any successor I have substituted the new successor but there were certain duties and functions which have not been succeeded by any one .Similar was the case with the Deputy Commissioner whose office has been succeeded in some areas by new successors but still many roles of Deputy Commissioner have not been succeeded by any one under new laws. In such cases of hardships I was left with no option but to leave those names undisturbed. Recently the offices of Deputy Commissioner and Assistant Commissioner have been restored in this Province and if they are given the same powers again by the law their names in subordinate legislation shall revive automatically if deleted by implication. Similarly if office of District and Sub Divisional Magistrate is revived the same shall be the situation.

24. During research some startling facts came to light and to mention only one such example I would like to refer to the local amendments made in the First Schedule to Code of Civil Procedure, 1908. In almost all the books of Code of Civil Procedure, 1908 by celebrated authors of the country local amendments made by the highest court of different provinces were printed under relevant rules. The amendments made in Punjab have been printed with No and Dates of Notification but not a single amendment of this Province is supported by any No of Notification or date. For the purpose I had to go through almost all the Gazettes of the Province right from 1911 to 1955 and I came up with all amendments made by the then Judicial Commissioner with the approval of executive with Notifications No and Dates. I have now added Part B to original section I of Chapter I of Volume I in which all such amendments have been incorporated. There are many amendments pertaining to this Province which have never been published in any book of Code of Civil Procedure in Pakistan so far as I could find out and now published in this

part referred to above. Similarly many amendments given in such books of Code of Civil Procedure have not been supported by any source. It is now for the users to decide whether to rely on such amendments or not. The pattern of the books of Code of Civil Procedure show that all such amendments have been mechanically copied in every new book of new author without determining the source of amendments.

25. There are many other aspects worth mentioning here but I think the introduction has been made a bit heavier than desired and difficult to digest easily, nevertheless, it was the minimum I could restrict myself to. The main idea has been communicated and the reader is the best judge to decide the hurdles faced by me and the limitation of resources at my disposal and there are chances of not accommodating all what was required to as there were some missing links which I wanted to go through but could not due to non availability. For example despite my effort I could not find Gazettes of this Province from 1901 to 1910. But, at least, one thing is satisfying that now there is a document for the High Court and legal fraternity in this Province to act on, to make further amendments in and improve the same with all its shortcomings and defects which I am sure shall be done in due course of time.

26. The Peshawar High Court has recently formed a committee for framing of rules and orders and now this document shall give them a starting pad to launch the desired initiative successfully.

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(Niaz Muhammad Khan)
District & Sessions Judge
Khyber Pakhtunkhwa.

Dated: 09.01.2016

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VOLUME I

BOOK 1

KHYBER PAKHTUNKHWA DISTRICT COURTS'

RULES AND ORDERS

VOLUME I OF 1901

AS APPLICABLE UPTO DATE

(2016)

RULES AND ORDERS OF THE CHIEF COURT OF THE PUNJAB (NOW PESHAWAR HIGH COURT) MADE UNDER THE AUTHORITY OF ACTS OF THE LEGISLATURE

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