Judicial Immunity or Judicial Impunity: Judicial Immunity of Superior Courts' Judges in Pakistan with Special Reference to Islamic Law

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Abstract
Judicial immunity, available to superior judiciary in Pakistan constitutionally, has been more than often abused in Islamic Republic of Pakistan by the Superior Judiciary through rendering decisions which are beyond the mandate of constitution and law. The aim of this paper is to critically examine the judicial immunities available to superior judiciary constitutionally in Pakistan and to also highlight their justification as to whether they are really necessitated. The methodology employed for researching the topic in hand was mainly case law analysis and historical research. It is averred in this article that judicial immunities available to superior judiciary in Pakistan needs revision for better administration of justice and to satisfy the Islamic edicts. This article has wide implications for the judicial system and people of Pakistan. The results strength mandate constitutional amendments for bringing real freedom to people and ensuring better judicial verdicts guaranteeing fundamental rights as envisaged by the constitutional framers. Such a study has not been undertaken in Pakistan before, that better accountability of superior judiciary and by limiting judicial immunity, the judiciary can perform its mandate more diligently.
Key Words: Immunity, Contempt, Judiciary, Mandate, Rights

Introduction

Revision of judicial immunity available to superior court judges in Pakistan is extremely necessary as frequent cases of Superior judiciary can be evidenced where glaring omissions have been made and deviation from the settled principles of law is noticeable. Justice according to law can be made possible by guaranteeing limited judicial immunity, so that judges of the superior courts remain on guard and do not encroach the mandate of constitution and law. There is no dearth of cases in Pakistan where law has been circumvented resulting in injustice for citizens of Pakistan from verdicts emanating from the superior judiciary.

In an unreported case, disposing of bail petition titled, Salman Zeb v State,[1] the then Chief Justice of Peshawar High Court, Peshawar granted bail to the accused in a murder case and deliberated that at most charge attracted sections of theft. The facts of the case are that the accused was charged for the murder of Shehryar. The deceased Shehryar had mark of ligature present on the neck

with one fire arm entry and exit wound with bruises and abrasions on different parts of the body. The incriminating evidence against the accused was that the car belonging to the deceased was recovered from the accused along-with CNIC of the deceased. Moreover, a piece of car seat cover belonging to accused containing blood stains of deceased was later verified by the National Forensic Science Agency to be of the deceased Shehryar. However, the Peshawar High Court held while annulling the order of Session Judge that there were no reasonable grounds to connect the accused with the factum of offence and at the most, he would be liable under Section 404 PPC of theft.[2] The Peshawar High Court in this case discussed the merits of the case which is a practice deprecated by the Supreme Court at bail stage. The foster father of the deceased victim has since died in grief over the deceased and outcome of the case. The impact of superior court decisions on general public can be seen from this case that how sense of injustice can affect them.

In a recent case titled, Muhammad Sajid etc. v Government of N.W.F.P and others, [3] which is also unreported, wherein vires of N.W.F.P Employees (Regularization of Services) Act, 2009 (N.W.F.P Act No. XVI of 2009) were challenged on the ground that respondents Civil Judges/ Magistrates who failed to qualify the competitive examination of the Public Service Commission K.P.K were regularized through the said Act to the detriment of petitioners who had qualified the Public Service Commission Examination. It was held by the division bench of Peshawar High Court by consensus that the N.W.F.P Employees (Regularization of Services) Act, 2009 was not discriminatory to the petitioners who had qualified the Public Service Commission Examination in juxta-position to the respondents who had failed and were subsequently appointed through the said Act. Moreover, it was also held that the orders of High Court are immune to challenge under Article 199 (5) of the Constitution of Islamic Republic of Pakistan.[4] It took almost five years for the High Court to decide this case against the mandate of National Judicial Policy which lays down a period of 60 days for the decision of writ petition in such like cases. The case is still pending before Supreme Court awaiting outcome and inconvenience caused to the effectees goes largely ignored. These are just a few instances affecting fundamental rights of the citizens and there is no scarcity of such like cases decided by the superior courts wherein orders have been passed to the detriment of the fundamental rights of the citizens. Therefore, it is averred that revision of judicial immunity is the need of the hour. Constitutional history of Pakistan is also ample evidence of the fact that to serve the interest of the powerful ruling elite, deviation from the normal course of law was made e.g. five member bench of supreme court in Zafar Ali Shah case,[5] unanimously authorized the military authorities to amend the constitution. The judgment was authored by Justice Irshad Hassan Khan for full court.[6]

The privileges available to Superior Judiciary in Constitution of Pakistan under the umbrella of independence of judiciary ensure that judges remain above law in case they trespass outside the mandate of Constitution & law. Independence of judiciary has been interpreted in Pakistan by the superior judiciary to mean independence from everything under the sun.

It is therefore, the need of the time to revise judicial immunity constitutionally in Pakistan by taking the lead from other developed jurisdictions and Islamic edicts so that accountability can also be ensured of the superior judiciary. This research will be a value addition to the academic discourse on judicial immunity as revision of judicial immunity in Pakistan from this perspective has not been discussed before. The limitations of the study were mainly of obtaining statistical data from the people that they desire judicial reforms. The constraint was due to vastness of the project that could not be undertaken on a limited scale & budget. Constraints were also of referring some of the ancient texts by earlier jurists of Islamic law on judicial immunity that are still not translated either in English or Urdu.

Exemption of Superior Courts from Writ Jurisdiction in the Constitution of Islamic Republic of Pakistan

High Courts are empowered under Article 199 of the Constitution of the Islamic Republic of Pakistan to issue writ in the nature of habeous corpus, certiorari, quo-warranto, mandamus or prohibition. The Supreme Court of Pakistan can also issue writ under Article 184(3) of Constitution of Pakistan likewise High Courts but only where there is infringement of fundamental rights and the matter is of 'public importance'. The term 'public importance' has been left entirely on the subjective assessment of superior judiciary as at times possession of bottle of wine has led to invoking of jurisdiction under Article 184(3). Therefore this term beckons elaborate interpretation so that Article 184(3) is not invoked unnecessarily. The writs by superior courts are issued against 'Person' which includes any authority or person other than the High Courts and the Supreme Court of Pakistan and a tribunal established pursuant to law relating to the armed forces of Pakistan.[7]

This implies that no writ can be issued to superior courts of Pakistan. The first significant judgment to discuss the exemption of superior courts from writ Jurisdiction under the Constitution of Pakistan is Abrar Hassan vs Government of Pakistan & Justice Abdul Kadir Shaikh.[8] In this judgment, appointment of Justice Abdul Kadir Shaikh a permanent judge of Supreme Court as a Chief Justice of Sindh and Baluchistan was questioned. The Supreme Court of Pakistan decided that such an appointment could be made. While discussing the immunity of superior courts, the Supreme Court held that superior courts were immune under Constitution of Pakistan from writ jurisdiction however the Supreme Court was equally divided on the question whether the writ of quo warranto is maintainable against superior courts. Judges in this case did not analyze constitutional privilege of exemption of superior courts from writ

jurisdiction in Pakistan where there is a constitutional bar vis a vis India where Constitution is silent in this regard. Half of the bench of Supreme Court in this judgment explicitly held that the writ of quo warranto is maintainable against superior courts despite the fact that Article 199(5) clearly stipulated that superior courts are exempt from writ jurisdiction and there was no exclusion for writ of quo warranto.[9] Chief Justice Yaqub Ali heading the bench discoursed that in his view a writ did not lay under Article 199 of the constitution of Pakistan.[10] This may have been the correct view keeping in view the constitutional provision. Justice Anwar ul Haq agreed with Justice Yaqub in this judgment that true import of Article 199(5) was to bar a writ of quo warranto.[11] The other two judges, however, differed and maintained that writ of quo warranto was maintainable against a superior court judge.[12] Judges in this judgment did not properly dilate upon the true import & value of Article 199(5).

Another significant judgment that discusses the exemption of superior courts from writ jurisdiction is Muhammad Ikram Chaudhary and others vs Federation of Pakistan.[13] In this judgment, the five member bench of Supreme Court of Pakistan unanimously held that, 'the Supreme Court or High Court cannot in exercise of its Constitutional jurisdiction interfere with an order passed by another judge or another bench of the Supreme Court. Moreover, one bench of the Supreme Court cannot sit as a Court of appeal over another order or judgment of another bench of Supreme Court. It was also laid down in this judgment that no writ can be issued by a High Court or Supreme Court against itself or against each other or its judges in exercise of jurisdiction under 199 of the Constitution subject to two exceptions, namely, where a High Court judge or a Supreme Court judge acts as persona designate or as a tribunal or where a quo warranto is prayed and a case is made out.'[14] This judgment however did not proffer any reason for holding such a view nor relied on any precedent as to why such an exemption for writ of quo warranto where superior courts can exercise jurisdiction against each other. In Khalid Iqbal and others vs Mirza Iqbal and other,[15] by a unanimous order, the Supreme Court of Pakistan has also held that bar under Article 199(5) prohibited issuance of a writ against Supreme Court and High Court or by any other collateral proceedings.[16] This judgment has been authored by Justice Amir Muslim Hani for the bench who later has given a contra view on the matter in Chaudhry Muhammad Akram vs Islamabad High Court case.[17] However, in this judgment he unequivocally maintained that a writ against superior courts was prohibited by virtue of Article 199(5).

Succeeding the judgment in Muhammad Ikram Chaudhary case, the most significant judgment to discuss the immunity of superior courts under writ jurisdiction is Muhammad Iqbal and others vs Lahore High Court through Registrar and others.[18] In this case, division bench of Supreme Court of Pakistan in a judgment authored by Sardar Raza Khan tried to resolve the

controversy of judgments at variance of Lahore High Court and the Peshawar High Court on the true import of Article 199(5). Speaking for the full bench of Lahore High Court, Justice Saqib Nisar had held that by virtue of Article 199(5) of the Constitution both the administrative and judicial orders were immune from writ jurisdiction,[19] while the opinion of Division Bench of Peshawar High Court was that only the judicial orders were protected.[20] The Supreme Court of Pakistan in Muhammad Iqbal and others vs Lahore High Court through Registrar and others,[21] held that, "by plain reading of Article 199(5) and by applying settled rules of interpretation, High Court cannot be deemed to be conferred with two distinct characters i.e. one judicial which is immune from writ and the other administrative amenable to the writ.[22] It was also held in this judgment that, " we perfectly agree with the view taken by Lahore High Court that all judicial orders passed by a High Court can be challenged in-accordance with the Constitution or the Law and are individually and specifically protected. For such purpose of protecting judicial orders, there was no need absolutely to enact the provisions of sub-Article (5) of Article 199 and that such provisions were given in the Constitution to protect, rather, the non-judicial orders of the High Court.[23] This reasoning that protecting judicial orders did not necessitate enacting provisions of sub-Article (5) of Article 199 was completely overlooked in the latter case of Chaudhary Muhammad Akram vs Islamabad High Court.[24] High Courts of Pakistan have also been frequently maintaining that the administrative orders were meant to be protected by virtue of Article 199(5) of the Constitution of Pakistan.[25] A division bench of the Balochistan High Court in a recent judgment titled, Miss Gulnaz Baloch vs Registrar Balochistan High Court Quetta,[26] has reasoned that Constitutional jurisdiction could not be invoked against orders passed by the High Court or the Registrar on behalf of High Court. Moreover, that High Court could not be deemed to be conferred with two distinct jurisdictions i.e one judicial which was immune and other administrative which was not immune. Where a High Court judge had exercised jurisdiction as a Court or on behalf of the Court than he was completely immune, irrespective of the jurisdiction he exercised. This judgment also reasoned that the constitutional makers had intentionally left superior courts from the definition of word 'person'. Judges in this case also relied on ten member bench decision of Supreme Court of Pakistan wherein this was held that the actions of the judge which relate to the performance of his duty and functions as a judge of the court or as a member of the court cannot be brought under challenge under Article 199 of the constitution before the High Court. Only such actions of a judge of superior court are amenable to the jurisdiction of High Court under Article 199 of the constitution which he performs in his personal capacity having no nexus with his official functions as a judge of the court. [27]

Interestingly in a recent development, a three member bench of the Supreme Court of Pakistan has unanimously held all the previous law on the subject to

be per incuriam, despite being a smaller bench, thereby declaring that administrative orders are not immune and infact, it is the judicial orders which were protected by virtue of Article 199(5).[28] In concluding that administrative orders were not immune, Justice Amir Muslim Hani speaking for the court in this judgment adopted similar reasoning as in the case of Muhammad Iqbal (supra) that "the plain reading of Article 199(5)" leads to the conclusion that by excluding a High Court and Supreme Court from the definition of 'person', the framers of Constitution envisaged judicial jurisdiction and not the extraneous administrative/executive/consultative matters pertaining to the establishment of the Courts.[29] The Supreme Court of Pakistan could have referred the matter to parliament for repeal of the Article but instead it superimposed its interpretation on Article 199(5) and gave verdict on a contentious question of law. This judgment has been welcomed as a good development in the jurisprudence of judicial immunity by legal community but what is alarming in this judgment, that even observation of five member bench in the case of Ikram Chaudhary and others (supra) has been overruled by three member bench in this judgment by holding that Article 184 is not dependent on 199 and can be pressed into service where there is infringement of fundamental right and the question is one of public importance.[30] Earlier in Ikram Chaudhary and others case,[31] five member bench of the Supreme Court had held that, "Article 184(3) confers jurisdiction on Supreme Court of the nature contained in Article 199 of Constitution of which excludes inter-alia, the Supreme Court and the High Courts.[32] Moreover, no writ can be issued by a High Court or Supreme Court against itself or against each other or its judges in exercise of jurisdiction under Article 199 of the Constitution subject to two exceptions, namely, where a High Court judge or a Supreme Court judge acts as persona designata or as a tribunal or where a quo warranto is prayed and a case is made out.[33] In the recent case of Ch. Akram (supra), Supreme Court by a three member bench has overruled these observations of five member bench of Supreme Court contrary to precedent law that larger bench binds the smaller benches. The Supreme Court of Pakistan in this judgment also observed that, "On the surface of this pool of heated debates between the parties, the material point of contention is whether this court under Article 184(3) is competent to entertain a petition in the nature of quo warranto challenging the appointments made by the then Chief Justice of Islamabad High Court in the establishment. It is important to unshackle some of the legal minds from the preconceived notions about the limitations to 'justice'. We need not remind the learned Counsel that the Supreme Court is the supreme and ultimate authority for the judicial determination of the precise scope of any Constitutional provision".[34] Thus, meaning thereby that Supreme Court could place any interpretation it felt like on words which were not open to scrutiny by anyone as the Supreme Court by this judgment was the final declaratory authority regarding the precise scope of any Constitutional provision. Moreover, this also implies that

judiciary could also assume the role of legislature and circumvent its mandate. It was also observed in the judgment that, ' In the aforesaid background, we are of the considered view that the issue raised in these proceedings attracts a question of public importance, which has a direct bearing on the fundamental rights of the citizens of Pakistan, therefore, we hold that this petition under Article 184(3) is competent as the appointments to the public office made by an authority can be challenged through a petition even in the nature of a writ of quo warranto so that no one can claim immunity from its scrutiny under the garb of any constitutional provision.'[35] Thus a constitutional provision has been made redundant by this judgment and a supra constitution judgment has been rendered by holding that immunity on the authority of legislation has no value. This was also observed in the judgment that a judge acts in two different domains, when he performs judicial functions under Article 199 and when he performs administrative/ executive/consultative functions under the rules (framed under Article 208 pertaining to establishment) which cannot be mixed with each other.[36] As to how this conclusion was reached by the judges that Article 199 only pertains to judicial powers and not to administrative matters is hard to comprehend and unconceivable, as all the administrative powers of superior courts are not listed in Article 208 of Constitution of Pakistan. The same judge who authored this judgment in Ch,Akram Case supra, Justice Amir Muslim Hani in another judgment Muhammad Rafi and another v Federation of Pakistan and others, while elucidating the scope of Article 199 of the Constitution of Pakistan held that, ' after a person had been appointed by observing all the codal formalities and the appointment letter was accepted than the appointment could not be nullified being non transparent."[37] The above discussion throws light on the issue that there is no exact methodology which Supreme Court of Pakistan could be credited with that it is following so that people of the country could be certain of their rights. Moreover, decisions are being rendered more on extraneous considerations rather than the dictates of law.

It is proposed that Article 199(3) & (5) should be referred to parliament for the repeal of said Articles so that army and judiciary do not enjoy a higher status than other organs of state. Only parliament is the competent forum to repeal the said articles and not the judiciary. It is also averred that contentious questions of law regarding interpretation of constitution should be resolved by full bench of Supreme Court.

Restriction on discussion in Parliament with Respect to Conduct of any Judge of High Court and Supreme Court

Article 68 of the Constitution of Islamic Republic of Pakistan, 1973 prohibits discussion in parliament on the conduct of any judge of Supreme Court or High Court apropos his official duties. Such like provision is not present in the Constitutions of Pakistan, 1956 & 1962.

However, the subject has been dealt by Pakistani Courts as far back as in 1958. In the case of Pakistan vs Ahmad Saeed Kirmani etc,[38] Justice Cornelius speaking for the three member bench observed that, 'each house has the right collectively to discuss subjects of its own choice without reference to the King and that individual members in debate can speak their mind with immunity, is generally recognized and accepted at the present times.'[39] This means that members can speak on the floor of house regarding conduct of judges with limitations of immunity.

In the case of Islamic Republic Of Pakistan Versus Mahmood Ali Kasuri and another,[40] the respondents had remarked on the floor of the house that, "we could throw the order of Supreme Court like a toilet paper." This remark was held to be contemptuous of the Supreme Court by the five member bench of Supreme Court unanimously and the respondent was held to be guilty. However the notices of contempt were discharged as the respondent tendered unqualified apology.[41] This manifests that superior judiciary is extremely sensitive to any affront or challenge thrown against its authority. It also seriously questions the supremacy of parliament in representing the will of people.

The land mark case of recent times explaining the scope of this Article is Syed Masroor Hassan vs Ardeshir Cowasjee.[42] The petition arose out of criticism directed against judges and Chief Justice of the Supreme Court by members of parliament on the floor of the parliament. Supreme Court in this case observed that, " clause (c) of sub rule (2) of Rule 48 of the National Assembly Rules also prohibits any discussion about the conduct of any judge of the Supreme Court or High Court in the discharge of his duties, the members of parliament have the right to discuss a matter relating to the judiciary which does not fall within the ambit of contempt of Court as defined by Article 204 of the Constitution and does not violate any of the Constitutional provision or the rules framed thereunder."[43] This observation seriously undermines universal core value of freedom of expression.

Construing the provision of Article 68, the four member bench of the Sindh High Court in the reference case Karachi Bar Association vs Abdul Hafeez Peerzada and another,[44] laid down the law that Article 68 of Constitution of Pakistan was mandatory in nature and speeches of members of parliament enjoy qualified privilege subject to the Constitution and are amenable to contempt of court proceedings under Article 204 as indicated hereinabove. The judges in this case also repelled the suggestion that Article 68 was directory and not a mandatory provision.[45] It was also observed in this judgment that judges of the superior courts cannot discharge their constitutional onerous duties unless they are free from all sorts of outside pressures.[46] Judges from this part of the world by this statement seem to be really susceptible and sensitive to outside pressures. If they are so sensitive and susceptible to fall for outside pressure then they should not be holding such an onerous duty of

dispensing justice on their shoulders. There is an attempt by the judiciary in all these cases where their jurisdictions is concerned to give verdict enhancing the jurisdiction of courts and grab more powers at the expense of people of the federation. In the case Commodore (r) Shamshad vs Federal Government[47], the three member bench of Supreme Court of Pakistan unanimously commenting upon Article 68 held that, privilege of a house had to be established before the Court of law and once it was established than Courts were required to stay their hands off ungrudgingly.[48] This judgment also held that while exercising powers under Article 66 Constitution of Pakistan which pertains to privileges of members including freedom of speech, there should be no violation or transgression of other provisions of the Constitution. Supreme Court also observed that it was its Constitutional duty to uphold independence of judiciary and supremacy of law.[49] The inclination by the superior judiciary to grab power and rule in favor of an enlarged jurisdiction of the court at the expense of people is perceivable, who may fall prey to this enlarged jurisdiction of courts. In Baz Muhammad Kakar vs Federation of Pakistan,[50] five member bench of Supreme Court unanimously held section 10(b) of Contempt of Court Act, 2012 violative of the fundamental right of freedom of speech which was subject to reasonable restriction inter-alia in relation to contempt of Court Act and Article 68 of Constitution of Pakistan.[51] This section prescribed that expunged record of senate, the national assembly or a provincial assembly shall not be admissible in evidence. The order of the court manifests that how courts are hypersensitive to criticism in Pakistan and not letting go of even expunged remarks. This also points to the malady that superior courts think themselves to be superior and sacred despite being comprised of fallible individuals. Superior courts of Pakistan are not careful in their observations and often hurl remarks, however, the superior courts expect due reverence to them while they neglect extending it to others by hurling uncalled for remarks misusing judicial immunity.

The Chief Justice of Pakistan in a recent case of orange line metro train commenting on the performance of government observed that, “mockery and not democracy was being practiced in the country, where bad governance was in vogue in the name of governance.”[52] The Superior courts of Pakistan have frequently held that each organ of government should work in its own sphere and not interfere with other organs or overstep its boundaries. Such interference by the Chief Justice of Pakistan in executive affairs is also beyond his Constitutional mandate if we look at the case law on the subject. Parliament cannot offer any clarification on the statement of CJP as it may be dragged within mischief of provisions of Article 68. Thus judiciary has emerged as an institution which is not accountable before any other authority in Pakistan. News reports on Court proceedings is order of today and Article 68 seems to be not in consonance with today’s age of information and freedom of speech where nothing is immune from scrutiny. The Supreme Court of Pakistan has

stopped the National Accountability Bureau (NAB) from using its powers under which the anti-corruption watchdog can drop charges against unscrupulous through voluntary return and plea bargain deals and also observed that Pakistan was being made a laughing stock by such an arrangement.[53] When parliament is frequently being bypassed and traversed in matters exclusively relating to it than parliament should be given the opportunity to redeem itself and Article 68 of Constitution needs to be reviewed in this regard. The recent case of military Courts has delegated to Parliament unlimited authority to amend the Constitution and basic structure theory to be ineffective.[54] In this backdrop also, Article 68 seems to be incompatible and warrants repeal as parliament has been held to be supreme. Relevant to the present topic is also Article. 63 (1) (g) of Constitution of Pakistan which details that a person shall be disqualified from being elected and chosen as member of parliament if he inter-alia propagates any opinion or acts in any manner prejudicial to independence of judiciary of Pakistan or ridicules the judiciary. Such provisions have the effect of moving judiciary to a higher pedestal than other mortals. Judiciary in the present age and times should not be sensitive to criticism and ridicule like all other institutions as humans serving judiciary are fallible like all other human beings. There are always two sides to the coin and there will always be people in support of a judge's cause as some are against. People should be allowed to speak their minds and judgments pronounced by judges should be the shield for judges which sometimes speak louder than what other people have to say about them.

It is proposed that Article 68 along with Article 63 (1) (g) may be considered for repealing and that if enactment of Article 68 Constitution of Pakistan is extremely necessary than it may be reformed to protect truthful speech as under:

68: No discussion shall take place in Majlis-e-Shoora (Parliament) with respect to the conduct of any judge of the Supreme Court or of a High Court in the discharge of his duties.

Provided that truth shall be a valid defense and afford protection in proceedings under this Article.

Power of Contempt of the Superior Courts

Article 204 Constitution of Pakistan, 1973 in relation to contempt of Court stipulates that superior courts in Pakistan have powers to penalize any person for contempt of court. The power to punish for its contempt also includes offence of scandalizing the court or bringing any judge of superior court into hatred ridicule or contempt. Article 204 also postulates that doing anything which prejudices the determination of a matter before the court constitutes contempt of superior courts.

The contempt law of Pakistan has a chequered history. Various legislations were promulgated over time that regulated the contempt law of Pakistan. Soon after partition, Pakistan was governed by the erstwhile Contempt of Court Act,

1926. This act was repealed by the Contempt of Court Act, 1976. Then came the Contempt of Court Ordinance, 2003 which was superseded by the Contempt of Court Ordinance, 2004. Finally, the Contempt of Court Act, 2012 was promulgated by the parliament in Pakistan which could not see the light of day and was subsequently repealed by the Supreme Court of Pakistan.[55]

There are a lot of historical cases on law of contempt discussing the powers of superior courts in relation to contempt of apex courts. The contempt of court law was reformed overtime by the superior courts in Pakistan by bold pronouncements and some necessary modifications were made to make it somewhat in line with modern developments in the world. Initially, the contemnor had to submit unconditional apology before being allowed to submit his defense for contempt of court.[56] This was demonstrably against all canons of justice. In Sir Edward Snelson Case (PLD 1961 SC 237), the contemnor Sir Edward Snelson contested the initiation of contempt proceedings by tendering of apology as an archaic law and prayed for its annulment. He also submitted in his defense that contempt law should be brought in line with new English law which allowed the criticism of judges. Sir Edward Snelson relied on judgment of Privy Council in Ambard v The Attorney General of Trinidad and Tobago (AIR 1936 FC 141) where Lord Atkin had observed:

"Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."[57] This judgment also permitted erroneous criticism of judges and judgments and held this to be not amounting to contempt.[58]

Sir Edward Snelson stance was not endorsed to allow his contentions before court and the appeals preferred by him were dismissed by five member bench of the Supreme Court wherein judges of the likes of Cornelius and Hamood ur Rehman were also present on the bench of Supreme Court. Each of the five judges in the bench added a separate note in the judgment but dismissed the appeal. [59] Sir Edward Snelson lived to see his stance vindicated by the unanimous judgment of four member bench of Supreme Court scribed by Justice Anwar ul Haq in Inayat Khan's case (PLD 1976 SC 354) wherein the practice of submitting an unconditional apology before submitting defense was done away with.[60] However, court shied away from any further pronouncement in interest of freedom of speech. This judgment laid down detailed law on contempt affecting the general public. It held that imputing motives to judges and alleging or even insinuating their judgments to be inspired by extraneous considerations like fear or favor also amounts to contempt of court.[61] Thus freedom of speech was seriously curtailed affecting people of the country. However this protection was not afforded to retired judges who were in case of insinuation advised to seek their remedy as private individuals.[62] Another archaic rule that truth was no defense to contempt application was done away with by a unanimous three member bench of the Supreme Court scribed by

Justice Dorab Patel in the case of Yousaf Ali Khan v The State.[63] This judgment was a bold law then previous judgments on the subject as it also provided that courts though to be protected against disgruntled and unscrupulous litigants yet judges not absolutely immune from all criticism nor entitled to silence truth in order to preserve public confidence in administration of justice. Plea of bias temperately worded and in respectful manner was held to be not amounting to contempt.[64] This judgment is a positive development on contempt of court law in Pakistan.

An important addition to the jurisprudence of contempt cases is Syed Masroor Ahsan and Others versus Ardeshir Cowasjee and Others. [65] Seven member bench in this judgment observed that the object of this judgment was to lay down the parameters in view of the latest trend in the civilized world in respect of contempt law and particularly keeping in view the provision relating to freedom of speech in the Constitution of Pakistan.[66] However, the law laid down is far from being in accordance with the civilized world. This judgment though holding that judiciary was constitutionally obliged to act within parameters of law however, maintained that relevant provisions relating to contempt are to be interpreted in a manner that ensured the independence of judiciary. [67] This judgment also expressed the view that dynamic and progressive approach is to be adopted while interpreting the Constitution but freedom of speech was subject to contempt of Court law as envisaged by the Constitution makers.[68] Thus, this verdict can be seen as full of contradictions and differing conclusions. Justice Munawar Ahmad Mirza added a separate note in this judgment and observed that while exercising rights boundaries must be fixed whereby the disparaging or disrespectful remarks or attempts violating law or transgressing the limits of fair comments are avoided. Truth can be expressed using decent and recognized phraseology. Ironical, or sarcastic expression, intemperate speech, immodest or disgraceful publications merely with malafide intentions aimed at blackmailing must be avoided and abhorred.[69] It was also observed by him that apology in contempt of court should not only appear but must also satisfactorily represent sincere and genuine remorse and should not be half hearted or mere formality.[70] This law seems to be of a majestic master for his servants and not for the people of a free democracy whose institutions serve them. It also relegates Pakistan again to pre Yousaf Ali Khan case(supra), where free speech was not protected. Instead of moving further, this verdict moved Pakistan a step backward in the development on contempt of court law. Conversely to what has been stated in the verdict, there is no indication in this judgment of bringing the law of contempt in conformity with the civilized world and the verdict seems to be of colonial tradition.

In a recent development, Contempt of Court Act, 2012 has been unanimously declared by the five member bench of Supreme Court of Pakistan unconstitutional, void and non est despite the fact that it was validly

promulgated by the Parliament.[71] The reasons proffered for nullifying the Contempt of Court Act, 2012 were that Contempt of Court Act, 2012 granted exemption to public office holder which was violative of Article 25 of the Constitution of Pakistan pertaining to equality of citizens as no law could be made for benefit of special class of people to the exclusion of other citizens.[72]Moreover, other provisions of Contempt of Court Act of 2012 were also deemed to be contrary to the provisions of the Constitution e.g. Court was defined in the said Act to include subordinate Courts, however, Article 204, detailed that Court meant only the High Court and Supreme Court of Pakistan. This judgment also laid down that the Contempt of Court Act, 2012 was also violative of provision relating to freedom of speech in the Constitution which was subject to contempt of Court, moreover, it was also offensive to Article 68 of the Constitution which provided that no discussion should take place in Parliament with respect to the conduct of the judge of Supreme Court or High Court.[73] Thus again, instead of preferring the interest of people and leaning in favor of enhancing their rights, enhancing the powers of courts was preferred by holding that freedom of speech was strictly subject to contempt of court. Judicial immunity like freedom of speech directly contrasts with protection of one's intellect as a subdued and closed mind cannot be a healthy mind.

Contempt by 'scandalizing' the Court owes its origin to the medieval ages in Britain, when the Courts were considered representatives of the monarch and were called King's Courts or Queen's Courts.[74] The United States has a more liberal dispensation, where only something that presents a clear and present danger to the administration of justice is considered contempt and although the British origin of contempt law in India has absolutely no relevance today, the judiciary has continued this jurisdiction.[75]

It is proposed that Article 204 should be reformed by the parliament in the following terms:

204. Contempt of Court. - A Supreme Court or High Court shall have power to punish any person who abuses, interferes with or obstructs the process of the Court in any way or disobeys any order of the Court.

Appointment Process of the Superior Judiciary in Pakistan and Judicial Immunity

Pursuant to the 18th amendment in the Constitution of Pakistan 1973, a judicial commission has been created to recommend the appointment of Judges of the superior courts in Pakistan. Article 175 (A) has been introduced in the Constitution of Pakistan through 18th and 19th amendments prescribing appointment of Judges to the Supreme Court, High Courts and the Federal Shariat Court.[76] This Article mandates that there shall be a judicial commission of Pakistan for appointment of Judges of the Supreme Court, High Courts and the Federal Shariat Court. The composition of judicial commission of Pakistan comprises of mostly senior judges with law ministers, advocate generals and a senior advocate. The Commission by majority of its total membership

nominates to the Parliamentary Committee one person, for each vacancy of a Judge in the Supreme Court, a High Court or the Federal Shariat Court. The parliamentary committee consists of members of parliament from the treasury and opposition benches. It is mandated by the constitution to confirm the nominee of judicial commission by majority of its total membership within fourteen days of the nomination, failing which the nomination is deemed to have been confirmed.

Previously the mode and qualification prescribed for appointment of Supreme Court Judge was detailed in Article 177 and for appointment to High Court Judge was provided in Article 193 of Constitution of Pakistan, 1973. Article 177(1) in relation to appointment of Supreme Court Judges detailed that the appointment of Chief Justice of Pakistan shall be made by the President solely on his discretion and appointment of other judges of Supreme Court of Pakistan is to be made by the President of Pakistan after consultation with the Chief Justice of Pakistan. Article 193(1) before the eighteenth and nineteenth amendment provided that, a Judge of a High Court shall be appointed by the President after consultation with the Chief Justice of Pakistan, Governor concerned of the province; and except where the appointment is that of Chief Justice of the province, with the Chief Justice of the High Court.

Elevation process of superior court judges has never been transparent in Pakistan. Cloaked under the impenetrable shield of 'judicial independence', successive generations have resisted introducing transparency into the process through which certain individuals are considered for elevation to the constitutional post of a superior court judge, and why others are ignored.[77] There is no public exam, public advertisement for the post or interview to be conducted by an independent commission for elevation to the post of superior court judges. The original scheme of our Constitution prescribes that judges of the Supreme Court were to be appointed "by the President, after consultation with the Chief Justice" (Article 177), and Judges of the High Court were appointed by the President after "consultation" with the Chief Justice, the concerned Governor, and Chief Justice of the relevant provincial High Court (Article 193). The landmark judgment of Al-Jehad Trust (PLD 1996 SC 324), a unanimous five member bench judgment of Supreme Court followed by Asad Ali's case (PLD 1998 SC 161) ten member bench judgment declared "consultation" of the Chief Justice, in the case of judicial elevations, binding upon the President; thereby granting Chief Justice the sole prerogative of recommending individuals for judicial appointment.[78] Consistent trend by the judiciary can be seen for grabbing more powers for itself rather than deciding on merits keeping in view the principle of checks and balance. Through 18th Constitutional Amendment (supplemented by the 19th Amendment) a "Judicial Commission" (headed by the Chief Justice, and comprising of a majority of judges) was constituted in order to recommend candidates for elevation, who would then have to be confirmed by a "Parliamentary Committee" comprising

of four members each from the Senate and the National Assembly, in equal proportions from the government and opposition benches. However, the sole authority to initiate a candidate's name, for consideration by the Judicial Commission, remains with the Chief Justice of respective province, who is not bound to provide any reasons for his preferences or give public notice inviting applications.[79] Munir Bhatti's case (PLD 2011 SC 407), a four member bench decision has held that, the Parliamentary Committee has no authority to question recommendations of the Judicial Commission thus making constitutionally created Parliamentary Committee redundant. Per the Presidential Reference No. 1 of 2012 (PLD 2013 SC 279), a five member bench of the Supreme Court by a majority in a judgment scribed by Justice Khilji Arif Hussain to which Justice Ejaz Afzal added a dissenting note has declared that the President cannot interfere with recommendations made on the "subjective" satisfaction of the Chief Justice and members of the Judicial Commission.[80] Justice Ejaz Afzal Khan in his dissenting opinion wrote that President before appointing a person a judge or a Chief Justice of a High Court or a judge of the Supreme Court shall ensure that his nomination is in accordance with the constitution and law.[81] Opinion of Justice Ejaz in this judgment is more inconsonance with justice and equity as it ensures check and balance in the appointment process. Munir Hussain Bhatti vs Federation of Pakistan,[82] declared that it is an undisputed tenet of our constitutional scheme that in matters of appointment, security of tenure and removal of judges, the independence of the judiciary should remain fully secured.[83] The judges did not rely on any constitutional provision to lend support to this contention as to where in the constitution this is prescribed that appointment, security of tenure and removal of judges, is linked to the independence of the judiciary.

Comparing the existing pattern of selecting judges of higher courts with the one when the judiciary was not 'independent' i.e. pre eighteenth and nineteenth amendment period, one finds that the 'nursery' from which the judges are produced continues to be the same. Judges still come from four sources: chambers of judges of the High Courts or Supreme Court, firms of 'eminent' lawyers; provincial bar associations' office bearers, present or previous; and the district judiciary. It is rare to see an 'ordinary' but meritorious lawyer who is not well connected being selected. It is not just a moral issue, but one that goes to the heart of the egalitarian democratic polity that our Constitution envisages, inter alia, under Article 25.[84] There is serious anomaly in the appointment process of superior court judges in Pakistan and it requires immediate attention of the lawmakers. Modern states are founded on a delicate system of checks and balances. Moreover, institutions also have their internal monitoring and audit systems, in addition to being constantly exposed to public scrutiny.[85] However, Superior Judiciary in Pakistan has been rendered immune to checks and balances. In trying to secure Independence of Judiciary for itself, checks and balances on the Superior Judiciary have been completely

circumvented. This is evident from perusing judgments like Munir Bhatti's case (PLD 2011 SC 407). In this case, the judicial commission had made recommendations for extension in tenure of Judges of High Courts. The parliamentary committee however, disagreed with the recommendations of the judicial commission and decided not to recommend the names of these judges for appointment. [86] Supreme Court declared that the decision of the Parliamentary Committee, whereby the names of Judges were not confirmed for extension in their tenure, were not in accordance with the provisions of the Constitution. [87] The four member bench of Supreme Court in this decision inter-alia held that parliamentary committee neither had the expertise nor the constitutional mandate to reverse the reasoning and findings of the Commission on professional caliber, legal acumen, judicial skill, quality and the antecedents of the judicial nominees. [88] Such domain was left exclusively to the judicial commission thus little has been left for parliamentary committee in the case of judicial appointments. All this was substantiated on the pretext of 'independence of Judiciary' which was directly linked to appointment, removal and security of tenure of superior court judges. Parliament has the competence to enact laws in Pakistan but does not have the expertise on professional caliber, legal acumen, judicial skill, quality and the antecedents of the judicial nominees which is a strange and outlandish argument forwarded in this judgment.

Justice Irshad Hassan Khan in Asad Ali vs Federation of Pakistan, [89] declared very pertinently that judicial independence is not an end in itself but is a means to promote impartial decision making. [90]

This dictum regarding independence of judiciary implies that judge remains free of bias. Appointment of a superior court judge by the judiciary itself cannot guarantee a judge who is free from bias e.g. he or she may acquire prejudice from some other source like from his peer judges who appointed the judge. Bypassing the parliamentary committee was also not the will of parliament while amending it through eighteenth and nineteenth amendments. Supreme Court in Munir Bhatti case (supra) may have infringed the constitutional mandate by making redundant the parliamentary committee. In Pakistan the appointment process of subordinate judiciary is carried out by the executive. There is precedence of superior court judges being appointed by the executive or legislature around the globe e.g. Supreme or Constitutional Court Justices in the US, Brazil and Russia, must be nominated by the president and approved by a house of the legislature by a majority vote. [91] In some cases (formerly the United Kingdom and several other common law jurisdictions) judges are appointed by a government minister (typically the Minister of Justice or Attorney General). [92]

It is proposed that to bring transparency in the appointment process of superior court judges either;

System of selection of superior court judges in Thailand may be adopted through a constitutional amendment where each judge is appointed by the King (in Pakistan's case King may be substituted with President), but only after the candidate fulfilling the requisite criteria has passed a judicial exam run by the courts, and served a one- year term of apprenticeship.[93] This is also suggested that the candidates should be considered for elevation from every walk of life holding a law degree so that eminent jurists of law are also able to make it to superior courts that are well versed in law and known to be men of integrity.

This procedure for selection of superior courts judges if adopted in Pakistan through a constitutional amendment will also serve the craving of judiciary in Pakistan for an independent judiciary as exam will be conducted by the courts for judicial elevation. This process will ensure transparency as public notice and public advertisement as held by the superior judiciary in Pakistan to be a sine qua non for all official positions will be mandatory along with exam. Moreover appointment by the president after satisfying himself that nominee for judicial elevation has successfully completed the probationary period will also ensure effective checks.

Or

The process adopted by the Chief Justice of Punjab High Court Justice Syed Mansoor Ali Shah for initial selection of names before being sent to the Judicial Commission maybe made mandatory for all the provinces by the Supreme Court of Pakistan or Parliament through a constitutional amendment. "By this process, names of eligible candidates for elevation were sought from all the bar associations up to district level. Thereafter, each recommended individual had been sent an Information Form, seeking details of casework, reported judgments, and income tax returns for the past three years. Then candidates submitting complete information were called for interview to be conducted by a three member bench other than the Chief Justice of the High Court. Short-listed recommendations were lastly forwarded to the CJP, for due consideration by the Judicial Commission."[94]

It may be added that though this process ensures transparency and judicial independence as interpreted by the Pakistani courts, however, it will serve the cause of justice and transparency more, if parliament also has a say regarding names finalized by the judicial commission and can veto the nominee of judicial commission if found to be lacking in merit.

Removal through Supreme Judicial Council: It's Effect on Judicial Immunity

Article 209 of Constitution of Pakistan deals with the mode & procedure for removal of judges of the superior courts. It authorizes the supreme judicial council only to deal with cases of capacity or conduct of superior court judges whether they are fit to hold office. The supreme judicial council consists of peers of judiciary.[95]

The Supreme Judicial Council has framed rules under Article 209 of Constitution of Pakistan after the 17th amendment in the Constitution of Pakistan. Previously only President could refer a case to Supreme Judicial Council for misconduct of a superior court judge, however, presently the supreme judicial council can proceed against a superior court judge by receiving information from any source and that includes ordinary public.[96]The supreme judicial council has also prescribed a code of conduct to be observed by judges of superior courts.[97]

Independence of judiciary has been trumpeted a lot in the judicial decisions of last many decades in Pakistan. However, justice has been seen to be under the clout of powerful and the most influential. Statement of Justice Javed Iqbal in the missing person's case when an advocate requested the apex courts to summon heads of the intelligence agencies depicts all. Justice Javed Iqbal said that, "last time when we tried to summon them, we were sent home for almost sixteen months."[98] Former President Perveiz Musharraf facing trial for High Treason alleged in an interview that Head of Army Chief maneuvered his voyage abroad for treatment from courts.[99] Moreover, it is no hidden secret that decisions are given to gain publicity in negation of code of conduct for Judges. In suo-motto cases, the higher judiciary never calls Secretary Water and Power or the Chairman WAPDA in court responsible for load shedding or Secretary Industries for creating gross employment and Secretary Narcotics to check the menace of Narcotics addiction.[100] Never a session judge, judicial magistrate or tehsildar has been called in the court to be shouted at.[101] The masses of Pakistan are facing these menaces due to a redundant supreme judicial council which has not delivered results. The cases decided by the supreme judicial council convicting superior court judges are too few since independence of Pakistan. Moreover, secrecy is attached to the proceedings of supreme judicial council. In a recent case, seeking the activation of the supreme judicial council (SJC) and publicizing of the number of references against superior court judges, the supreme court of Pakistan held that the prayer made by the petitioner in his petition under Article 184(3) of the Constitution violates the spirit of Articles 209 and 211 of the Constitution, read with the SJC's Procedure of Inquiry.[102]

Under the 1956 Constitution of Pakistan, Judges of the Supreme Court would hold office until the age of sixty five years unless, unless they were removed from office on grounds of misbehavior, infirmity of mind or body by an order of President following an dress by the national assembly praying for such a removal. Under the 1962 Constitution, the president was to appoint a council, to be known as the supreme judicial council for removal of judges."[103] Similar pattern has been followed in the 1973 Constitution of Pakistan with the prescribed composition for supreme judicial council. The cases of removal of superior court judges are too few and that too on flimsy grounds by the dictators. On March 9, 2007 the Chief Justice of Pakistan, Iftikhar Mohammad

Chaudhry, was charged with "misconduct" and "misuse of authority" by President Musharraf and a reference was sent to the Supreme Judicial Council for a decision. However, the reference was quashed by the Supreme Court of Pakistan.'[104] The reference against Chief Justice Iftikhar Mohammad Chaudhry was set at naught by thirteen member bench of Supreme Court of Pakistan by a majority of ten to three in a judgment scribed for the majority by Justice Khalil ur Rehman Ramday, Justice Muhammad Nawaz Abbassi & Justice Ch. Ejaz Ahmad, despite the presence of immunity clause in the form of Article 211 Constitution of Pakistan which prohibited the proceedings before the council to be called in question in any Court. Thus the Supreme Court exceeded its constitutional mandate by setting at naught the presidential reference in trying to grab more powers for the judiciary. It was evident that the decision was not independently given rather was an outcome of popular demand ignoring principles of judicial independence that it also means pronouncing unpopular verdict with the people which is according to law. The Supreme Court of Pakistan inter-alia held that the suspension of a judge from office and restraining him from performing his functions amounts to his removal from office which is not permitted under the Constitution. Security of office of a judge and its tenure is a sine qua non for the independence of judiciary and even a short or brief intervention with the tenure of the office of Judge amounted to unconstitutional removal.[105] These wordings suggest that a judge accused of wrongdoing against whom a prima facie case exists cannot even be laid off temporarily on the pretext of such wrongdoing. This is a strange argument on the underpinning of judicial independence.

Superior Judiciary enjoys tremendous immunity in the form of removal proceedings of superior court judges; as such proceedings are conducted by peers of judiciary only. Moreover, no time frame is set for proceedings before supreme judicial council. Serious reform is needed relating to law for removal of superior judiciary in Pakistan. This is also imperative as Pakistan is a third world country where Superior Judiciary is more susceptible to malpractices and requires a system of checks and balances.

It is therefore proposed as follows:

a. A system similar to United Kingdom for impeachment of superior court judges may be introduced in Pakistan where the House of Commons holds the power of initiating an impeachment. 'The member of Commons must support the charges with evidence and move for impeachment. If the Commons carries the motion, the mover receives orders to go to the bar at the House of Lords and to impeach the accused in the name of House of Commons, and all the Commons of the United Kingdom. The House of Lords hears the case with the Lord Chancellor presiding. The hearing is an ordinary trial. Both sides can call witnesses and present evidence. At the end of the hearing and after all have voted, a Lord must rise and declare upon his honor, guilty or not guilty. After voting on all of the Articles has taken place, and if the Lords find the defendant

guilty, the commons may move for the judgment. The Lords cannot declare the punishment until the commons have so moved. The lords may then provide whatever punishment they find fit, within the law.'[106] In the case of Pakistan the House of Commons may be suitably amended with National Assembly and House of Lords with the Senate. Moreover, simple majority should be prescribed for National Assembly for carrying the motion.

This procedure if adopted for Pakistan will ensure transparency and checks and balances as the trial will be conducted by Senate, which will ensure an impartial tribunal in terms of the due process clause as the Senate members will not feel the bias as the judges of superior judiciary may experience in a trial against brother colleagues. Moreover, a superior court judge facing trial will have a fair chance of defending allegations against him as proper trial will be conducted by the senate. It may also be noted here that judges carry out the will of the legislators. Moreover, in a parliamentary democracy parliament is supreme, therefore, by necessary implication, power of impeachment of higher judiciary can be vested in the parliament.

Or

b. At-least the existing laws may be amended so that they also provide time frame regarding disposal of reference against judges. Moreover, proceedings before Supreme Judicial Council should be made open to general public to inspire confidence. It is a cardinal principle of justice that trails are open to public, however in Pakistan's case, in-house procedure is prescribed for removal of superior court judges which has precarious foundations as is evident from the results delivered by the supreme judicial council. To make the Supreme Court operational, at least mandatory time period should be prescribed by the legislature. Moreover, its jurisdiction should be enhanced so that supreme judicial council can also take cognizance of blatant violations of law.

Judicial Immunity and Islamic Law

The Holy Quran which is the primary source of law for Muslims mentions, 'Allah doth command you to render back your Trusts to those to whom they are due; And when ye judge between man and man, that ye judge with justice: Verily how excellent is the teaching which He giveth you! For Allah is He Who heareth and seeth all things.'[107] It is clear from the verse that mercy of Allah is with the just and anyone who departs from justice is flouting Almighty's commands. Another verse states, 'we have sent down to thee the Book in truth, that thou mightest judge between men, as guided by Allah. so be not (used) as an advocate by those who betray their trust;' [108] So judging according to the book is the limiting criteria which means that final decision rests with Quran and Sunnah of Holy Prophet (P.B.U.H). Another verse of the Quran further states, 'And this (He commands): Judge thou between them by what Allah hath revealed, and follow not their vain desires, but beware of them

lest they beguile thee from any of that (teaching) which Allah hath sent down to thee. And if they turn away, be assured that for some of their crime it is Allah's purpose to punish them. And truly most men are rebellious.'[109] These verses make it ample clear that Allah desires people to be judged as per the commandments of Quran and Sunnah and people who deviate from the desired path have been labeled rebellious. Therefore, laws should be made to the effect, so that anyone violating the commandments of Allah can be taken to task in Pakistan for violating such injunctions of Islam.

Sunnah of Holy Prophet (P.B.U.H) in Islamic Law serves as a commentary to the Holy Book. Sahih Bukhari is the most authentic account of Sunnah and it has the following extracts expounding judicial immunity explicitly.

Narrated 'Aisha: Usama approached the Prophet on behalf of a woman (who had committed theft). The Prophet said, "The people before you were destroyed because they used to inflict the legal punishments on the poor and forgive the rich. By Him in Whose Hand my soul is! If Fatima (the daughter of the Prophet) did that (i.e. stole), I would cut off her hand."[110] This tradition illustrates that there was no immunity for the noble during the times of Prophet Muhammad (P.B.U.H) and anyone violating the rules could be held accountable. The words in this reference are absolute and don't indicate any exclusion. If we see the verses of Quran and traditions of Holy Prophet closely we derive an irrefutable conclusion that judging according to book is the criteria for a meritorious decision and anyone deviating from this principle can be brought to task. Ibn Umar reported Prophet Muhammad(P.B.U.H) as saying, " Hearing and obeying are the duty of a Muslim man both regarding what he likes and what he dislikes, as long as he is not commanded to perform an act of disobedience to God, in which case he must neither hear nor obey".[111] This hadith indicates that an unjust order can be questioned and there is no judicial immunity attached to such an act. Ali reported Prophet (P.B.U.H) as saying, "No obedience is to be given in the case of an act of disobedience to God, obedience is to be given only regarding what is reputable."[112] This tradition is also clear on the point that no immunity is attracted in case of an illegal order i.e against the commandments of Allah. The difficult position of judge is also evident from the tradition of Prophet (P.B.U.H) narrated as, 'He who is entrusted with the position of judge, is slaughtered without a knife.[113] All these above references expound and indicative of the fact that an unjust decision which is not in-accordance with the Holy instructions can be challenged and there is no duty to obey such an unlawful order.

Caliphs succeeding the Prophet Muhammad (P.B.U.H) were closest to Prophet (P.B.U.H) being companions, and can be accredited with the knowledge of truest meaning of Shariah as they had been imparted wisdom by the Prophet (P.B.U.H) himself. Their understanding of Islam can be safely stated to be the best interpretation of Shariah. Caliphs of Islam were also the Chief Justices in the Islamic state. Caliph Abu Bakr is reported to have said in his very first

speech as Caliph that whenever I deviate from the commandments of Allah & Prophet (P.B.U.H) do not obey me.[114] This shows that he did not claim immunity for his decisions. He also said that judge must not give judgment in anger.[115] Thus indicating that in such a scenario judicial immunity is lifted. Caliph Umar is reported to have visited a Court in connection with his case. On seeing him, judge rose from his seat. This was seen as a weakness of the judge and the judge was dismissed.[116] This incident shows that there was no immunity for judicial officers and on deviating from the right course they must be penalized. Caliph Ali is also reported to have appeared before a Judge in connection with a private dispute in which verdict was pronounced against him.[117] A concise passage from Hazrat Ali letter to Malik al-Ashtar al-Nakha'i narrates, ' then select the best of people for the post of qadi, such as one with whom the matters do not become narrow and difficult and whom the litigants cannot infuriate. He who does not brood or greed. He who does not stop at the ordinary understandings before reaching the farthest. He who pauses at doubts and thinks. He who concedes most to arguments and does not become tired of hearing and the most perseverant in discovering the truth of facts. The most expedient when he reaches the farthest conclusion. Then frequently examine his judicial work and spend on him with bountiful hand that remove his ills and needs to people. Confer on him position that other peoples covet'.[118] The phrase that 'examine his judicial work' in the letter of Caliph Ali is indicative of the facts the verdicts of judges are liable to scrutiny. Caliph Umar ibn Khattab is credited with formation of a code of conduct for judges which establishes that there is no judicial immunity in Islam and judges must pursue the right course. It is also reported from Hazrat Umar, 'And he who is oppressed by his governor, has the right to complain to me in order to judge with justice for him. Amre Ibn al-Ass said: 0, Commander of Believers! If a commander castigated one of his subjects will you punish him? Omar said: Why not and I saw the Messenger of Allah, to whom May Allah's Blessings and peace be granted, punishing himself. In fact, the Messenger of Allah, to whom May Allah's Blessings and peace be granted, used to punish himself For instance, at Badr Battle, he went out of his position to adjust the rows. He adjusted the rows with a bladeless arrow. Then, he, may peace be upon him, passed by Sawad Ibn Ghazieh Halif al-Najjar, as he was out of the row, and he (the Messenger of Allah, to whom May Allah's Blessings and peace be granted, hit him in his abdomen by the bloodless arrow telling him (get right Sawad). He said: 0, Messenger of Allah! You have caused me pain and Allah sent you with right and justice. So, let me have my right from you (Let me punish you). Then, the Messenger of Allah, to whom May Allah's Blessings and peace be granted, uncover his abdomen and told Sawas: Take avenge Sawad. But Sawad hugged the Prophet, may peace be upon him, and kissed his abdomen. He said: What made you do that Sawad? He said:I wanted this to be the last chance in which my skin touches your, Then, the Messenger of Allah

supplicated for him with good and benefit.'[119] The illustrious examples of rightly guided Caliphs clearly demonstrate that there is no judicial immunity in Islam and a judge can be impeached if he misconducts or is guilty of negligence. There is reproach for unjustified conduct and just as upright conduct has been commended. These examples also illustrate that executive has the authority to impeach judicial officers in case of deviation from the settled principles of judicial propriety as was done by the rightly guided Caliphs by impeaching judges.

Pakistan is a predominantly Hanafite country, however, law has accommodated opinions of different fiqhs therefore in the context of Pakistan every jurist has been accorded respect. Al-Marghinini, the author of one of the Hanafi code suggests that it is necessary for a judge to be a competent witness thus laying down the ground for impeachment of judge i.e. competency as a truthful witness. He also suggests that appointing authority should refrain from appointing fasiq(one who violates commandments of Allah) as a judge.[120] Ibn Qudama, the Hanbalite jurist also postulates qualifications for a judge and mentions that a fasiq cannot be a judge.[121] Fasiq has been defined by one of the jurist to mean:

(1) (murderer), (2) (usury), (3) (adultery), (4) (sodomy), (5) (procurer's job), (6) (cuckoldry), (7) (drinking of intoxicants), (8) (Theft) (9) (usurpation), (to run away from the battle-tield), (11) (to give false evidence) (12) (disobedience to parents), (13) (despair from the mercy of Allah), (14) (to deem oneself secure from Allah's scheme.), (15) (dishonesty in measurement and weights), (16) (delaying of performance of obligatory prayer from the time wherein its performance is recommended as better), (17) (ascribing false statemennt to Allah and His Apostle), (18) (delaying performance of Hajj from the year wherein it became obligatory), (19) (to beat and torture a Muslim without justification), (20) (concealing the evidence), (21) (bribery), (22) (to exhort a cruel person or ruler to do injustice to some individual or community), (23) (preventing, and abstaining from, payment of Zakat), (24) (slandering with commission of adultery), (25) (backbiting), (26) (tale bearing), (27) (to cut off uterine relations), (28) (misappropriation of the property of an orphan), (29) (comparing back of one's wife to that of his mother), (30) (eating the flesh of swine), (31) (eating dead meat not slaughtered-.), (32) (robbery with use of criminal force), (33) (sorcery), and (34) (gambling)."[122] Some of these conditions have been extremely meticulously written and extremely relevant to our times. If 'sadiq' and 'ameen' is the criteria for members of National Assembly in Pakistan then it is proposed that 'fasiq' (debauch/corrupt) may be incorporated as a ground for impeachment of a judge in Islamic Republic of Pakistan. Hanafis and Shafis are unanimous on the view that immunity is lifted when a judge becomes 'fasiq'(debauch/corrupt) .[123] Fasiq (debauch/corrupt) may be taken to mean as one who violates the codified law in the present times so that implementation of law can be ensured. This way courts will also respect

the law and will not decide cases arbitrarily. The majority of jurists are in agreement that retaliation against qazi is a justified action in case of criminal cases and in civil cases status quo ante is to be restored. [124] The jurists of Islam donot favor granting absolute judicial immunities to qadis and have deduced, that, as per sharia law qadi can be taken to task for neglect. According to the Shafi School of law, lunacy or unconsciousness on the part of the judge, or loss of sight or of any of the intellectual or moral qualifications required, or carelessness or forgetfulness has the consequence of annulling his decrees; and it is the same where he is of notorious misconduct.[125] A judge who becomes incompetent for one of these reasons cannot resume his duties of his own accord, even where the cause of his incompetence has ceased to exist.[126] Moreover, the sovereign may dismiss any judge who appears to him to be incapable of performing his duties; or even a judge who is in every respect capable, if he can find one still more capable.[127] Inference can be drawn from this extract of Shafi jurist that in Islamic dispensation of justice, sovereign is authorized to appoint and dismiss judges which inter-alia also implies that in present times the authority to appoint and dismiss judges should lie with parliament being the sovereign in parliamentarian democracies.

Shafi jurist also specifically detail that judicial immunity is not available to judges in Islamic dispensation. The following extract is ample evidence of the fact.

'Where, after his dismissal, a judge is accused of pronouncing an unjust pecuniary award, either he was bribed or because for example he has accepted as sufficient the evidence of two slaves, legal proceedings should be taken against him for damages. An accusation is even admissible, and summons may be issued upon the evidence accepted by the judge.'[128] Thus, a judge is liable as an ordinary individual as per the Shafite School of law. Fatawa Alamgiri, one of the most prominent of the Hanafi codes also establishes that no judicial immunity is available in the Islamic dispensation of justice to the judges and they may be taken to task in case of an erroneous verdict.[129] It states that in case a judge gives a wrong verdict intentionally where rights of Allah are involved e.g. fornication, theft etc, then he will be personally liable monetarily and also liable to 'tazir'(discretionary punishment) besides impeachment.[130] In such like cases where decision is erroneous and not intentional, the judge is liable but compensation will be paid from the bait-ul-mal. Furthermore, where the rights of individuals are involved, the decision is liable for reversal and in case the verdict cannot be reversed like in cases of retaliation for murder, the judge is liable for diyat.[131] Imam al Shawkani a distinguished Hanbali jurist in his fiqh manual postulates pre-conditions for a judge giving judgments.[132] Imam al Shawkani has laid strict conditions for the conduct of Qazi/Judge but there is no mention of any retaliation or retribution in case a judge doesn't observe the conditions laid down for the conduct of a judge. It can be inferred that Imam al Shawkani laid these conditions for the conduct of a judge so that

if these conditions e.g. judge taking bribery etc. are not met than judicial immunity is lifted. Imam al Kasani, a hanafi jurist in his fiqh manual also discusses judicial immunity. In his opinion, an erroneous decision is liable to rectification by himself where rights of individuals are involved and where rights of Allah have been infringed by an erroneous decision than compensation is to be paid from bait ul mal.[133] However, Imam al Kasani has written meticulously on conditions which warrant dismissal of a judge from his office.[134] This clearly shows that some form of liability is attached to judicial actions. The jurist interpreted textual sources literally to stay close to intention of lawgiver, however keeping in view the spirit of Islam it can be safely stated that no immunity was attached to judicial actions and a judge can be taken to task for bypassing laws which in an Islamic state also have a sacred status being the commandments of Allah Almighty. Ibn Rushd (Averroes) in his famous fiqh manual bidayat ul mujtahid says that it is agreed by all jurists that fisq(corruption) leads to removal of a judge from his office, however, the judgments rendered remain valid.[135] Ibn Rushd has not defined nor elaborated the term 'fisq' in his famous manual of law which requires a detailed and precise interpretation so that judges are clear in their minds as to what path they ought not to tread.

It is strongly proposed that to implement what jurist proposed regarding judicial immunity, a forum for redressal of grievances against neglectful decisions of superior court judges may be provided by the law makers. This can be done by detailing a single suit challenging the order of superior court before an independent judicial ombudsman over sighting superior courts on the pretext that a judge erred in pronouncing decision therefore he is liable for damages as the jurist have proposed some form of liability for the judges which in present times can be accommodated by lifting judicial immunity and prescribing damages suit.

Conclusion

It is proposed that other provision of Constitution be also reformed which elevate army and judiciary to a higher pedestal particularly the provisions relating to freedom of speech. It is suggested that the repeal of constitutional Articles should be done through parliament alone as mandated in the Constitution so that constitutional mandate is not eroded. Judiciary should not undertake such an exercise of making redundant provisions of the Constitution as it is beyond their mandate and authority.

One organ of the government should not interfere with the other by usurping its powers in a sense that it starts to exercise the function of another. Appointment and removal process of superior court judges is not transparent in Pakistan. This has compromised the integrity of judiciary and it has stooped to low stratums in the eyes of masses. Efficiency and decisions according to law can only be guaranteed if Judges are appointed on merit and not on extraneous

considerations. Judges of the superior judiciary will remain on guard if they fear that bypassing law will entail their removal. This can be done by enhancing the jurisdiction of Supreme Judicial Council so that it can take cognizance of blatant violations of law. Trials before supreme judicial council should be made open to public, moreover mandatory time period should be prescribed for disposal of cases pending before supreme judicial council. It is the need of time so that judiciary can be redeemed in the eyes of people and it comes out of its past shadows when it has been rendering decisions under executive's clout or any other powerful influence.

Justice system in Islam is based on checks and balances where judges are free to dispense justice in-accordance with the book of Allah. A judge is to be removed on becoming fasiq (debauch/corrupt) meaning that he doesn't obey the mandatory commandments of Allah. Amendments should be made in the constitution of Pakistan which detail that judges will be entitled for removal on becoming fasiq(debauch/corrupt). Fasiq (debauch/corrupt) may be taken to mean as one who violates the codified law in the present times so that implementation of law can be ensured. This way courts will also respect the law and will not decide cases against the directives of law. The jurist of Islam worked on judicial immunity extensively and it is clear from their texts that there was no immunity attached to judicial actions. It is, therefore, strongly proposed that to implement what jurist proposed regarding judicial immunity, a forum for redressal of grievances against neglectful decisions of superior court judges may be provided by the law makers. This can be done by detailing a single suit challenging the order of superior court before a civil court on the pretext that a judge erred in pronouncing decision therefore he is liable for damages and his judgment for rectification. This function can also be mandated to an independent judicial ombudsman over sighting superior courts.

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