Judicial Immunity of Superior Courts Judges in
Constitutional Framework: A Case Study of Pakistan

By

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# Table of Contents

Acknowledgments ........................................................................................................... viii
Executive Summary ......................................................................................................... ix
Introduction ..................................................................................................................... xiv

CHAPTER ONE .............................................................................................................. 1
Definition and Historical Development of the Concept of Judicial Immunity .......... 1
  1.1. Introduction ............................................................................................................ 1
  1.2. Definition and the Concept of Judicial Immunity .............................................. 2
  1.3. Policy Considerations for Judicial Immunity with Countervailing Argument... 7
  1.4. Historical Development of Judicial Immunity in the Common Law
       Jurisdictions .............................................................................................................. 8
       1.4.1. Historical Development in England ............................................................. 8
       1.4.2. Historical Development in U.S.A ............................................................... 13
  1.5. Judicial Immunity in Civil Law Jurisdictions ..................................................... 19
  1.6. Historical Development in Pakistan .................................................................. 19
  1.7. Conclusion ............................................................................................................ 23

CHAPTER TWO ............................................................................................................. 25
Judicial Immunity in the Judicial System of Pakistan ............................................... 25
  2.1 Introduction .......................................................................................................... 25
  2.2 Exemption of Superior Courts from Writ Jurisdiction in the Constitution of
       Islamic Republic of Pakistan .................................................................................... 26
  2.3 Restriction on discussion in Parliament with Respect to Conduct of any Judge
       of High Court and Supreme Court ........................................................................ 36
  2.4 Power of Contempt of the Superior Courts ......................................................... 43
  2.5 Rule making powers of the Superior Courts in Pakistan ..................................... 52
  2.6 Conclusion ............................................................................................................. 57

CHAPTER THREE ......................................................................................................... 59
Appointment and Removal of the Superior Court Judges in Pakistan .................... 59
  3.1. Introduction .......................................................................................................... 59
  3.2. Appointment Process of the Superior Judiciary in Pakistan and Judicial
       Immunity .................................................................................................................... 61
3.3. Removal through Supreme Judicial Council: It’s Effect on Judicial Immunity
76
3.4. Conclusion ........................................................................................................... 86
CHAPTER FOUR ......................................................................................................... 87
Judicial Immunity in India ........................................................................................... 87
4.1 Introduction ........................................................................................................... 87
4.2 Superior Courts and Writ Jurisdiction in the Constitution of India ..................... 88
4.3 Restriction on discussion in Parliament with Respect to Conduct of any Judge of High Court and Supreme Court ........................................................................... 92
4.4 Power of Contempt of the Superior Courts ........................................................ 96
4.5 Rules making power of Superior Courts in the Constitution of India ................. 99
4.6 Conclusion ........................................................................................................... 101
CHAPTER FIVE ........................................................................................................ 103
Appointment and Removal of the Superior Court Judges in India ....................... 103
5.1 Introduction ........................................................................................................... 103
5.2 Appointment ....................................................................................................... 104
5.3 Removal of Judges ............................................................................................. 108
5.4 Conclusion ........................................................................................................... 111
CHAPTER SIX .......................................................................................................... 113
6.1 Introduction ........................................................................................................... 113
6.2 Judicial Immunity in the Times of Prophet Muhammad (P.B.U.H) ................. 114
6.3 Judicial Immunity in the times of Caliphs following Prophet Muhammad (P.B.U.H) ........................................................................................................... 121
6.4 Judicial Immunity and Muslim Jurists .................................................................. 125
6.5 Conclusion ........................................................................................................... 131
CHAPTER SEVEN .................................................................................................... 133
Conclusion and Recommendations ............................................................................ 133
7.1 Conclusion ........................................................................................................... 133
7.2 Recommendations ............................................................................................. 135
BIBLIOGRAPHY ......................................................................................................... 147
List of Books, Journal, Newspaper & Websites ......................................................... 147
List of cases ............................................................................................................... 156
### Annexures .................................................................................................................................................. 163

### Annex A .................................................................................................................................................. 163

The Judicial Officers` Protection Act, 1850\(^1\) ...................................................................................... 163

### Annex B .................................................................................................................................................. 166

Article 199 of the Constitution of Pakistan. Jurisdiction of High Court .............................................. 166
Article 68 Constitution of Pakistan. Restriction on Discussion in Majlis-e-Shoora (Parliament) ........... 169
Article 204 of Constitution of Pakistan. Contempt of Court ............................................................... 170
Article 202 of Constitution of Pakistan. Rules of Procedure ............................................................... 170
Article 208 Constitution of Pakistan. Officers and Servants of Courts ............................................. 170
Article 175-A Constitution Of Pakistan. Appointment Of Judges to the Supreme Court, High Courts and the Federal Shariat Court .......................................................... 171
Article 209 Constitution of Pakistan. Supreme Judicial Council ....................................................... 176

### Annex C .................................................................................................................................................. 179

The Judges (Protection) Act, 1985 ............................................................................................................ 179

### Annex D .................................................................................................................................................. 181

Article 32 of the Constitution of India. Remedies for Enforcement of Rights Conferred by this Chapter ............................................................................................................................................. 181
Article 226 of the Constitution of India. Power of High Courts to Issue Certain Writs ................................. 181
Article 121 of the Constitution of India. Restriction on Discussion in Parliament ..................................... 183
Article 129 of the Constitution of India. Supreme court to be a Court of Record ................................. 183
Article 215 of Constitution of India. High courts to be Courts of Record ............................................ 183
Article 145 of the Constitution of India. Rules of Court etc ..................................................................... 184
Article 146 of the Constitution of India. Officers and Servants and Expenses of the Supreme Court ..................................................................................................................................... 185
Article 227 of the Constitution of India. Power of Superintendence of High Courts over Subordinate Courts .................................................................................................................... 186
Article 229 of the Constitution of India. Officers and Servants and the Expenses of the High Courts .................................................................................................................................. 187
Article 124 of the Constitution Of India Concerning Appointment of Supreme Court Judges ................................................................. 188
Article 217 Concerning Appointment of High Court Judges in India ................................................. 191
Annex E ........................................................................................................................................... 194

Supreme Judicial Council Procedure of Enquiry 2005 (Pakistan) ........................................ 194

Annex F ........................................................................................................................................... 203

The Judges (Inquiry) Act, 1968 (India) ....................................................................................... 203

Annex G ........................................................................................................................................... 209

Article 22 Constitution of Pakistan 1956. Remedies for Enforcement of Rights Conferred by this Part ........................................................................................................................ 209

Article 170 Constitution of Pakistan 1956. Power of High Courts to Issue Certain Writs, etc. ................................................................................................................................. 209

Article 56 Constitution of Pakistan 1956. Privileges, etc., of Members of the National Assembly. .......................................................................................................................... 210

Article 176 Constitution of Pakistan 1956. Supreme court and High Courts to be Courts of Record .......................................................................................................................... 211

Article 166 Constitution of Pakistan 1956. Appointment of High Court Judges ................. 211

Article 167 Constitution of Pakistan 1956. Qualification of High Court Judges ................. 211

Article 169 Constitution of Pakistan 1956. Removal of Judges of High Court. ............... 213

Article 149 Constitution of Pakistan 1956. Appointment of Judges of the Supreme Court. ................................................................................................................................. 213

Article 150 Constitution of Pakistan 1956. Age of Retirement and Disabilities of Judges of the Supreme Court ................................................................................................. 214

Article 151 Constitution of Pakistan 1956. Removal of Judges of the Supreme Court .... 214

Annex H ........................................................................................................................................... 216

Article 98 Constitution of Pakistan 1962. Jurisdiction of High Courts. ......................... 216

Article 111 Constitution of Pakistan 1962. Privileges, etc., of Assemblies ....................... 218

Article 123 Constitution of Pakistan 1962. Contempt of Court ................................ .... 219

Article 127 Constitution of Pakistan 1962. Officers and Servants of Courts ................... 219


Article 52 Constitution of Pakistan 1962. Retiring Age. ............................................... 221

Article 92 Constitution of Pakistan 1962. Appointment of High Court Judges ............. 221

Article 94 Constitution of Pakistan 1962. Retiring Age. ................................................ 222

Article 128 Constitution of Pakistan 1962. Supreme Judicial Council ......................... 222
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Executive Summary

Revision of judicial immunity available to superior courts judges in Pakistan is extremely necessary as frequent cases of Superior judiciary have surfaced up, where deviation from the settled principles of law has been made. Justice according to law can only be ensured by guaranteeing limited judicial immunity so that judges of the superior courts remain on guard. Judicial immunities have been extended to superior judiciary within Pakistan on the pretext of independence of judiciary. Doctrine of independence of judiciary is an offshoot of separation of powers theory which entails a system of checks and balances however checks and balances have been completely ignored in the constitutional dispensation of Pakistan. The privileges available to Superior Judiciary in Constitution of Pakistan under the garb of independence of judiciary ensure that judges remain above law even in case they trespass outside the mandate of Constitution & law. The laws in pre-partition India were promulgated to serve the interests of dominion of England. Post partition, India and Pakistan were required to do away with colonial traditions of slavery and enact new laws that benefited people of both countries and enlarged their freedom. However, both the nations continued with the vestiges of the past which has made people of India and Pakistan virtually still a dependent of various institutions. Fate of people’s life and rights rests with the superior judiciary. It is therefore, the need of the
time to revise judicial immunity constitutionally in Pakistan so that accountability can also be ensured of the superior judiciary.

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. This implies that no writ can be issued to superior courts of Pakistan. 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, thereby declaring that administrative orders are not immune and infact, it is the judicial orders which were protected by virtue of Article 199(5).\(^1\) 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. It is imperative in the light of recent developments in the case law relating to judicial immunity. 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. It is proposed that following the lead in India where administrative orders are not immune constitutionally, Article 199(5) of the constitution of Pakistan may be deleted as its removal will serve the ends

\(^1\) Ch. Muhammad Akram vs Registrar Islamabad High Court & others, Cont.P no.3 of 2014, page 30-31.
of justice and bring more clarity to the law. The problems of the world in the form of terrorism are increasing day by day and all this has roots in denying justice to people who then as a last resort take up arms. All this mandates doing away with the immunity provisions.

In a functional democracy, people are supreme therefore their representative by implication should also enjoy supreme authority which necessarily includes the power to criticize higher judiciary. It is proposed that India and Pakistan should come out of past vestiges and reform the law of contempt on the pattern of America and England where criticism of judge does not amount to contempt.

It is recommended that power of promulgation of rules of superior courts may be relegated back to the parliament so that effective checks can be ensured on the workings of superior courts. It is also in-consonance with separation of powers theory and as a result thing would be put in their proper perspective. This would also curtail the legislative tendencies as seen in Pakistan of the superior judiciary. Delegated legislation in Great Britain is controlled by the parliament and taking lead from the example of Britain such secondary legislation may be considered to be given in the hands of parliament in the interest of justice, equity and fair play.

In Pakistan judicial independence has been taken to mean independence from everything under the sun. Thus judicial integrity has been compromised as malpractices have crept in due to absence of checks and balances on the Superior Judiciary. Integrity of judiciary can only be ensured if judicial immunities
are kept to a minimum and transparency is guaranteed in appointment and removal process of superior court judges. Numerous other professionals such as physicians, attorneys and police officers' carry out their responsibility effectively with the threat of lawsuits ever present.\textsuperscript{2} To correct the anomaly, judges of superior courts must be subjected to extremely limited immunity so that accountability is ensured of every organ of the state. A review of other Commonwealth jurisdictions reveals that parliamentary oversight is now commonplace not only in the appointment of judges but also in their removal. It is therefore strongly recommended that such a manner should also be adopted in Islamic Republic of Pakistan.

Islamic law has special reference in the context of Pakistan. Article 227 of the Constitution of Pakistan postulates that all laws promulgated must be in-accordance with Quran and Sunnah. A judge is to be removed on becoming fasiq meaning that he doesn’t obey the mandatory commandments of Allah. This is a mandatory provision in Islamic law only applicable to judges. Islam doesn’t grant immunity to anyone except the Prophet of Allah (P.B.U.H). Everyone is to be judged as per his deeds. It is therefore proposed that during the elevation of judges they are to be checked whether they obey the mandatory commands of Allah and are imbued with the basic knowledge of shariah. Moreover, amendments should be made in the constitution of Pakistan which detail that judges will be liable for removal on becoming fasiq. Fasiq should interalia mean, pronouncing an erroneous decision

which is not inconformity with commandments of Allah. Sharia does not favor granting absolute immunity to judges and there is liability in case of deviation from normal course of law as enforcement and upholding of law is a sacred duty for judges under Islamic law because of religious nature of the law in Islamic state.
**Introduction**

Judicial reforms have not been thought and considered so far by limiting judicial immunity for superior court judges for improved judicial functioning. Justice according to law can only be ensured by guaranteeing limited judicial immunity so that judges of the superior courts remain on guard and construe law strictly by implementing it in its true letter. Revision of judicial immunity available to superior court judges in Pakistan is extremely necessary as frequent cases of Superior judiciary have surfaced up, where deviation from the settled principles of law has been made. There is no dearth of such like cases in Pakistan and even former Prime Minister of Pakistan Zulfikar Ali Bhutto faced the predicament. Z.A Bhutto was charged and convicted by the superior courts of the country for the murder of Nawab Muhammad Ahmad. In an unprecedented move, his trial was conducted before the Lahore High Court and not the Sessions Court though such powers have been provided in section 526 Code of Criminal Procedure. As per the established practice of High Court at that time, cancellation of bail was to be entertained by the same judge who had granted bail to Mr. Bhutto however his cancellation of bail was fixed before a bench that did not include Mr. Samdani who had originally granted bail to the former Prime Minister.3 Due to presence of military orchestrated judiciary and non-expectation of any relief, the accused council seems to have preferred to do away with the idea of preferring any challenge to these orders. Dr. Naseem Hassan Shah, a Justice of the

Supreme Court of Pakistan, who was part of the conviction verdict of death sentence to the former P.M has in his book ‘Memoirs and Reflections’ stated that he tried to convince other judges from different provinces other than Punjab who were in favor of acquittal, to give death sentence to Mr. Bhutto and in consequence the judges from province of Punjab constituting the majority will award lesser sentence to Mr. Bhutto. This proposal was not agreed to and consequently Z.A Bhutto was hanged in a trial divided by four to three judges. Three judges from smaller provinces who represented the rest of Pakistan did not concur with the majority and had favored acquittal. It is also stated by Dr. Nasim Hasan Shah in his book that counsel for Mr. Bhutto was also requested during trial to address the Court on mitigation circumstances for reducing sentence, however Mr. Yahya Bakhtiar, counsel of the accused did not take heed hence this was also the reason for death sentence to Mr. Bhutto.4

In an unreported case, disposing of bail petition titled, *Salman Zeb v State*,5 the Chief Justice Peshawar High Court, Peshawar Dost Muhammad Khan granted bail to the accused and converted charge of murder into one 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 firm 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 verified by the

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National Forensic Science Agency to be of the deceased Shehryar. However, the Peshawar High Court held 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. The Peshawar High Court in this case discussed the merits of the case which is a practice not approved by the Supreme Court at bail stage. The foster father of the deceased victim has since died in grief over the deceased. The complainants being disgusted from long length of litigation and cost of litigation did not prefer any appeal to Supreme Court of Pakistan.

_Muhammad Sajid etc. v Government of North.West.Frontier.Province and others_, is a recent unreported case, 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 pronounced by the division bench of Peshawar High Court by consensus in a judgment authored by Justice Rooh ul Amin Khan 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, Peshawar High Court also ruled that the orders of High Court are immune to challenge under Article 199 (5) of

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6 Ibid.
the Constitution of Islamic Republic of Pakistan.\textsuperscript{8} 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 still remains pending before the Supreme Court. A report reveals that many persons on death row are juveniles.\textsuperscript{9} Ordinary superior courts of the country have failed that is why a need arose for the Army Courts to convict terrorists in Pakistan. The decision of army courts is reviewable before Supreme Court on extremely limited grounds \textit{i.e.} \textit{coram non judice}, being without jurisdiction or suffering from mala fide.\textsuperscript{10} Ordinary courts could have been invested with the powers to try terrorists by improved legislation but the law makers have not trusted the judicial system of Pakistan. This situation can be remedied by empowering local courts by granting them similar powers as army courts and lifting their immunity so that in case of an erroneous decision they could be taken to task. This would make the judges wary and they would not let go terrorists easily. Supreme Court in one case upheld the death penalty of a schizophrenic patient.\textsuperscript{11} There are other cases where right to recourse to law of poor litigants was completely circumvented on flimsy grounds. One example is \textit{Muhammad Zaman and others versus Government of Pakistan and others},\textsuperscript{12} other is

\textsuperscript{8} Ibid.


\textsuperscript{12} \textit{Muhammad Zaman and others versus Government of Pakistan and others}, 2017 SCMR 571.
Shafique Ahmad Khan and others versus NESCOM and others,¹³ wherein right of government employees seeking reliefs effecting their rights before superior courts was curtailed by declaration that rules are non-statutory when they pertain to internal control and management and their scope was not broader or complementary to the main statute.¹⁴ This interpretation was made despite the fact that no such sanction for it is present in statutory law which shows the malady in superior courts of interpreting the statutory provisions whimsically and beyond the mandate of statute. These two judgments changed the previous law on the subject relating to statutory and non statutory rules and further curtailed its scope thus denying relief to millions of government servants who can now only file suit for damages if meted with wrongful treatment. Similarly provisions of preemption law for proof have been made equivalent to criminal case despite no sanction being there in law thus a valuable right has been made redundant by the superior courts.¹⁵ The legislative tendencies despite there being no sanction in law are manifest in superior court judgments in Pakistan.

These are just a few instances affecting fundamental rights and statutory 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 rights of the citizens bypassing constitutional and statutory law. 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,

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¹³ Shafique Ahmad Khan and others versus NESCOM and others, PLD 2016 SC 377.
¹⁴ Ibid.
deviation from the normal course of law was made *e.g.* five member bench of
Supreme Court in *Zafar Ali Shah case*,\(^{16}\) unanimously authorized the military
authorities to amend the constitution. The judgment was authored by Justice Irshad
Hassan Khan.\(^{17}\) Inherent powers of courts to do justice are limited by law and this has
been frequently held by superior courts while interpreting article 187 constitution of
Pakistan and 151 C.P.C pertaining to inherent powers of court that such powers are
subject to law and courts mandate does not extend to rectifying any decision of court
which has been passed erroneously or against the dictates of law. Never has been such
a power exercised in Pakistan on the pretext of annulling any judgment of court of
law. It was held in the case of *Sheikh Khurshid Mehboob Alam Vs Mirza Hashim Baig
And Another*,\(^{18}\) that, “Supreme Court would sparingly exercise its jurisdiction under
Art.187 of the Constitution, but not in a case when a legal remedy would be available
to a party praying for exercise of such power.” Proceedings before the superior courts
can fail causing gross injustice and article 187 of the constitution of Pakistan in this
regard does not afford adequate relief. It has also been held by the Supreme Court in
the case of *Syed Shabbar Raza Rizvi And Others vs Federation Of Pakistan, Ministry
Of Law And Justice Division Through Secretary, Islamabad And Others*,\(^{19}\) that,
“Article 184(3) could not be exercised as a parallel review jurisdiction when decision

\(^{16}\) *Syed Zafar Ali Shah and others vs Perviez Musharraf and others*, PLD 2000 SC 869.
\(^{17}\) Ibid.
\(^{18}\) *Sheikh Khurshid Mehboob Alam Vs Mirza Hashim Baig And Another*, 2012 S C M R 361
\(^{19}\) *Syed Shabbar Raza Rizvi And Others vs Federation Of Pakistan, Ministry Of Law And Justice
Division Through Secretary, Islamabad And Others*, 2018 S C M R 514
has been rendered on such review.”\(^{20}\) Thus article 184(3) is also not relevant for the purpose of correcting an illegality or an erroneous judgement.

Judicial immunities have been extended to superior judiciary within Pakistan on the pretext of independence of judiciary. Doctrine of independence of judiciary is an offshoot of separation of powers theory which entails a system of checks and balances however checks and balances have been completely ignored in the constitutional dispensation of Pakistan. In U.S.A, all the three organs of government operate as a check on other organs e.g. presidential veto of legislation, judicial review of executive actions and judicial impeachment by congress.\(^{21}\) The privileges available to Superior Judiciary in Constitution of Pakistan under the garb of independence of judiciary ensure that judges remain above law even in case they trespass outside the mandate of Constitution & law. The laws in pre-partition India therefore were promulgated to serve the interests of dominion of England. Post partition, India and Pakistan were required to do away with colonial traditions of slavery and enact new laws that benefited people of both countries and enlarged there freedom. However, both the nations continued with the vestiges of the past which has made people at large of India and Pakistan virtually still a dependent of various institutions. Fate of people’s life and rights rests with the superior judiciary. It is therefore, the need of the time to revise judicial immunity constitutionally in Pakistan so that accountability can also be ensured of the superior judiciary.

\(^{20}\) Ibid.
The methodology employed for researching the topic in hand was mainly case law analysis and historical research. The research initially details various definitions of the concept of ‘judicial immunity’ and presents a brief historical account of the development of the concept in the West and South Asia. Then the discussion proceeds to available judicial immunities in Pakistan and its comparison with India. Finally judicial immunity in light of Islamic edicts is discussed and conclusions are drawn in favor of a limited judicial immunity.
CHAPTER ONE

Definition and Historical Development of the Concept of Judicial Immunity

1.1. Introduction

An impartial judiciary is the cornerstone and one of the fundamental pillars of an independent and sovereign state in all legal systems. It is true that the judiciary keeps a check on the executive and the legislature but at the same time a check on the powers exercised by the judiciary is absolutely necessary. Thus the three organs of the state should be able to check the powers exercised by the others. It is to this end that a check on the superior judiciary is imperative. The consequences of a reformed superior judiciary will trickle down towards inferior courts which in effect will also work properly to the satisfaction of masses. Thus the issues in the lower judiciary can be easily remedied through a limited judicial immunity for superior judiciary as by this way superior judiciary will have a stronger check on the working of lower courts by annulling their verdicts. The whole process of improved, impartial and independent judicial functioning has roots in curtailing judicial immunity for superior judiciary. Appellate processes and also the original jurisdiction vested in the superior courts can fail as humans are fallible. Therefore, the revision of judicial immunity is of utmost importance. It is not rare that superior judiciary has trespassed its mandate in Pakistan and later reviewed its decisions; therefore, initially this chapter will study history of judicial immunity in
Pakistan and some other jurisdictions so that reforms can be proposed on judicial immunities available to superior court judges in a meaningful way.

This chapter explores the definition and concept of judicial immunity along with its historical development to underscore the importance of extremely limited judicial immunity. Justice Holmes had remarked,

“The rational study of law is still to a large extent the study of history because without it we cannot know the precise scope of rules. It is a part of the rational study, because it is the first step toward an enlightened skepticism, that is, toward a deliberate reconsideration of the worth of those rules” \(^22\)

Therefore, before proceeding further, a study of history is mentioned and then the study will shift to the real worth of the rules on judicial immunity for masses especially in a country like Pakistan where intellectual and moral corruption is rampant.

1.2. Definition and the Concept of Judicial Immunity

Immunity in general is defined as, “a personal favor granted by law contrary to the general rule. A privilege or special privilege; a favor granted, and affirmative act of selection of special subjects of favor not enjoyed in general by citizens under Constitution, statute or law.” \(^23\) Black’s Law dictionary defines

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judicial immunity as, “the immunity of a judge from civil liability arising from the performance of judicial duties.”  

24 Advanced Law Lexicon defines judicial immunity as, “the exemption of a judge or magistrate from personal actions for damages arising from the exercise of his judicial office. The immunity is absolute in respect of all words or actions of the judge while acting within his jurisdiction and extends to acts done without jurisdiction provided that they were done in good faith.”  

25 In the American Jurisdiction, the definition of judicial immunity has been postulated in many ways. Clay, Gilman, and Mckeague, Circuit Judges held jointly in Dixon v. Clem, 26 that, “judicial immunity is short hand for the doctrine of absolute immunity that operates to protect judges and quasi-judicial officers alike from suit in both their official and individual capacities.”  

27 Justice Mcgraw along-with Judge John A. Hutchison excluding Justice Davis who did not participate in judgment, in Kaufman v. Zakaib, 28 laid down that, “judicial immunity protects a judge from suit for any of his or her official actions as a judge.”  

29 Expanding the doctrine of judicial immunity, Mark R. Kravitz in Greene v. Wright, 30 authored that, “under the judicial immunity doctrine, Judges who act within their judicial capacity are immune from suit for money damages, so long as they do not act in the clear absence of jurisdiction.”  

31 Judge Sharp in the case of Sims v. Marnocha, 32 has held that, “judicial immunity doctrine affords state judges absolute immunity

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26 Dixon v. Clem, 492 F. 3d 665 (6th Cir. 2007).
27 Ibid.
29 Ibid.
31 Ibid.
for past judicial acts regarding matters within their court’s jurisdiction, even if their exercise of authority is flawed by commission of grave procedural error.”

Moreover Judge Warren in Wickstrom v. Ebert, said that, “judicial immunity doctrine provides that judges are immune from suit for judicial acts within or in excess of their jurisdiction even if such act had been committed maliciously or corruptly; sole exception to such cloak of immunity is for act done in clear absence of all jurisdiction, as opposed to acts merely in excess of jurisdiction.”

The doctrine of judicial immunity first finds mention in the decisions of Sir Edward Coke of early seventeenth century. The two decisions of Lord Coke in Star Chamber, Floyd & Barker and the verdict of the Marshalsea, laid the basis for the doctrine of judicial immunity. Coke’s reasoning for judicial immunity is constructed on four public policy aims which are the jurisprudential basis of judicial immunity till now. These are:

1. Need for finality of ruling;
2. Judicial independence;
3. Freedom from repeated calumniations; and,
4. Respect and confidence in the judiciary.

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33 Ibid.
35 Ibid.
Coke in the case of *Floyd & Barker* has stated that, “a judge is immune for anything done by him as a judge.” Explaining the doctrine of judicial immunity, “Marshalsea is a case wherein Coke denied a judge, immunity for presiding over a case in assumpsit. Assumpsit in common-law means an action for recovery of damages for breach of contract. Coke in this case proceeded to explain the operation of jurisdiction requirement for immunity: He reasons that when a Court has jurisdiction of the cause, and proceeds erroneously, then the party who sues, or the officer or minister of the Court who executes the precept or process of the Court, no action lies against them. But when the Court has no jurisdiction of the cause, then the whole proceeding is before a person who is not a judge, and actions will lie without any regard of the precept or process. Though coke limited the doctrine of judicial immunity by this precedent, however, Coke further suggested that there was a presumption of jurisdiction and that the judge must have been aware that jurisdiction was lacking.”

Later, following the lead from this judgment, judicial immunity was conferred on all actions within the jurisdiction of Court. It was held that at common law, immunity extends to all decisions taken within the judge’s very wide jurisdiction even if actuated by malice or corruption.

Judicial immunity has no-where been defined by Pakistani courts until now. Commenting on judicial immunity, the five member bench of Indian Supreme Court, in *K. Veeraswami v Union of India and Others*, has held that,

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41 Anderson v Gorrie [1895] 1 Q.B. 668.
“there are various protections afforded to judges to preserve the independence of the judiciary. They have protection from civil liability for any act done or ordered to be done by them in discharge of their judicial duty whether or not such judicial duty is performed within the limits of their jurisdiction, as provided under section 1 of Judicial Officers Protection Act, 1850. Likewise, section 77 of the Indian Penal Code gives them protection from criminal liability for an act performed judicially. A discussion on the conduct of the judges of the Supreme Court and the High Courts in the discharge of their duties shall not take place in Parliament or in the State Legislatures, as envisaged by Articles 121 and 211 of the Constitution. The Supreme Court and the High Courts have been constituted as Courts of Record with the power to punish for committing contempt as laid down by Articles 129 and 215. The Contempt of Courts Act, 1971 provides power to take civil and criminal contempt proceedings. The executive is competent to appoint the judges but not empowered to remove them. The power to remove is vested in Parliament by the process analogous to impeachment as envisaged by Article 124 of the Constitution”.43 This was also held in this judgment by the majority view that superior court judges are ‘public servants’ and liable like all other citizens of India under the Prevention of Corruption Act, 1947.44 Justice Shetty authored this judgment for the majority. The case was dismissed by a majority opinion authorizing criminal prosecution against a superior court judge with a single dissent in favor of acceptance of appeal.

43 Ibid.
44 Ibid. 655, 658.
Policy Considerations for Judicial Immunity with Countervailing Argument

“Foremost argument that is offered in defense of judicial immunity is the ‘independence of judiciary’. It is reasoned that for proper administration of justice, judicial immunity is indispensible as without judicial immunity, litigant parties may intimidate judges in performing their functions and ultimately into subjection to their views. However, if judges could be held liable in cases involving flagrant violation of law or abuse of power, judiciary may be deterred from acting as such. This could be seen as furthering the cause of justice rather than underpinning the administration of justice.”\(^45\)

“A second argument that is proffered in favor of judicial immunity is this that lawyers would be deterred from becoming judges if immunity is removed or curtailed. This argument also does not seem plausible as comparable immunity was available to barristers in England which is not available now but people still choose to become barristers. There are considerable emoluments attached to the office of judges which will always attract the attention of public to become judges.”\(^46\)

“A third justification that is offered in favor of judicial immunity is that to have finality of court decisions judicial immunity is necessary. This reason can be controverted by the fact that to curb frivolous litigation against judges’ heavy


\(^ {46} \) Ibid, 465.
costs can be imposed as per the dictates of law. Moreover correction in abuse of law is in the interest of justice and equity.”

“The fourth reason advanced is that for ensuring dignity of judiciary, judicial immunity is indispensible. However, in present times, dignity lies in presenting oneself for accountability.”

Supreme Court in Pakistan has ruled that superior judiciary accounts will not be subjected to audit by outsider. This creates doubts about the integrity of judiciary. To enjoy dignity in present times, it is necessary that one subjects itself to accountability. This is only possible by way of a qualified judicial immunity.

“Other reason that is advanced for judicial immunities is that there are other channels of accountability against judges. This reason can be countervailed by the argument that, ‘the power to remove a judge from office or censure for that matter, offers little comfort to the man who suffers imprisonment as a result of an improper refusal of bail or leave to appeal or who is convicted by virtue of a deliberate misdirection’. Moreover a deliberate wrongdoing must be accompanied by an appropriate remedy.”

1.4. Historical Development of Judicial Immunity in the Common Law Jurisdictions

1.4.1. Historical Development in England

In initial English Laws, the proceedings of appeal from one court to a higher Court were completely unknown. A litigant challenged the correctness

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48 Ibid, 468.
49 Ibid, 470-472.
of a decision by an accusation against the judges. The Anglo-Saxon Law of the tenth and eleventh century detailed that a judgment could be challenged by accusing the judge with falsehood. By this process, a litigant obtained a writ causing the challenged Court to produce its record before a superior lord. This record could be challenged by anyone willing to engage in physical combat with the judge of the challenged Court. In case of success, the lower court’s judgment was cancelled and corrected. The doctrine of judicial immunity in England developed in close proximity with the appeal system. When the appeal system developed, there was a need felt to not to attack the source of judgments i.e. judge even in case the judgment was fraudulent or based on ill will. This dissertation will inter-alia propose that the wrong committed by a superior court judge may be treated as an individual wrong rather than a public wrong being final courts of appeal and judicial immunity may be lifted for a third world country like Pakistan in interest of justice so that judges may be held responsible for their wrongs committed against the individual. A mechanism for this will be proposed in the seventh chapter. Presently the wrongs committed by the superior courts around the world are treated as public wrongs and their amends is through public impeachment methods rather than recompensing the individual concerned who has been wronged.

Courts of Record could not be held civilly and criminally liable by a litigant party even in case of abuse of jurisdiction till Edward III.'s reign [1326-

1377]. This can be gleaned from a case reported in one of the books of Assizes, which runs as follows: J de R was accused as a judge. He was a justice to hear and terminate felonies and trespasses. Certain persons were indicted for trespass whereas he made an incorrect entry in his record that they were indicted for felony. The judge was tried for this omission and answers the accusations against him. It was finally decided that this presentment against the judge was bad and the only recourse open to the suitor in such a case was to attack the legal conclusions in the record by writ of error, founded either on the record or on a bill of exceptions to a ruling of the judge.\footnote{Ibid, 884.} Thus absolute judicial immunity was attached to judge’s action and only recourse open to a disgruntled litigant was by way of an appeal.

The foremost reported case on judicial immunity in England is \textit{Floyd vs Barker},\footnote{\textit{Floyd vs Barker}, 77 Eng. Rep. 1305.} wherein judge Coke held that courts of record (superior courts) were immune. It was held that, in the event that the legal matters of record agitated repeatedly, there never will be end of causes and the controversies will surface continually; \textit{et infinitum in jure reprobatur}.\footnote{Ibid.} Coke also stated that a judge is immune for anything done by him as a Judge.\footnote{Ibid.} This opinion was undercut in subsequent case known as \textit{The Marshalsea Case},\footnote{\textit{Marshalsea Case}, 77 Eng. Rep. 1027.} wherein this was held that lack of subject matter jurisdiction makes a judge liable for the consequences of his judicial acts.\footnote{Ibid.}

The root decision in English History explaining judicial immunity of superior court judges is \textit{Hamond v Howell},\footnote{\textit{Hamond v Howell}, (1674) 1 Mod Rep 119.} wherein this was held that being a
superior court of record; the superior court judge was not liable in damages.\textsuperscript{59} The prelude to \textit{Hamond v Howell} Case is Bushell’s Case.\textsuperscript{60} It is the trial of the Quakers, William penn and William Meade. They were tried at the court of Oyer and Terminus at the Old Bailey before the Lord Mayor and the Recorder. The Recorder of London in his verdict instructed the jury that in point of law the Quakers were guilty. The jury didn’t comply with the direction and absolved the Quakers of the charge. The recorder imposed 40 marks apiece on the jury. On non-payment by the jury of the levied fine, Recorder of London committed the jury to prison. The jury then brought a writ of habeas corpus against the recorder. The judgment in writ against jury members expressed that, no judge had any right to fine or imprison a jury for disobeying his direction in point of law, for every case depended on the facts and of the facts the jury was the sole judge. The jurymen were released by this verdict.\textsuperscript{61} Afterwards, one of the jurymen named Hamond brought an action against the Lord Mayor and the recorder for false imprisonment.\textsuperscript{62} Counsel for the jurymen cited \textit{the Marshalsea Case} and argued that a justice of peace and a constable were liable when they exceeded their jurisdiction so if a judge of Nisi Prius doth anything not warranted by his commission it is void. The Court of common pleas rejected the argument and held that, “though the defendants were mistaken yet they acted judicially and for that reason no action will lie against the defendant.”\textsuperscript{63} The same principle has been recognized in \textit{Miller v Seare}.\textsuperscript{64} This was held in this case that, “in all the cases where protection is given to the judge giving

\textsuperscript{59} Ibid.
\textsuperscript{60} \textit{Bushell’s Case}, (1670) Vaugh 135.
\textsuperscript{61} Ibid.
\textsuperscript{62} \textit{Hamond v Howell}, (1674) 1 Mod Rep 119.
\textsuperscript{63} \textit{Hamond v Howell}, 2 Mod Rep 220-221.
\textsuperscript{64} \textit{Miller v Seare}, (1777) 2 Wm Bl 1141-1145
an erroneous judgment, he must be acting as judge. The protection in regard to the superior courts is absolute and universal; with respect to the Inferior, it is only while they act within their jurisdiction.”  

The same principle was affirmed in Taaffe v Downes, and in an action against Blackburn J, Fray v Blackburn, where Crompton J said, “no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously or corruptly.” In Anderson v Gorrie, a suit against three judges of the Supreme Court of Trinidad and Tobago for wrongfully committing the plaintiff for contempt and taking too much bail from him. The jury maintained that one of the judges had acted oppressively and maliciously. Lord Esher MR said, “to my mind there is no doubt that the proposition is true to its fullest extent, that no action lies for acts done or words spoken by a judge in the exercise of his judicial office, although his motive is malicious and the acts or words are not done or spoken in the honest exercise of his office.” The view that superior courts are absolutely immune when acting judicially has been maintained by superior courts in England till now.

The modern landmark judgment on judicial immunity in England is Sirros v Moore and others, authored by Lord Denning. The details of the case are that the plaintiff, who was a citizen of Turkey, was produced before a Magistrate for breach of the Aliens Order, 1953. The magistrate fined him £50 and made a recommendation for deportation, however it was also directed that the plaintiff should not be detained pending the Home Secretaries decision regarding

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65 Ibid.  
66 Taaffe v Downes, (1813) 3 Moo PCC 36.  
67 Fray v Blackburn, (1863) 3 B & S 576-578.  
68 Anderson v Gorrie, [1895] 1 QB 668-671.  
69 Ibid.  
70 Sirros v Moore and others, [1974] 3 ALL ER 776.
the deportation. On appeal to the Crown Court, the plaintiff was detained and denied bail and it was held that the Court had no authority to hear an appeal against a recommendation for deportation and announced the Court decision that the appeal is dismissed. The next day, plaintiff moved for writ of habeas corpus, which was decided in favor of the plaintiff by the division bench. Then the plaintiff moved to the Court of Appeal, civil division with a writ claiming damages of physical attack and false incarceration against the defendants, Circuit judge and the Police Officers, who had acted on the judge's orders in detaining the plaintiff. The Court of Appeal held that as the circuit judge was acting judicially and under the honest belief that his act was within his jurisdiction although in consequence of a mistake of law or fact, what he had done was outside his jurisdiction, therefore, the judge was protected from liability in damages.\(^71\) The courts in England have leaned towards judicial immunity to end the litigation once for all however, a chance could have been provided to litigating parties to redeem their stance by preferring accusation against a judge.

1.4.2. Historical Development in U.S.A

Doctrine of judicial immunity in America was inherited from the British common law.\(^72\) The other jurisprudential base for judicial immunity besides finality of judgments is judicial independence.\(^73\) The model code of judicial conduct postulated by the American Bar Association adopted by many states of America while elucidating judicial independence holds that, “judges to avoid

\(^{71}\) Ibid, 776–797.


\(^{73}\) Ibid.
impropriety and the appearance of impropriety and perform their duties impartially and diligently.” It is averred in this dissertation that since impartial judicial decision making has been compromised in Pakistan, therefore, judicial immunities may be lifted in the interest of masses and justice and this will not affect judicial independence as real connotation of judicial independence is promotion of impartial decision making which will be benefited by the lifting of judicial immunities. The foremost reported American cases involving judicial immunity are Ross v. Rittenhouse, Lining v. Bentham, Brodie v. Rutledge and the Connecticut Supreme Court's 1804 decision in Phelps v. Sill upholding judicial immunity on pretext that cases are not agitated repeatedly just like the case of England. Thus the doctrine of judicial immunity in England seems to have travelled to U.S.A where the judicial immunity has been given the same sanctity as in Great Britain. In Brodie v. Rutledge, wherein deceased Justice Rutledge was sued for libel, it was held by the Court that, "no suit will lie against a judge for any opinion delivered by him in his judicial capacity, either supreme or subordinate". Following these earlier cases, a significant decision describing judicial immunity and its scope was Randall v. Brigham in 1868. In this case, plaintiff Randall brought a suit against judge Brigham for unlawful removal as an advocate from the

74 Ibid.
75 Ross v. Rittenhouse, 2 Dall. 160 (Pa. 1792).
rolls and sought monetary relief. The court in its opinion discussed the importance of absolute judicial immunity and articulated that judges require the ability to make decisions freely without needing to consider the personal effects of those decisions in order for the judicial processes to work properly. The court also determined that judges are not answerable to civil suits for their judicial performances even when such acts are beyond their jurisdiction or done maliciously or corruptly. Three years later, the Supreme Court of U.S again addressed the application of absolute judicial immunity in Bradley v. Fisher. In this case, Bradley sued Judge Fisher and sought monetary relief stemming from Judge Fisher's actions debarring Bradley from practicing before the Supreme Court of District of Columbia. The Court once again upheld absolute judicial immunity and observed that judges are immune from all civil liability unless they have negated all jurisdictions and acted maliciously or corruptly. Additionally, the Court emphasized that judges who could not be held civilly liable in light of judicial immunity, could still face sanctions or impeachment.

The most notable of the modern cases discussing judicial immunity are Stump v. Sparkman, Forrester v. White and Mireless v. Waco.

82 Ibid.
83 Ibid.
84 Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872).
85 Ibid.
86 Ibid.
a. Stump v. Sparkman⁸⁸

U.S Supreme Court pondered on judicial immunity in general for all classes of judges in the case of *Stump vs Sparkman* decided in the year 1978. Justice White authored the majority opinion in this judgment for concurring five judges which was dissented by four judges. One judge did not partake in the decision of the case. The facts of the case are that one Ora McFarlin mother of fifteen-year-old Linda Sparkman instituted a case before judge Stump praying therein that her daughter Linda Sparkman be sterilized through a process of tubal ligation. She cited concerns for her daughter alleging that her daughter had been spending night outs with men therefore judge should allow tubal ligation to be performed on her daughter. Judge Stump without calling for any further evidence in the matter allowed Ora MacFarlin to perform tubal ligation on her daughter. The mother then without informing the daughter about the whole affair surreptitiously got performed tubal ligation on her daughter Linda Sparkman so that she will not be able to conceive ever. Linda Sparkman later trying to conceive after marriage came to know about the whole process of tubal ligation performed on her. She sued judge Sparkman for the wrong done to her. The U.S Supreme Court held that judge Sparkman was immune and no action was maintainable against him. The Supreme Court of U.S.A maintained that the act of Stump was a judicial act and not in complete absence of all jurisdictions therefore immunity was attached to the action

of judge Stump.\textsuperscript{89} The majority of judges in this case while elucidating judicial act defined it as one where court facilities are utilized and formal proceedings held.\textsuperscript{90}

This case is a clear example of how judicial immunity can cause gross injustice. The whole process of tubal ligation was carried out on Sparkman against the settled principles of law without consent of Sparkman and the judge got away on the pretext of judicial immunity. “The petition was granted the day it was presented in an exparte proceedings without a hearing, moreover, neither the petition nor the order were ever filed or recorded; no notice was given to Sparksman nor was a guardian ad-litem appointed.”\textsuperscript{91}

\textbf{b. Forrester v. White}\textsuperscript{92}

In this case, U.S Supreme Court considered whether the administrative orders of judges were immune. Justice O’Connor delivered the view of the Court. The facts of the case are that, a judge in Illinois under authority of law hired a probation officer and later fired the same. The fired probation officer brought a suit against the judge for violation of his rights by the removal. The U.S Supreme Court inter-alia in this case considered judicial immunity and held that

\textsuperscript{91} Ibid,113.
\textsuperscript{92} Ibid,161.

administrative orders of judges were not immune and only the judicial orders were protected by the doctrine of judicial immunity.93

Following the lead in other countries like U.S and India, Supreme Court of Pakistan in a recent case titled *Ch. Muhammad Akram vs Islamabad High Court and others*,94 after overruling nearly all the previous law on judicial immunity in Pakistan by holding it per in curiam ruled that administrative order of superior courts is not immune.95

c. *Mireles v. Waco*96

In this case again suit was brought against a judge for alleged mistreatment of the suitor by the police on the orders of the judge. The adjudicating court held that that judge was immune and no action would lie against him. Court while elucidating judicial immunity held that the doctrine of judicial immunity will lift only in the case where the action of judge was not a judicial act and was without jurisdiction.97

This case also sets a bad precedent that even if judge of a superior court breaches law, he or she is immune. Such a stand may be really frustrating for

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94 *Ch. Muhammad Akram vs Islamabad High Court and others*, Const.p.no 3/2014.

95 Ibid.

96 Ibid.

97 Brittney Kern, “Giving new meaning to ‘Justice for All’: Crafting an Exception to Absolute Judicial immunity” by Brittney Kern, 2014, p.163. 
disgruntled litigants whose rights are trampled as they are left with no other forum to redress their misery.

1.5. Judicial Immunity in Civil Law Jurisdictions

‘Historically civil law jurisdictions e.g. Germany and France don’t accord sanctity to principle of judicial immunity. Civil law jurisdictions rely on codified law and do not blindly follow precedents. Any breach in statutory law in amenable to liability against judges. A judge must be sued personally in France and state is also liable to pay damages. Germany has a more safer principle with regard to state liability where employing body is liable in case of gross negligence and willful disregard by the judge but can reimburse the damages from the judge. Generally under the Prussian code of procedure the judge is liable personally to the party who has been wronged by breach of law.’

These principles could have been adopted keeping the interest of masses and preserving the dictates of Article 175 of the Constitution of Pakistan for the dominions of Pakistan and India if the constitution makers had been alive to the situation in securing independence for people.

1.6. Historical Development in Pakistan

Pakistan inherited the colonial Judicial Officers Protection Act, 1850 for the undivided India which provides for the immunity of judges. It lays down as follows:

"An Act for the protection of Judicial Officers

Preamble. For the greater protection of Magistrates and others acting judicially; It is enacted as follows: –

1. Non-liability to suit of officers acting judicially, for official acts done in good faith, and of officers executing warrants and orders. No judge, magistrate, justice of the peace, collector or other person acting judicially shall be liable to be sued in any civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction: Provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of; and no officer of any Court or other person, bound to execute the lawful warrants or orders of any such judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any civil Court, for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same.99

This Act catered for civil immunity of judges. To provide the judges additional immunity against criminal trials, Section 77 of the Pakistan Penal Code, 1860 laid down as follows: -

"Nothing is an offence which is done by a judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law".100

99 Judicial Officers Protection Act, 1850, Act No. XVIII of 1850.
100 Section 77, The Pakistan Penal Code, XLV of 1860.
Thus Pakistan has also inherited the colonial principle of judicial immunity which the Britishers on reaching our shores bequeathed to us and maintained by the native Indians with the same sanctity till now. There is no reported precedent of a Suit being filed against a judge for any wrong doing in the judicial history of Pakistan. There have been instances where superior court judges were removed following an inquiry by the Supreme Judicial Council but these are too few which will be discussed in the third chapter. Elaborating the scope of the Judicial Officers Protection Act, 1850, this was maintained by the three member bench of Supreme Court of AJ&amp;K unanimously in a judgment scribed by Justice Muhammad Ibrahim Zia, that the bare recital of the Judicial Officers Protection Act, 1850 clearly connotes that the immunity is only to the extent of civil liability and this is also with the condition if the acts are done in good faith. No immunity from criminal liability or disciplinary actions on misconduct proceedings has been provided by this law.\(^\text{101}\)

Touching upon the question of immunity of judges in Writ Jurisdiction, Chief Justice of Pakistan Muhammad Yaqub Ali in a passing remark in *Abrar Hassan v Government of Pakistan*, observed that,\(^\text{102}\) in their private capacity, judges are like all other citizens amenable to laws of the land but immune from writ jurisdiction while performing the duties of office.\(^\text{103}\)

The landmark judgment on judicial accountability in Pakistan by the Supreme Court is *Khan Asfandyar Wali and others v Federation of Pakistan*

\(^{101}\) *Muhammad Ashraf Qureshi v Competent Authority for (Judicial Officers) of AJ&amp;K Judicial Service Department/ High Court of Azad Jammu &amp; Kashmir, Muzaffarabad and 3 others*, 2012 PLC (C.S) 348.

\(^{102}\) *Abrar Hassan v Government of Pakistan*, PLD 1976 SC 334.

\(^{103}\) Ibid.
through Cabinet Division, Islamabad and others, wherein vires of the National Accountability Ordinance, 1999 were under consideration. It was held by the four-member bench of the August Supreme Court of Pakistan unanimously in a judgment written by Chief Justice of Pakistan Irshad Hassan Khan that the judges of the superior courts are only accountable in the mode laid down under Article 209 of the Constitution, which prescribes that the President alone can mark a case of the judge of the superior court to Supreme Judicial Council for conducting of an inquiry against him. That such a right is not available to any individual for moving to supreme judicial council against a superior court judge. This position of reference by the President alone was altered by the 17th amendment to the Constitution of Pakistan and “The Supreme Judicial Council Procedure of Enquiry 2005” which provided that the Supreme Judicial Council could proceed against a superior court judge on receiving information from any source. “Code of conduct to be observed by judges of the Supreme Court of Pakistan and of the High Courts of Pakistan”, has also been promulgated by the Supreme Judicial Council but deviation therefrom has not been made civilly or criminally liable and the only recourse in case of deviation from the prescribed code of conduct is by impeachment through the Supreme Judicial Council. The role of Supreme Judicial Council has been severely curtailed by the thirteen member bench judgment of the Supreme Court in Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v

104 Khan Asfandyar Wali and others v Federation of Pakistan through Cabinet Division, Islamabad and others, PLD 2001 SC 945-946.
105 Ibid.
President of Pakistan,¹⁰⁷ wherein this has been held by the unanimous judgment authored by Khalil-ur-Rehman Ramday that the proceedings before Supreme Judicial Council could be quashed under Article 184(3) which affords an appropriate remedy.¹⁰⁸ It was also held that the Supreme Judicial Council was not a judicial court because it could not decide any matter but could only submit its report to the President which is recommendatory in nature and not binding on the President. Moreover, a superior court judge could not be restrained from performing his function against whom proceedings are pending before Supreme Judicial Council. The judges (compulsory leave) order was declared to be against constitution of Pakistan being offensive to independence of judiciary.¹⁰⁹ The executive and legislature role has been completely eliminated in matters of judiciary by declaration of Supreme Court of Pakistan from time to time as will also be elaborated in chapters two and three on the pretext of independence of judiciary which clearly militates against checks and balances as an independent judiciary implied an unbiased setup rather than a setup which was free from all accountability and could pronounce decisions whimsically.

1.7. Conclusion

Immunity in general is defined as, “a personal favor granted by law contrary to the general rule. A privilege or special privilege; a favor granted, and affirmative act of selection of special subjects of favor not enjoyed in general

¹⁰⁷ Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v President of Pakistan, PLD 2010 SC 61.
¹⁰⁹ Ibid. 495.
by citizens under Constitution, statute or law.**110 In the American Jurisdiction, the definition of judicial immunity has been postulated as, “judicial immunity is short hand for the doctrine of absolute immunity that operates to protect judges and quasi-judicial officers alike from suit in both their official and individual capacities.”**111 In English jurisdiction, judicial immunity has been held to mean, “In all the cases where protection is given to the judge giving an erroneous judgment, he must be acting as judge. The protection in regard to the superior courts is absolute and universal; with respect to the Inferior, it is only while they act within their jurisdiction.”**112 Pakistani courts have not defined judicial immunity. Indian court while commenting upon judicial immunity in *K. Veeraswami v Union of India and Others*,**113 has held that, ‘there are numerous securities provided to judges, to preserve the independence of the judiciary. They have security from civil liability for any act done or ordered to be done by them in performance of their judicial duty whether or not such judicial duty is performed within the limits of their jurisdiction, as mentioned under section 1 of Judicial Officers Protection Act, 1850.’**114 In American jurisdiction administrative orders of superior courts are not immune.

111 Ibid.
112 Ibid.
114 Ibid.

CHAPTER TWO

Judicial Immunity in the Judicial System of Pakistan

2.1 Introduction

Various immunities are available to superior judiciary within Pakistan. These immunities ranging from exemption in writ jurisdiction extend to powers in relation to contempt of Court and security in respect of tenure, salary and pension etc. Such immunities have been extended to superior judiciary as Constitution makers have envisaged an independent judiciary. Independence of judiciary has been the hallmark of Constitution of Pakistan since its inception. The doctrine was subsequently endorsed by the judiciary to be an integral part of the Constitution of Pakistan through insertion of objective resolution as substantive part of the Constitution. The doctrine of independence of judiciary is an offshoot of separation of powers theory which also entails a system of checks and balance e.g. Impeachment of a superior court judge in U.S is mandated to senate through a 2/3rd majority. 115 The privileges available to superior judiciary in Constitution of Pakistan under the garb of independence of judiciary ensure that judges remain above the law even in case they trespass outside the mandate of Constitution & law. It is imperative that a system of checks and balance be also guaranteed under the Constitution and provisions that impinge on checks and balances be repealed through amendment of Constitution. This way Constitution will come of age and also correspond to modern times. Lead in this regard can be taken from developed

countries like U.S & U.K which have time tested institutions and their procedures tried over time. It seems evident from various verdicts of superior courts that it has undertaken the task of doing ‘justice’ which is to be interpreted at its whims and can be interpreted in any fashion; rather than doing justice according to law which is the real constitutional mandate of the superior judiciary within Pakistan.

2.2 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. The High Courts of respective provinces may issue writ in the nature of habeous corpus, certiorari, quo-warranto, mandamus or prohibition.\footnote{116} 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 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.\footnote{117}

This implies that no writ can be issued to superior courts of Pakistan as superior courts have been exempted from the definition of person in the Constitution of Pakistan. The first significant judgment to discuss the exemption of superior courts from writ Jurisdiction under the Constitution of Pakistan is Abrar Quddus, "Judicial Immunity or Judicial Impunity: Judicial Immunity of Superior Courts’ Judges in Pakistan with Special Reference to Islamic Law," \textit{Hazara Islamicus} 7, no. 1 (January 1, 2018): hazaraislamicus.hu.edu.pk/issues/2018/016.pdf.\footnote{116} Article 199(5), Constitution of Islamic Republic of Pakistan.
Hassan vs Government of Pakistan & Justice Abdul Kadir Shaikh. 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. Excerpts of judgments from jurisdictions like India were relied on by judges favoring issuance of a writ against superior courts ignoring that immunity in writ jurisdiction was not provided to judges constitutionally in India. 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. 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. This may have been the correct view keeping in view the constitutional provision. Justice Salahuddin maintained that writ of quo warranto was maintainable against superior judiciary as rule of comity was not a universal rule. Justice Anwar ul Haq agreed with

119 Ibid.
120 Ibid, 336.
121 Ibid, 342.
Justice Yaqub in this judgment that true import of Article 199(5) was to bar a writ of quo warranto. Justice Gul however differed and maintained that writ of quo warranto was maintainable against a superior court judge. Judges in this judgment did not properly dilate upon the true import & value of Article 199(5). The discussion was more focused on position in other countries and other extraneous considerations.

Another significant judgment that discusses the exemption of superior courts from writ jurisdiction is *Muhammad Ikram Chaudhary and others vs Federation of Pakistan*. In this judgment authored by Chief Justice of Pakistan Ajmal Mian, 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 additionally set 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 special cases, in particular, where a High Court judge or a Supreme Court judge goes about as persona designata or as a tribunal or where a quo warranto is implored and a case is made out.’ 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

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122 Ibid, 344.
123 Ibid, 351.
124 *Muhammad Ikram Chaudhary and others Vs Federation of Pakistan*, PLD 1998 SC 103.
125 Ibid. 108, 113.
Khalid Iqbal and others vs Mirza Iqbal and other,\textsuperscript{126} by a unanimous order, the Supreme Court of Pakistan has also held that the judgment of supreme court cannot be challenged as the bar under Article 199(5) prohibited issuance of a writ against Supreme Court and High Court or by any other collateral proceedings.\textsuperscript{127} This judgment has been authored by Justice Amir Muslim Hani. 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.\textsuperscript{128} 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,\textsuperscript{129} while the opinion of Division Bench of Peshawar High Court in a judgment written by Justice Ehsanullah Qureishi was that only the judicial orders were protected.\textsuperscript{130} The Supreme Court of Pakistan in Muhammad Iqbal and others vs Lahore High Court through Registrar and others,\textsuperscript{131} 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 \textit{i.e.} one judicial which is immune from writ

\begin{footnotes}
\item[126] Khalid Iqbal and others vs Mirza Iqbal and other, PLD 2015 SC 64.
\item[127] ibid.
\item[128] Muhammad Iqbal and others vs Lahore High Court through Registrar and others, 2010 SCMR 632.
\item[129] Asif Saeed Case, PLD 1999 Lahore 350.
\item[130] Kaleem Arshad Khan Case, 2004 PLC(C.S.) 1558.
\item[131] Muhammad Iqbal and others vs Lahore High Court through Registrar and others, 2010 SCMR 636.
\end{footnotes}
and the other administrative amenable to the writ.\textsuperscript{132} 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.”\textsuperscript{133}

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 \textit{Chaudhary Muhammad Akram vs Islamabad High Court}.\textsuperscript{134} 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.\textsuperscript{135} A division bench of the Balochistan High Court in a recent judgment scribed by Justice Muhammad Hashim Khan Kakar, titled \textit{Miss Gulnaz Baloch vs Registrar Balochistan High Court Quetta},\textsuperscript{136} had 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

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{132} ibid.
\item \textsuperscript{133} Ibid, 635.
\item \textsuperscript{134} Ch. Muhammad Akram \textit{vs} Registrar Islamabad High Court \& others, Cont.P no.3 of 2014.
\item \textsuperscript{135} Muhammad Ashraf \textit{vs} Union Bank of Middle East Ltd, 1991 MLD 2037, Nusrat Elahi \textit{vs} Registrar Lahore High Court, Lahore, 1991 MLD 2546, Asif Saeed \textit{vs} Registrar Lahore High Court, PLD 1999 LHC 350.
\item \textsuperscript{136} Miss Gulnaz Baloch \textit{vs} Registrar Balochistan High Court Quetta, 2015 PLC(C.S) 393.
\end{enumerate}
\end{footnotesize}
and other administrative which was not immune. Where a High Court judge had exercised jurisdiction as a Court or on behalf of the Court then he was completely immune, irrespective of the jurisdiction he exercised. The judges in 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 by Justice Saeed uz Zaman Siddiqui speaking for the majority, that the activities of the judge which identify with the execution of his obligation and capacities as a judge of the court or as an individual from the court can't be brought in examination under Article 199 of the Constitution. Just such actions of a judge are amenable under Article 199 of the Constitution which he performs in his own ability having no nexus with his official capacities as a judge of the court.137

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 in fact, it is the judicial orders which were protected by virtue of Article 199(5).138 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

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137 Ibid.
138 Ch. Muhammad Akram vs Registrar Islamabad High Court & others, Cont.P no.3 of 2014, page 30-31.
administrative/executive/consultative matters pertaining to the establishment of the Courts.\textsuperscript{139} Thus, in this case Supreme Court has taken a contrasting view on the same reasoning that was followed earlier i.e ‘plain reading of Constitution’ and assumed a different interpretation of the same Article. The Supreme Court of Pakistan could have referred the matter to parliament for repeal of the Article but instead it superimposed its interpretation of 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 \textit{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.\textsuperscript{140} Earlier in \textit{Ikram Chaudhary and others} case,\textsuperscript{141} five member bench of the Supreme Court had held that, “Article 184(3) confers jurisdiction on Supreme Court of the like contained in Article 199 of Constitution of which eliminates interalia, the Supreme Court and the High Courts.”\textsuperscript{142} 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 purview under Article 199 of the Constitution subject to two exemptions, where a High Court judge or a Supreme Court judge goes about as persona designata or as a tribunal or where a quo warranto is supplicated and a case is made out.\textsuperscript{143} In the recent case of \textit{Ch. Akram} (supra), Supreme Court by a three member bench has overruled these

\textsuperscript{139} Ibid, 30
\textsuperscript{140} Ibid, 24,25.
\textsuperscript{141} Muhammad Ikram Chaudhary and others Vs Federation of Pakistan, PLD 1998 SC 108.
\textsuperscript{142} Ibid.
observations of five member bench of Supreme Court and many employees of Islamabad High Court have lost their jobs after putting in many years of service. 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”. ¹⁴⁴

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 encroach its mandate. It was also observed by the Supreme Court 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

¹⁴⁴ Ch. Muhammad Akram vs Registrar Islamabad High Court & others, Cont. P no.3 of 2014, page 24.
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.”\(^{145}\)

Thus a constitutional provision has been made redundant by this judgment and a supra constitutional judgment has been rendered by holding that immunity on the authority of legislation has no value. The judgment also laid law retrospectively by removing the employees of Islamabad High Court against settled principles that law is changed prospectively. 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.\(^ {146}\)

As to how this conclusion was reached by the judges that Article 199 only pertains to judicial powers is hard to comprehend and inconceivable as all the administrative powers have not been listed in Article 208 of Constitution of Pakistan. The same judge who authored this judgment in \textit{Ch.Akram Case supra}, Justice Amir Muslim Hani in another judgment \textit{Muhammad Rafi and another v

\(^{145}\) Ibid, 27.
\(^{146}\) Ibid, 30.
Federation of Pakistan and others,\textsuperscript{147} 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.”\textsuperscript{148} 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. This also points to the malady that superior courts can interpret the way they feel like provisions of constitution as per their suitability. This also reflects intellectual dishonestly on the part of the superior court judges. This judgment interpreting service law while ignoring previous law on the subject also held that aggrieved person could invoke the constitutional jurisdiction of the high court against the public authority if he satisfied that the act of authorities was violative of service regulations even if they were non statutory.\textsuperscript{149}

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 imperative in the light of recent developments in the case law relating to judicial immunity wherein the inclination of the judiciary has been to make redundant Article 199(5) on popular demand to serve the ends of justice. It is also proposed that other provision of the

\textsuperscript{147} Muhammad Rafi and another v Federation of Pakistan and others, 2016 SCMR 2146.
\textsuperscript{148} Ibid.
\textsuperscript{149} Ibid.
Constitution be also reformed which elevate army and judiciary to a higher pedestal particularly the provisions relating to freedom of speech.

2.3 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 forbids 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*,\(^\text{150}\) 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.’\(^\text{151}\) This was said in reference to superior judiciary and implies that members cannot speak at all on the floor of house regarding conduct of judges.

In the case of *Islamic Republic Of Pakistan Versus Mahmood Ali Kasuri and another*,\(^\text{152}\) 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

\(^{150}\) *Pakistan vs Ahmad Saeed Kirmani etc*, PLD 1958 SC 411.

\(^{151}\) Ibid.

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. The judgment was authored by C.J Yaqub Ali for the majority.153 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 as judiciary seems to undermine parliament so that it may not repeal its verdicts.

The land mark case of recent times explaining the scope of this Article is Syed Masroor Hassan vs Ardeshir Cowasjee.154 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. Justice Ajmal Mian speaking for the seven member bench of 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.”155

153 Ibid.
154 Syed Masroor Hassan vs Ardeshir Cowasjee, PLD 1998 SC 823.
155 Ibid,1018.
Justice Munawar Ahmad Mirza and Justice Bashir Jehangiri while agreeing with the conclusions arrived by majority in this judgment also added a separate note. This verdict seriously undermines universal core value of freedom of expression besides reflects that judiciary is extremely sensitive in matters relating to its powers as constitutional provision could have been interpreted in a way so that its provisions could be shown to be directory rather than mandatory and interpreting it so that only serious obstruction of justice could bring a person within the ambit of breach of these provisions.

Construing the provision of Article 68, Justice Ajmal Mian speaking for the four member bench of the Sindh High Court in the reference case Karachi Bar Association vs Abdul Hafeez Peerzada and another,156 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.157 It was also observed in this judgment that judges of the superior courts cannot perform their constitutional arduous duties unless they are free from all sorts of external pressures.158 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

156 Karachi Bar Association vs Abdul Hafeez Peerzada and another, PLD 1988 Kar 325-326.
157 Ibid.
158 Ibid, 325.
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*\(^{159}\), the three member bench of Supreme Court of Pakistan unanimously commenting upon Article 68, in a judgment scribed by Justice Faqir Muhammad Khokhar 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.’\(^{160}\) Again the inclination is to grab power and rule in favor of an enlarged jurisdiction of the court at the expense of people who may fall prey to this enlarged jurisdiction of courts. 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.\(^{161}\)

In *Baz Muhammad Kakar vs Federation of Pakistan*,\(^{162}\) five member bench of Supreme Court unanimously in a judgment authored by Chief Justice Iftikhar Muhammad Chaudhary 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.\(^{163}\) 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

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\(^{159}\) *Commodore(r) Shamshad vs Federal Government*, PLD 2009 SC 79-80.

\(^{160}\) Ibid.

\(^{161}\) Ibid.

\(^{162}\) *Baz Muhammad Kakar vs Federation of Pakistan*, PLD 2012 SC 890.

\(^{163}\) Ibid.
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 composed of fallible individuals.

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.”164 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. A fearless judiciary has nothing to worry and is not affected in its working by outside pressures. 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. 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. In this backdrop also, Article 68 seems to be incompatible and warrants repeal so that parliament is able to legislate on contentious issues pertaining to superior judiciary. Article 68 also militates against article 238 of the constitution of Pakistan as by virtue of article 238, parliament has unlimited authority to amend the constitution of Pakistan and such jurisdiction cannot be called in question before any forum. The basic structure theory by virtue of which superior courts of Pakistan have arrogated to themselves the responsibility of protecting the basic structure or spirit of the constitution of Pakistan is very much against the provisions of article 238 of the constitution of Pakistan and warrants revisiting by the superior judiciary of Pakistan. 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


166 District Bar Association Rawalpindi and others vs Federation of Pakistan etc, PLD 2015 SC 401.
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.

Article 19 of the Universal Declaration of Human Rights, adopted in 1948, states that:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” 167

Universal Declaration of Human Rights represents the collective conscience of humanity and provisions like Article 68 disturb right to freedom of speech.

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.

2.4 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.\(^{168}\)

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

\(^{168}\) Baz Muhammad Kakar and others vs Federation of Pakistan and others, PLD 2012 SC 870.
had to submit unconditional apology before being allowed to submit his defense for contempt of court.169 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.”170 This judgment also permitted erroneous criticism of judges and judgments and held this to be not amounting to contempt.171

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 stalwart judges of the likes of Cornelius and Hamood ur Rehman were also present on the bench of Supreme Court that are highly regarded. Each of the five judges in the bench added a separate note in the judgment but dismissed the appeal. 172 Sir Edward Snelson lived to see his stance vindicated by the unanimous judgment of four member bench of Supreme Court

171 Ibid, 69.
172 Ibid, 73.
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.\(^\text{173}\) 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.\(^\text{174}\) 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.\(^\text{175}\) 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*.\(^\text{176}\) 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.\(^\text{177}\) This judgment is a positive development on contempt of court law in Pakistan.

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\(^{173}\) Ibid, 75.  
\(^{175}\) Ibid, 376.  
\(^{176}\) *Yousaf Ali Khan v The State*, PLD 1977 SC482.  
\(^{177}\) Ibid, 503.
An important addition to the jurisprudence of contempt cases is *Syed Masroor Ahsan And Others versus Ardeshir Cowasjee and Others*. 178 C.J Ajmal Mian speaking for the 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. 179 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. 180 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. 181 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.’ 182

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178 *Syed Masroor Ahsan And Others Versus Ardeshir Cowasjee And Others*. PLD 1998 SC 823.
179 Ibid, 868.
180 Ibid, 1005.
181 Ibid.
182 Ibid, 1230.
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.\textsuperscript{183} 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 \textit{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.

The suo motto case regarding contempt of Supreme Court by Prime Minister Yousaf Raza Gillani wherein Prime Minister Yousaf Raza Gillani was convicted for contempt of court for not initiating proceedings relating to money laundering in Swiss Court against the President of Pakistan, the seven member bench of Supreme Court unanimously in a judgment scribed by Justice Nasir ul Mulk and Asif Saeed Khosa held that immunity of President could be pressed at the foreign Court however it shied away from granting immunity to President under Article 248 of Constitution of Pakistan.\textsuperscript{184} Thus Article 248 has virtually been made redundant as Constitution makers had postulated immunity of President from prosecution. In this case also Supreme Court held that it had the final say regarding the interpretation of any Constitutional provision. The Supreme Court of Pakistan observed, “Interpretation of law was the exclusive domain of the judiciary” and that executive is not entitled to flout the Court’s decision because it

\textsuperscript{183} Ibid, 1231.

\textsuperscript{184} \textit{Yousaf Raza Gillani Contempt Proceedings}, PLD 2012 SC 553.
believes the same to be inconsistent with the law or Constitution.\footnote{Ibid, 598.} It was also observed in the judgment that, ‘present bench had no power to modify the judgment and delay implementation. Contentions regarding immunity of President under the international law had been urged before the Supreme Court in review petitions and same were not accepted, therefore, present bench was in no position to examine such contentions and even otherwise present bench was not sitting in review, therefore, could not go beyond what had been held therein.’\footnote{Ibid. 588} It was strange that Supreme Court of Pakistan expressed this remark as it had the authority to change the law of other Supreme Court benches if same view was erroneous or incorrect. The observation that Supreme Court had the final say in interpretation of any constitutional provision is plausible but under the garb of this observation making redundant the constitutional provision is not plausible and uncalled for because constitutional provision duly enacted is the primary source of law from which the validity of all laws is derived and even the existence of judiciary for its validity is dependent on the constitutional provisions.

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 \textit{non est} despite the fact that it was validly promulgated by the Parliament.\footnote{Baz Muhammad Kakar and others Vs. Federation of Pakistan through Ministry of Law and Justice and others, PLD 2012 SC 870.} The reasons proffered for nullifying the Contempt of Court Act, 2012 in a judgment scribed by Justice Iftikhar Muhammad Chaudhary 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. 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. 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 foundation 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. The United States has a more liberal regulation, where just something that shows a reasonable and current risk to justice is considered contempt, and in spite of the fact that the old British Contempt law in India has no significance today, it still continues to hold

188 Ibid, 887,888.
189 Ibid.
the field. The language employed by the constitution makers in Article 204 is so wide that everyone can be brought within the mischief of its provisions who takes a leeway with the judiciary.

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

**Proposed Change:** 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.

Modern theories of justice postulate that laws should not eat away human liberties. Utilitarianism expounds four goals of legislation: to provide subsistence; to produce abundance; to favor equality; and to maintain security. Laws elevating the status of judiciary and curtailing freedom of speech do not upkeep equality and should be repealed. They do not even maintain security as disgruntled citizens will feel unrest if not allowed to express themselves. Modern jurist Richard Posner believes that judiciary is handicapped by two things that prevent it from contributing to efficiency. These are the independence of judiciary and need to follow precedents. Rawls on principles of justice writes,

“Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all. Moreover, social and economic inequalities are to be arranged so that they are both to the greatest of least advantaged, consistent with the just saving

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191 Ibid.
193 Ibid, 163.
principle and attached to offices and positions open to all under conditions of fair equality of opportunity.”

This conception of justice also favors deleting of provisions that elevate judiciary to a sacred status like the contempt law, which is also to the disadvantage of common man and the least advantaged. The policy reasons that are offered generally for maintaining a broad contempt power as is prescribed in the Constitution of Pakistan may be summarized as:

- For preserving independence of judiciary
- A desire to uphold respect for the decisions of the court
- To maintain image of judiciary
- Public interest

This was expressed in the case of *Masroor Ahsan And Others versus Ardeshir Cowasjee and Others*, by Justice Ajmal Mian that, “the object of contempt proceedings is not to afford protection to the judges personally from imputations to which they may be exposed as individuals, but it is intended to be a protection to the public whose interest would be very much affected if by the act or conduct of any party, the authority of the Court is lowered and the sense of confidence which the people may have in the administration of justice by it is weakened.”

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194 Ibid, 169.
195 *Syed Masroor Ahsan And Others Versus Ardeshir Cowasjee And Others*. PLD 1998 SC 1091.
196 Ibid.
However, a curtailed contempt law as is prevalent today in other advanced jurisdictions *i.e.* USA and Great Britain is not supposed to be a hindrance to any of these policy reasons stated aforesaid. The advanced countries of the world like USA allow criticism of judgments and discussion on conduct of superior judiciary is not considered contempt. Only flouting the orders and judgments are indictable. These countries also take pride in the fact that there judiciaries are independent but a curtailed contempt law in no way is considered a hindrance to judicial independence, moreover, an abridged contempt law is believed to be in the interest of public so that people may speak out there minds freely. In a country like Pakistan where freedom of speech is fairly curtailed due to religious sensitivities, a broad contempt law militates against public interest and principle of check and balance.

### 2.5 Rule making powers of the Superior Courts in Pakistan

Article 202 and 208 of the Constitution of Pakistan deal with the powers of superior courts in Pakistan to formulate rules and do lawmaking. Article 202 of the constitution gives unqualified powers subject to the constitution and law to the High Courts to formulate rules for itself or courts subordinate to High Court in relation to practice and procedure of such courts. Article 208 enumerates that Supreme Court and the Federal Shariat Court with approval of the President and High Courts with the respective approval of their Governor concerned may make rules regarding terms and conditions of their court staff. Such like powers to frame rules were not delegated to superior courts in the Constitution of Pakistan, 1956. Article 191 of the Constitution of Pakistan, 1973 appertains to the Supreme Court
of Pakistan and mandates the supreme court itself for the formation of its rules of procedure subject to the constitution and the law.

There has been no significant contribution by the High Court’s under Article 202 of Constitution of Pakistan in their legislative domain, pertaining to framing of rules for their procedural court work or courts subordinate thereto. Nearly all the High Courts in India have framed rules governing their practice and procedure but in Pakistan the erstwhile Lahore High Court Rules continue to hold the field for all the provincial High Courts in Pakistan. There have been committees working in different High Courts in Pakistan to work on High Court Rules and Orders but nothing has come out from their workings which shows the state of affairs of superior courts in Pakistan.

Deriving their powers from the strength of Article 208, all the High Courts in Pakistan have framed rules for their court staff except the Baluchistan High Court, which has adopted the Lahore High Court Establishment Rules. In the case of Registrar Supreme Court of Pakistan vs Qazi Wali Muhamamd, a three member bench of the Supreme Court of Pakistan elaborated the scope of Article 208 of the Constitution of Pakistan. The judgment was a unanimous three member bench verdict and scribed by Justice Said-uz-Zaman Siddiqui with separate additional notes by Justice Fazal Karim and Mukhtar Ahmed Junejo. Justice Fazal Karim noted in this judgment that,

“Article 208 occurs in Part VII of the constitution. This part deals with judicature and contains provisions for the method of appointment and

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197 Registrar Supreme Court of Pakistan vs Qazi Wali Muhamamd, 1997 SCMR 141.
security of the tenure of the members of the judiciary which are designed to assure to them a degree of independence from the two branches of the government.”

This judgment categorically held that employees of High Court were not civil servants as their rules were directly framed under Article 208 of the Constitution of Pakistan. It is pertinent to mention here that judicial officers are civil servants in Pakistan as they are recruited under the respective Civil Servants Act while court staff of superior courts has been declared to be not of the category of civil servants on the pretext of judicial independence, therefore, the anomaly is manifest on the face of it. Thus rules regulating their employees have been delegated to the superior courts to be framed under Article 208 on the pretext of independence of judiciary, unlike judicial officers which continue to be civil servants. Justice Fazal Karim though in a different connotation relied on an excerpt from American Constitutional law by A. Thomas Mason and William M. Beaney that,

“Our constitution is a federal constitution and provides for a federal structure. Though there is no strict adherence to the concept of separation of powers which is a well-known fundamental political principle in many modern democracies, yet, there can be discerned the vesting of the legislative, the executive and the judicial powers in three separate organs. And, as in America their essential nature may properly be exercised by only a particular branch of government; that such functions cannot be delegated

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198 Ibid, 155.
199 Ibid, 153.
to any other branch; and that one department may not interfere with another
by usurping its powers or by supervising their exercise.”

The real connotation of this passage was that 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. However, it was interpreted to
advocate judicial independence which in this judgment and the Pakistani context
means possessing all the powers which judiciary can possibly acquire. It is
noticeable that in Pakistan, in trying to ensure independence of judiciary the
constitution makers have gone too far. They have placed the powers which
absolutely related to the parliament domain to the judiciary. Thereby judiciary has
emerged as an institution which is immune from everything in the country on the
pretext of independence of judiciary. It is no secret that corruption is prevalent
among the court staff however nothing substantial has come out from the judiciary
in rooting out corruption despite being the repository of all the powers in this
regard. However, this judgment also laid an important piece of law with regard to
court staff that they must be given a right of appeal, hence, declared rule 11 of the
Supreme Court establishment rules violative of injunctions of Islam.

Another judgment which endorsed the view of the judgment
Registrar Supreme Court of Pakistan vs Qazi Wali Muhammad supra is
Muhammad Siddique vs Lahore High Court. This division bench judgment
authored by Justice Tanvir Ahmed Khan expressed the view that, ‘High Court
employees being not civil servants, provisions of Civil Servants Act, 1973 as well

\[200\] Ibid, 154.
\[201\] Muhammad Siddique vs Lahore High Court, PLD 2003 SC 885.
as Service Tribunal Act, 1973 would not be attracted in their cases. Appeal being a substantive right of an employee which was the creation of the statues and did not confer any right that had never existed. Employees in the present case having exhausted the remedy of appeal provided under the establishment rules, could not seek remedy from the service tribunal." Appeal under the establishment rules of High Courts is an in-house procedure. The courts shied away from the remarks in this judgment as detailed in other judgments that an order based on malafide, being corum non judice or without jurisdiction can be challenged further. This was also observed in the judgment that Article 208 was pari materia with Article 127 of the 1962 Constitution. The Constitution of 1962 was an outcome of dictatorial rule.

It is recommended that power of promulgation of rules of superior courts may be relegated back to the parliament so that effective checks can be ensured on the workings of superior courts. It is also in-consonance with separation of powers theory and as a result things would be put in their proper perspective. This would also curtail the legislative tendencies as seen in Pakistan of the superior judiciary. There is a history of judgments in Pakistan where law has been laid in derogation of statutory rules or constitutional provisions. It is therefore proposed that legislative powers of the judiciary may be relegated back to the parliament so that legislative tendencies in the judiciary can be curbed and judiciary starts to give effect to the rules as they stand rather than importing meanings to words. Executive powers to legislate should also be mandated to parliament as the legislature alone in Pakistan claims to be the law making body which needs to be awaken to their task. Relegating back the powers of legislation

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202 Ibid, 888,890.
203 Ibid, 890.
will also inter-alia ensure effective check and balance on the working of the judiciary which is the real essence of separation of power and judicial independence.

Giving the powers to the parliament to legislate or approve rule making power of superior judiciary is not a novel idea as a secondary or delegated legislation in England is controlled by the parliament. The procedure in England for secondary legislation is as under:

“‘Negative resolution’ – the subordinate legislation has immediate effect, but is brought before Parliament and may be annulled if a resolution against it is passed within 40 days

'Affirmative Resolution' – the subordinate legislation must be affirmed by resolutions in each House of Parliament before it may come into effect.”

2.6 Conclusion

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. It is imperative in the light of recent developments on the case law relating to judicial immunity. It is proposed that other provision of Constitution be

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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.

It is proposed that Article 68 Constitution of Pakistan should be reapealed and if its enactment is extremely necessary than it may be reformed to protect truthful speech as under:

**Proposed Change:** “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 in proceedings under this Article.”

It is proposed that Article 204 should be reformed by the parliament in the following terms as conception of justice favors deleting of provisions that elevate judiciary to a sacred status:

**Proposed Change:** “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.”

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. Therefore, it is recommended that power of promulgation of rules of superior courts may be
relegated back to the parliament. It will be in-consonance with separation of powers theory and as a result things would be put in their proper perspective.

CHAPTER THREE

Appointment and Removal of the Superior Court Judges in Pakistan

3.1. Introduction

“The term "judicial independence" embodies the concept that a judge decides cases fairly, impartially, and according to the facts and law, not according to whim, prejudice, or fear, the dictates of the legislature or executive, or the latest opinion poll. At times, judicial independence means making unpopular decisions, whether unpopular with the legislative or executive branch, the public or judicial colleagues.”

In Pakistan judicial independence has been taken to mean independence of judiciary from everything under the sun. Thus judicial integrity has been compromised as malpractices have crept in due to absence of checks and balances on the Superior Judiciary. Integrity of judiciary can only be ensured if judicial immunities are kept to a minimum and transparency is guaranteed in appointment and removal process of superior court judges. Article 175(2) of the Constitution of Islamic Republic of Pakistan states that, “No Court shall have any

jurisdiction save as is or may be conferred on it by the Constitution or by or under any law”. It has also been frequently held by the superior courts of Pakistan that, “A judge must wear all laws of the country on the sleeves of his robes”. 206 Any deviation from these principles must entail consequences so that effective accountability is ensured of the superior judiciary. Under Article 203 of Constitution of Pakistan, each High Court shall have supervisory jurisdiction over courts subordinate thereto but the superior courts of the country do not have any check over them therefore qualified judicial immunity for superior courts judges is of utmost importance so that common people should not suffer and can have ready recourse to law for amelioration of their grievances in case of an erroneous decision. To correct the anomaly, judges of superior courts must be subjected to extremely limited immunity so that accountability is ensured of every organ of the state. Revision of judicial immunity available to judges of superior courts has now become the necessity of time as old concepts have proved to be fatal over time as rights of people have been frequently trampled upon by the superior judiciary under the protection of judicial immunity, therefore, reform is vital. Accountability should be commensurate with the pay and privileges that a judge draws as the pay and privileges of a judge is far beyond what other public servants secure. These perennial issues in Pakistan have roots in the appointment process of superior court judges as appointments on merit and of deserving candidates can only guarantee that law would not be trespassed by the superior courts. A transparent process of

206 Raja Humayun Sarfraz Khan v Noor Muhammad, PLD 2007 SCMR 307. Almas Ahmad Fiaz v Secretary Govt of Punjab Housing and Physical Planning Development Lahore and Another, 2007 PLC (SC) 64.
removal of unscrupulous of superior court judges will also inspire people’s confidence.

3.2. 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. This Article commands that there should be a judicial commission of Pakistan for placement of Judges to 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 through majority opinion of its total membership nominates to the Parliamentary Committee, individual as 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. Covered under the impermeable shield of ‘judicial independence’, successive eras have opposed bringing transparency into the procedure through which certain people are considered for elevation as a judge of superior court, and why others are overlooked.208 There is no public exam, public advertisement for the post or interview to be conducted by an independent commission for succeeding to the coveted 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 authored by C.J Sajjad Ali Shah to which Justice Ajmal Mian and Justice Hussain Sial added a separate note with their own reasons, followed by *Asad Ali’s case* (PLD 1998 SC 161) ten member bench judgment scribed by Justice Saeed uz Zaman Siddiqui to which Justice Irshad Hassan Khan added a separate on judicial independence, 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.”

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 eighteenth Constitutional Amendment (supplemented by the nineteenth Amendment) a "judicial Commission" (headed by the Chief Justice, and involving a greater part of judges) was constituted with a specific end goal to nominate superior court judges, who then must be affirmed by a "Parliamentary Committee" containing four individuals each from the Senate and the National Assembly, in equivalent extents from the treasury and opposition seats. However, the sole expert to initiate a hopeful's name, for consideration by the Judicial Commission, stays with the Chief Justice of individual region, who is not mandated to give any reasons for his inclinations or give any public notice inviting applications.

The initial case which discussed the constitutional amendments pertaining to judicial and parliamentary commissions is *Nadeem Ahmed Advocate*
v Federation of Pakistan.211 The petitioners in this case made following recommendations which were made the basis for outcome of the case and translated into order.

i. “That instead of two most senior judges of the supreme court being part of the judicial commission, the number should be increased to four most senior judges.

ii. That when a recommendation has been made by the judicial commission for the appointment of a candidate as a judge, and such recommendation is not agreed/agreeable by the committee of the parliamentarians as per the majority of 3/4th, the committee shall give very sound reasons and shall refer the matter back to the judicial commission for reconsideration. The judicial commission upon considering the reasons if again reiterates the recommendation, it shall be final and the president shall make the appointment accordingly.

iii. That the proceedings of the parliamentary committee shall be held in camera and a detailed record of its proceedings and deliberations shall be maintained.”212

“After hearing the arguments of the parties, the court decided to refer the matter to the parliament for reconsideration, the issue of appointment process of of judges of the superior judiciary under article 175-A of the constitution. Until the decision of the parliament the court decided to keep the petitions pending. In the meanwhile,

211 Nadeem Ahmed Advocate v Federation of Pakistan, PLD 2010 SC 1165.
212 Ibid, 1182.
the court directed that appointment of judges in the Supreme court and High Courts shall be made as directed by the court inn para 15 of the case. Order of the court was similar like the amendments suggested by the petitioners as stated before. The court ordered that in all cases of an anticipated or actual vacancy a meeting of the judicial commission shall be convened by the Chief Justice of Pakistan in his capacity as its chairman and the names of candidates for appointment to the Supreme Court shall be initiated by him. The Federal Shariat Court by the Chief Justice of the said Court and of the High Courts by the respective Chief Justices. The Chief Justice of Pakistan as head of the judicial commission shall regulate its meetings and affairs as he may deem proper. The proceedings parliamentary committee shall be held in camera but a detailed record of its proceedings and deliberations shall be maintained. The parliamentary committee shall send its approval of the recommendations of judicial commission the prime minister for onward transmission to the president for necessary orders if the parliamentary committee disagrees or rejects any recommendation of judicial commission, it shall give specific reasons and the prime minister shall send copy of the said opinion of the committee to the chief justice of Pakistan and the same shall be justiciable by the Supreme Court. It can be safely stated that presently the order of judicial commission if an order of judges who happen to be majority of members of commission. Moreover, prime minister reduced to ministerial work which is against the spirit of parliamentary form of government; one of the cardinal features of our constitution."\(^\text{213}\)

This case authored by Chief Justice Iftikhar Muhammad Chaudhry throws ample light on the issue that how parliamentary mandate was eroded and a constitutional body of parliamentary committee made redundant. *Munir Bhatti’s case* (PLD 2011 SC 407), a four member bench decision authored for the majority by Justice Mahmood Akhtar Shahid Siddiqui with additional reasons by Justice Jawad S. Khwaja has held that, the Parliamentary Committee has no authority to challenge proposals 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.” Justice Ejaz Afzal Khan in his dissenting opinion wrote that, President before selecting a man a judge of a High Court or a judge of the Supreme Court shall make sure that his designation is as per the Constitution and law. Opinion of Justice Ejaz in this judgment is more inconsonance with justice and equity as it ensures check and balance in the appointment process. The learned attorney general in this judgment submitted to the court relying on an Indian constitutional commentary by Durga Das Basu that President is not a robot placed in the President house nor a computer controlled automation nor a figure head nor an ornamental piece placed in the show window of the nation called the president house. Moreover, he contended that the president

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214 Ibid.
cannot be kept out of the affairs regulating the appointment of judges.\textsuperscript{216} However, this view did not find favor with the Supreme Court. \textit{Munir Hussain Bhatti vs Federation of Pakistan},\textsuperscript{217} declared that it is an undoubted fundamental of our constitutional scheme that in matters of appointment, security of tenure and removal of judges, the independence of the judiciary should remain fully protected.\textsuperscript{218} 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.

Contrasting the current example of choosing judges of higher courts with the one when the judiciary was not "free/independent" \textit{i.e.} pre eighteenth and nineteenth amendment period, one finds that the "nursery" from which the judges are provided is the same. Judges still originate from four sources: chambers of judges of the High Courts or Supreme Court, firms of "famous" legal counsels; bar affiliated office bearers, present or past; and the lower judiciary. It is uncommon to see a "normal" yet exemplary legal counsel who is not associated being chosen. It is not only an ethical issue, but rather one that goes to the heart of the equality based country that our Constitution conceives inter -alia, under Article 25.\textsuperscript{219} There is serious anomaly in the appointment process of superior court judges in Pakistan and it requires immediate attention of the lawmakers. Current states are established on a sensitive arrangement of governing rules. In addition, establishments have

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\textsuperscript{216} Presidential Reference No. 1 of 2012, PLD 2013 SC 294-296. \\
\textsuperscript{217} Munir Hussain Bhatti vs Federation of Pakistan, PLD 2011 SC 467. \\
\textsuperscript{218} Ibid. \\
\end{flushleft}
their inward checking and review frameworks, notwithstanding being always presented to open examination.\textsuperscript{220} 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 \textit{Munir Bhatti’s case} (PLD 2011 SC 407). In this case, the judicial commission had made recommendations for enhancement in tenure of Judges of High Courts. The parliamentary committee contradicted the suggestions of the judicial commission and chose not to prescribe the names of these judges for appointment.\textsuperscript{221} 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.\textsuperscript{222} The four member bench of Supreme Court in this decision inter-alia held that parliamentary committee neither had the proficiency nor the constitutional mandate to reverse the reasoning and findings of the Commission on professional competence, legal insight, judicial skill, quality and the precursors of the judicial nominees.\textsuperscript{223} Such domain was left exclusively to the judicial commission thus little has been left for parliamentary committee in the case of judicial appointments. Review against the \textit{Munir Hussain Bhatti} case was dismissed with the observation that parliamentary committee had only the domain to check antecedents of the potential superior court nominee and that too on independent information and it could not rely on the information that

\textsuperscript{220} Ibid.
\textsuperscript{221} \textit{Munir Hussain Bhatti Advocate and others vs Federation of Pakistan and another}, PLD 2011 SC 407.
\textsuperscript{222} Ibid.
\textsuperscript{223} Ibid, 443.
was already scrutinized by the judicial commission. This constitutional interpretation was later follower in numerous other cases and is an accepted precedent. In the case of *High Court Bar Association Bahawalpur vs Federation of Pakistan*, a decision rendered by Chief Justice Mansoor Ali Shah of Lahore High Court, wherein observations of judicial commission and intelligence report were relied on by the parliamentary committee to non-suite one nominee for elevation, this was emphatically held that parliamentary committee veto was subject to judicial review and it must give independent reasons. Thus parliamentary committee has little left in case of appointments as judicial commissions nominees are mostly confirmed as was seen in the case of *High Court Bar Association Bahawalpur* (supra) by reviewing the decision of parliamentary committee while making redundant the parliamentary committee on flimsy grounds. 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 and in similar judgments on the subject. The aforesaid judgment starts with high sounding words that judges must be dissatisfied with superficial solutions but proffers a superficial solution. The trend in most of superior courts judgment in Pakistan throughout

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224 *High Court Bar Association Bahawalpur vs Federation of Pakistan*, PLD 2015 LAH 317.
225 Ibid.
226 Ibid.
history has been to quote catchy phrases and high sounding words but the decision rendered is contrary to the high assertions as raised in the judgment.

Independence of judiciary has been held to mean in *Sharaf Faridi case*; \(^{227}\)

a. “That every judge is free to decide matters before him in-accordance with his assessment of facts and his understanding of the law without improper influences, inducements or pressures, direct or indirect, from any quarter or for any reason; and

b. That the judiciary is independent of the executive and legislature and has jurisdiction directly or by way of review, over all issues of a judicial nature.” \(^{228}\)

This is a significant judgment on independence of judiciary prescribing guidelines for judicial independence. It is a five-member bench unanimous judgment on judicial independence authored by justice Nasim Hassan Shah and Justice Wali Muhammad Khan.

Justice Irshad Hassan Khan in *Asad Ali vs Federation of Pakistan*, \(^{229}\) declared very pertinently that, “judicial independence is not an end in itself but is a means to promote impartial decision making.” \(^{230}\)

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227 Government Of Sindh Through Chief Secretary Of Govt Of Sindh, Karachi And Others vs Sharaf Afridi And Others, PLD 1994 SC 105.
228 Ibid.
229 Asad Ali vs Federation of Pakistan, PLD 1998 SC 362.
230 Ibid.
This dictum regarding independence of judiciary implies that judge remains free of bias. A dishonest judge can be a product of executive or of the judiciary. Selection of superior court judges by the judiciary itself is no guarantee for a conscientious judge. However, if elevation process of superior court judges is transparent, it will inspire people’s confidence and better results in selection of conscientious judges. 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 in many provinces e.g. Khyber Pakhtunkhwa, is carried out by the executive through public service commission and this was endorsed by the apex court of the country. There is precedence of superior court judges being appointed by the executive or legislature around the globe e.g. Constitutional Court Justices in the US, Brazil and Russia, must be selected by the president and endorsed by the lawmaking body by a greater part of the vote.231 In some cases (formerly the United Kingdom and several other common law jurisdictions) judges are appointed by a government minister (usually the Minister of Justice or Attorney General).232 The period in Pakistan where executive appointed the superior court judges was also arbitrary bases on the discretion of

232 Ibid.
few individuals and also the period thereafter, as ordinary public was not involved therein.

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

a. 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.\(^{233}\) 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. Checking the merit of candidates in not a novel

\(^{233}\) Ibid.
idea as it is being practiced successfully in South Africa where potential candidates are interviewed.234

“The South African model established under the Constitution of 1996 consists of the following members and offers the commission which consists of parliamentary members and smacks of transparency:

(a) the Chief Justice, who presides at the meetings of the Commission;

(b) the President of the Supreme Court of Appeal;

(c) one Judge President designated by the Judges President;

(d) the Cabinet member responsible for the administration of justice, or an alternate designated by that cabinet member;

(e) two practicing advocates nominated from within the advocates’ profession to represent the profession as a whole, and appointed by the President;

(f) two practicing attorneys nominated from within the attorneys’ profession to represent the profession as a whole, and appointed by the president;

(g) one teacher of law designated by teachers of law at South African universities;

(h) six persons designated by the National Assembly;

(i) four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;

(j) four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly; and

(k) when considering matters relating to a specific High Court, the Judge President of that division and the Premier, or an alternate designated by the Premier, of the province concerned.38

Evidently, the South African Commission consists of judges, the Minister of Justice, practising and academic lawyers, members of the National Assembly including a substantial number of opposition members, members of the Provincial parliament, persons nominated by the President of South Africa after consulting leaders of all political parties represented in the National Assembly and in some cases the Premier of the Province or the Premier’s nominee. Thus the composition of the Commission is representative in nature and is not under the exclusive control of the executive government.

The system used by the South African Judicial Service Commission in appointing judges is credited with having ‘a fair degree of openness’. The
Commission identifies a list of meritorious candidates by advertising judicial vacancies and interviewing the ‘short-listed candidates in public, as if in open court’. It must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President who ‘may make appointments from the list’. The President ‘must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made’. The Commission then ‘must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.’

Or

b. 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

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235 Ibid.
Court. Short-listed recommendations were lastly forwarded to the CJP, for due consideration by the Judicial Commission.\textsuperscript{236}

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. It is also suggested that the names of potential superior court judges and entire process should be open to public eye to inspire confidence so that transparency is visible to public eye and any objection e.g. connections of the potential candidate with judges is exposed at earlier stages.

3.3. 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.\textsuperscript{237}


\textsuperscript{237} \url{http://www.supremecourt.gov.pk/web/page.asp?id=434}, (assessed 28\textsuperscript{th} November,2016).
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. The supreme judicial council has also prescribed a code of conduct to be observed by judges of superior courts.

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 persons 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.” Former President Pervez Musharraf facing trial for High Treason alleged in an interview that Head of Army Chief maneuvered his voyage abroad for treatment from courts. 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

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238 Ibid.
239 Ibid.
240 Inam R Sehri, Judges and Generals in Pakistan (Surrey: Grosvenor, 2013), 1243.
addiction. Never a session judge, judicial magistrate or tehsildar has been called in the court to be shouted at. 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.

Pakistan has inherited the colonial model where superior judiciary was responsible to itself as in the Government of Act, 1935. It was held in the case of Supreme Court Advocates on Record Association of India vs Union of India, an Indian Supreme Court judgment that under the 1935 government of India Act, the majesty may remove a superior court judge if the judicial committee of the privy council on reference being made to it by the majesty found that the judge was incapable of performing his duties on grounds of misbehavior or infirmity of mind. Thus judiciary being accountable to it has roots in the British colonial

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242 Ibid, 1302.
243 Ibid, 1303.
245 Supreme Court Advocates-On-Record Association And Others v. Union Of India. | Supreme Court Of India | Judgment | Law | CaseMine, , accessed October 11, 2018, https://www.casemine.com/judgement/in/5609ac8ee4b014971140f213#.
246 Ibid.
traditions. “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.” 247 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. “The foremost reference in the legal history of the Pakistan was recorded against Justice Hasan Ali Agha in the Federal Court of Pakistan in 1951; the second reference was against Justice Ikhlajq Hussain and the third against Justice Shaukat Ali while the fourth one was documented against Justice Safdar Ali Shah. Every one of these references was documented during the military law administrations aside from the one against Justice Hasan Ali Agha that was recorded in civilian administration and he was exonerated of all charges in 1951. The reference against Justice Ikhlajq was made out in Ayub's administration; Justice Shaikh Shaukat Ali alongwith Justice Fazal-e-Ghani confronted reference in General Yahya's administration and Justice Safdar Ali Shah in General Zia's administration. Every one of these cases was made out in unconventional conditions and was settled on various grounds. In all the three references documented in respective military administrations, the judges were released from duty. Justice Sh.Shaukat Ali was expelled on the premise of the reference yet the expulsion remained questionable. Justice Shaukat Ali was

247 Hamid Khan, A History of judiciary in Pakistan (Karachi: Oxford University Press, 2016), 94.
expelled on the charge that he was running business while also serving in the judiciary. He was a partner in an arms firm of his family. Justice Fazal-e-Ghani was removed for having sold a firearm he had brought from Britain for individual utilization. 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.\textsuperscript{1248} 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 Abbasi & 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.\textsuperscript{249} These wordings suggest that a corrupt judge against whom a prima facie case exists cannot even be laid off temporarily on the pretext of such corruption, which is a strange argument on the foundation of judicial independence. Recently in the case of \textit{Justice Shaukat Aziz Siddiqui And Others v Federation of Pakistan and others},\textsuperscript{250} wherein the judges facing proceedings of misconduct prayed for open trial before the supreme judicial council, the Supreme Court of Pakistan held that open trial could not be held where it was feared that the superior court judges against whom proceedings of misconduct are pending might attack the dignity of court or flurry accusations on the conduct of sitting judges.\textsuperscript{251}

One judge facing accusation in this case of maligning the courts with outside involvement was eventually impeached consequent to finding by the supreme judicial council of misconduct. Thus it is evident on the face of it that superior court judges in order to save their skin didn’t allow the judge facing enquiry an open trial who might in his defense revealed the inner working of superior courts and their extent of independence. The Supreme Court of Pakistan inter-alia also held that proceedings before supreme judicial council are an inhouse procedure conducted by the peers of judiciary only. It was also held that the power to frame for supreme judicial council though not specifically granted by the constitution but it could be inferred considering the fact that jurisdiction was outlined in the

\textsuperscript{249} \textit{Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v President of Pakistan}, PLD 2010 SC 61.

\textsuperscript{250} \textit{Justice Shaukat Aziz Siddiqui And Others v Federation of Pakistan and others}, PL D 2018 Supreme Court 538.

\textsuperscript{251} Ibid.
constitution of Pakistan regarding supreme judicial council and it could impliedly frame rules for itself.\textsuperscript{252} This judgment also held that the verdict of supreme judicial council was a final blow meaning thereby that President was bound by the verdict of supreme judicial council and issuance of notification by the President of Pakistan was a mere formality.\textsuperscript{253} Similar view was also expressed in a judgment of Azad Jammu and Kashmir in the case of \textit{Sardar Karam Dad Khan and 5 others vs Chairman, Aj&K Council/Prime Minister Of Pakistan Through Secretary Aj&K Council, Islamabad And 9 Others},\textsuperscript{254} wherein Ghulam Mustafa Mughal CJ held that President was bound to act on the recommendations of the supreme judicial council.\textsuperscript{255} This judgment also expressed the view that accountability of superior court judges could only be through supreme judicial council and superior court judges could not be dragged in ordinary courts. It is, however, averred that accountability should be commensurate to the position of office of the superior court judge.

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

\begin{footnotesize}
\footnote{\textsuperscript{252} Ibid.}
\footnote{\textsuperscript{253} Ibid.}
\footnote{\textsuperscript{254} \textit{Sardar Karam Dad Khan and 5 others vs Chairman, Aj&K Council/Prime Minister Of Pakistan Through Secretary Aj&K Council, Islamabad And 9 Others}, P L D 2010 High Court (AJ&K) 47.}
\footnote{\textsuperscript{255} Ibid.}
\end{footnotesize}
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. ‘A member from Commons moves for prosecution. The member starting the movement gets endorsement to go to the bar at the House of Lords and to impugn the superior court judge in the name for House of Commons. The House of Lords manages the case with the Lord Chancellor presiding. The hearing is a standard trial. Both sides can call witnesses and present proof. Toward the end of the hearing and after all have voted, a Lord must ascent and pronounce, liable or not liable. Subsequent to voting by the greater part of the house, and if the Lords discover the respondent blameworthy, the house may move for the judgment. The Lords can’t announce the verdict until the house have so moved. The rulers may then give whatever penalty they discover fit, inside the law.’

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

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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.

“In Australia, federal judges are removed upon the passage of a motion by both houses of parliament praying for removal on the ground of proved misbehavior or incapacity. However, prior to such a motion, the chief justice or his nominee judge carry out preliminary investigations which may lead to the constitution of a conduct committee of the judiciary. If the chief justice, assisted by the findings of such a committee, considers the existence of viable grounds justifying removal, the chief justice may approach the attorney general to initiate the process of parliamentary removal, who can then appoint a commission to conduct a public hearing and determine whether grounds for removal exist or not. The system of accountability of judges in New Zealand’s prescribed by Judicial Conduct Commissioner and Judicial Conduct Panel Act of 2004, which lives true to its stated purpose of, inter alia, providing a robust investigation mechanism and a fair process that recognizes and protects the requirements of judicial independence and natural justice. To augment the stated objects of the Act, a judicial conduct commissioner is appointed who investigates complaints about judicial misconduct and, if so warranted, may recommend to the attorney general that a judicial conduct panel be appointed to
conduct a public hearing, unless decided otherwise for compelling reasons, inquiring into the allegations. Upon their recommendation, the attorney general may take steps to initiate the removal of the judge who is ultimately removed upon an address of the House of Representatives’ by the sovereign or the governor general.

A review of other Commonwealth jurisdictions would further reveal that parliamentary oversight is now commonplace not only in the appointment of judges but also in their removal.257

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 trials 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.

3.4. Conclusion

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 stratum 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.
CHAPTER FOUR

Judicial Immunity in India

4.1 Introduction

India and Pakistan are inheritors of colonial traditions being a colony of British Rule. British promulgated laws in pre-independence India to serve their interests and not to serve the people. The sovereignty before partition belonged to King as opposed to people of India. The laws in pre-partition India therefore were promulgated to serve the interests of dominion of England in keeping the British colony intact. Post partition, India and Pakistan were required to do away with colonial traditions of slavery and enact new laws that benefited people of both countries and enlarged there freedom. However, both the nations continued with the vestiges of the past which has made people at large of India and Pakistan virtually still a dependent of various institutions. New traditions must replace the old in this part of the world so that world sees the light of justice also coming from this part of the world.
4.2 Superior Courts and Writ Jurisdiction in the Constitution of India

The Indian Parliament has enacted the Judges (Protection) Act, 1985. Section 3 of the said act provides additional protection with immunity to judges and states that, “no Court shall entertain or continue any civil or criminal proceeding against any person who is or was a judge for any act, thing or word committed, done or spoken by him when, or in the course of, acting or purporting to act in the discharge of his official or judicial duty or function.” Thus by virtue of this act, the judges of superior courts are immune and a disgruntled litigant has no recourse against a judge in case of an erroneous or wrongful decision against the litigant. However, writ jurisdiction in the Constitution of India doesn’t exempt superior Courts in the exercise of such jurisdiction against superior Courts. By virtue of Article 226 read with Article 32 of the constitution of India, superior courts are not exempt from writ jurisdiction. There is no analogous provision like 199(5) of constitution of Pakistan in the constitution of India. Pakistani Parliament could have promulgated an act like the Judges (Protection) Act, 1985 inferring immunity for judges in constitutional scheme from article 199 (5). Dilating on this question of exemption of superior courts from writ jurisdiction, the single member bench of High Court of Karnataka in a judgment scribed by N.Kumar in case titled, ‘Shri K. Sippe Gowda vs The High Court Of Karnataka’, held that,

“A similar identical provision like Article 361 (pertaining to immunity of President and Governor) conferring protection to the Chief

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Justice of High Court is conspicuously missing in the Constitution. Therefore, it is clear that the framers of the Constitution did not intend extending this complete immunity to the Chief Justice. In the absence of such express immunity being extended to the office of the Chief Justice it is not possible to infer any such immunity to the Chief Justice by implication.

As stated earlier the Chief Justice has a dual capacity. As a judge of the High Court on the judicial side when he passes an order the said order is challenged in the higher forums and in such proceedings the Chief Justice is not made a party as it is settled law that there is no necessity for impleading the Judicial Officer who disposes of the matter on the judicial side (Savitri Devi v. District Judge, Gorakhpur and Ors., Civil Appeal No. 932/1999 disposed of on 18.2.1999). However, on the administrative side as a disciplinary authority when he passes an order imposing a penalty on a servant of a High Court, it is an order which is amenable to writ jurisdiction of the High Court under Article 226 of the Constitution.\(^260\)

This ruling clearly emphasizes that administrative orders of superior courts in India are not immune as constitutional provision in this regard is conspicuously missing, while judicial orders can be challenged in accordance with law by way of appeal \(\textit{etc.}\) There is myriad of law on this point in India that administrative orders of superior courts are not immune and can be challenged in writ jurisdiction.\(^261\) The old law in India also validates this point. In the case of

\(^{260}\) Ibid.

Abul Khair And Ors. vs Hon'ble Chief Justice, High Court of Allahabad,\(^{262}\) wherein certain officials of High Court challenged orders of Chief Justice of that Court, the single member bench of Allahabad High Court presided over by Justice W.Broome held that, ‘the history of the powers exercised by the Chief Justice in relation to the High Court staff also supports the view that these powers are personal to the Chief Justice and are not exercised by him as a representative of the High Court as a whole. Moreover, the High Court has the power to issue writs against the Chief Justice and the Registrar in respect of action taken or orders passed in exercise of the powers conferred by Article 229.\(^{263}\) The view that administrative powers are personal to the Chief Justice and are not exercised by him as a representative of the High Court as a whole is unlike Pakistan where each judge of High Court is considered as a representative of High Court under Article 192 of the Constitution of Pakistan. A similar view has been expressed in Mahesh Prasad Srivastava vs Abdul Khair And Ors presided over by Justice Dwivedi of Allahbad High Court that writ can be issued against Chief Justice acting administratively. This judgment also expressed the view that,

‘The Constitution has made a distinction between the High Court as a collective institution and the Chief Justice. When the Chief Justice acts in exercise of the power vested in him under Article 229, he does not act for the High Court. He acts in his individual capacity as the Chief Justice.’ \(^{264}\)

\(^{170}\)Abul Khair And Ors. vs Hon'ble Chief Justice, High Court of Allahabad, AIR 1971 ALL 44.  
\(^{262}\)Mahesh Prasad Srivastava vs Abdul Khair And Ors, AIR 1971 ALL 205.  
\(^{264}\)Ibid.
It was held as far back in 1952 in the case of *Motilal vs State*\(^2\), an Allahabad High Court Judgment of division bench authored by Justice Agarwala that courts and tribunals were not exempt from the purview of Article 226 containing writ jurisdiction. This was also observed in the judgment that, “the power, which has been conferred on the High Courts to issue certain writs, orders or directions, is of a most extensive nature, for the words ‘any person or any authority’ would include all Courts and tribunals situated within its territorial jurisdiction, including any Court or tribunal constituted by or under any law relating to the Armed Forces.”\(^3\) Amendment in this regard is also required in the constitution of Pakistan so that nothing is left out of the jurisdiction of court. This is stressed that this amendment should be done by the parliament alone and not through any superimposed interpretation by the judiciary in the interest of justice.

A nation is not truly independent unless its people are free. Freedom means that fundamental rights of people are guaranteed to every section of society. Constitutional provisions which are hurdle to enforcement of fundamental rights symbolize an enslaved nation. It is imperative that in today’s period dignity be ensured of every human and provisions that exclude certain institutions like army and judiciary from the ambit of writ jurisdiction for better disciplining the persons serving within these institutions be suitably amended. A superior court judge is exempt from writ jurisdiction for an erroneous decision in India and reasons proffered for this exemption is that erroneous judgment can be challenged by way of an appeal. Due to the increasing cost of litigation, not everyone can afford


\(^3\) Ibid.
remedy by way of appeal or for many other reasons. Therefore, on the judicial side, superior courts should also enlarge their jurisdiction and entertain writ petitions against erroneous decisions. Institutions and individuals that are fallible should be within public scrutiny all the times. Accountability is talk of the town these days and to bring everyone within its ambit, immunity clauses require repealing. If one is fair and impartial than he has nothing to fear. Law suits against superior court judges are extremely necessary to protect vulnerable community. This will ensure justice at grass root level. Justice is what people require more than anything. The problems of the world in the form of terrorism are increasing day by day and all this has roots in denying justice to people who than as a last resort take up arms. All this mandates doing away with the immunity provisions.

It is therefore proposed that following the lead in India where administrative orders are not immune constitutionally, Article 199(5) of the constitution of Pakistan may be deleted as its removal will serve the ends of justice and bring more clarity to the law.

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

Article 121 of the Constitution of India states that discussion with regard to the official conduct of a superior court judge is prohibited except upon a
motion in parliament for presenting an address to the President praying for the removal of the superior court judge on grounds of incapacity or misconduct.”

Article 121 of the Constitution of India is similar to Article 68 of the Constitution of Pakistan. Both these Articles restrict discussion in parliament with respect to the conduct of any judge of superior courts. These Articles are the relics of British Raj and militate against sovereignty of parliament. In 1953 soon after the creation of India, Allahabad High Court in a single member bench judgment scribed by Justice Supr, in case titled Raj Narain Singh vs Atmaram Govind And Anr. held,

“A perusal of Article 121 would show that the founding fathers have protected judges from criticism in Parliament by laying down that there shall, except on a motion of misbehavior, be no discussion in Parliament on the conduct of any judge or Court of law having jurisdiction in any part of India in the exercise of his or its judicial functions. Rule 32 of the Rules of Procedure of the U.P. Legislative Assembly relating to the form and content of questions lays down in Clause (10) that there shall be in the House no reference to the conduct of any judge or court of law having jurisdiction in any part of India in the exercise of his or its Judicial functions. Rule 79 lays down, as one of the conditions of the admissibility of the resolution, that a resolution shall not relate to any matter which is under adjudication by a court of law having jurisdiction in any part of India. It is right and proper that judicial authorities should be free from

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267 Article 121, Constitution of India.
268 Raj Narain Singh vs Atmaram Govind And Anr, AIR 1954 All 319.
http://indiankanoon.org/doc/1596730/ (last assessed 12/5/2-17)
criticism so far as their judicial work is concerned in the State legislature or Parliament.”

Five member bench of the Supreme Court of India by majority opinion in a judgment authored by Justice B Verma in the case of *Sarojini Ramaswami vs Union Of India & Ors,* elucidating the scope of Article 121 of the Constitution of India held that,

“Prior proof of misconduct in accordance with the law made under Article 124(5) is a condition precedent for the lifting of the bar under Art. 121 against discussing the conduct of a judge in the Parliament. Art. 124(4) really becomes meaningful only with a law made under Article 124(5). Without such a law the constitutional scheme and process for removal of a judge remains inchoate.”

This implies that bar of Article 121 in India is lifted after findings of culpability of a judge under the *Judges (Inquiry) Act,* 1968. Supreme Court of India in another case titled *C. Ravichandran Iyer vs Justice A.M. Bhattacharjee & Ors,* authored by Justice K Ramaswamy held that,

“Article 121 of the Constitution prohibits discussion by the members of the Parliament of the conduct of any judge of the Supreme Court or of High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the judge as provided under Article 124 (4) and (5) and in the manner

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269 Ibid.
270 *Sarojini Ramaswami vs Union Of India & Ors,* 1992 (1)Suppl.SCR 108.
271 Ibid.
laid down under the Act, the Rules and the rules of business of the Parliament consistent therewith. By necessary implication, no other forum or fora or platform is available for discussion of the conduct of a judge in the discharge of his duties as a Judge of the Supreme Court or the High Court, much less a Bar Council or group of practising advocates. They are prohibited to discuss the conduct of a judge in the discharge of his duties or to pass any resolution in that behalf.”

A division bench of Allahabad High Court has also later endorsed the view that discussion in regard to the conduct of a judge of the Supreme Court or High Court can take place only at the time of prayer for removal of such a judge as provided under the Constitution. Thus position in India is slightly better than Pakistan as some form of discussion can take place against misconduct of a judge in the Parliament which may lead to removal of the superior court judge in case charges are proved of the alleged misconduct. This process of removal is also in consonance with the theory of checks and balance as Parliament serves as a check on the judiciary. In a functional democracy, people are supreme therefore their representative by implication should also enjoy supreme authority which necessarily includes the power to criticize higher judiciary. Thus one of the symbols of true democracy is free speech which India and Pakistan lack. It is therefore, proposed that reform should be carried out in this regard in the sub-continent by the law makers. This would be in accordance with the principles of parliamentary sovereignty.

273 Ibid.
274 Smt. Saroj Giri vs Vayalar Ravi And Ors, 1999 CriLJ 498.
4.4 Power of Contempt of the Superior Courts

Article 129 of the Constitution of India pertains to the contempt of Supreme Court of India. It states that the supreme court of India is a Court of Record and has such powers including the powers of contempt.\(^\text{275}\)

Article 215 of the Constitution of India relates to power to punish for contempt of the High Court. It states that every High Court is a court of record and has all the powers of such a court including the power to punish for contempt of itself.\(^\text{276}\)

As to what constitutes contempt, it has not been defined in the Constitution of India. Section 2 in the Contempt of Courts Act, 1971 of India expounds contempt. It is a detailed provision and includes scandalizing of court and prejudicing a case as contempt of superior courts.\(^\text{277}\) There is little difference between the contempt provisions of India and Pakistan relating to superior judiciary. Superior courts have been declared as courts of record in the constitution of India on the pattern of British Raj which shows that constitution makers in India were inspired by the British legal system. Instead of providing a law that enlarges the freedom of people in India, constitution makers in India decided to follow the British footsteps just like the case of Pakistan. Therefore, there is virtually a

\(^{275}\) Article 129, Constitution of India.
\(^{276}\) Article 215, Constitution of India.
continuation of the British raj in the two countries of the dominion where officials run the show in both India and Pakistan and freedom in real terms has still not come to people.

Interpreting the contempt provisions in India, the four member bench of Patna High Court in the case of *Shri Harish Chandra Mishra vs The Hon’ble Mr. Justice S. Ali*,278 authored by N Singh held that, ‘the judges of superior courts could not be charged with contempt. Moreover, it was observed that, ‘the framers of the Constitution on British pattern declared the Supreme Court and High Courts, Courts of Record by saying so in clear and unambiguous term in Articles 129 and 215 of the Constitution.’279 Thus this case is also indicative of the fact that contempt provisions are an off-shoot of British Raj. The Supreme Court of India in the case of *Delhi Judicial Service vs State Of Gujarat And Others*,280 in a judgment authored by Justice K Singh while dilating upon contempt provisions in the constitution of India, laid down that inferior court could also be charged with the contempt of superior courts and that there was no bar in the constitution prohibiting such an exercise.281 Division bench of Andra High Court in the case of *Government Of Andhra Pradesh vs K. Anantha Reddy And Others*,282 authored by Justice B S Reddy held that inferior courts could not invoke the provisions of contempt and had to report contempt to superior courts.283

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278 *Shri Harish Chandra Mishra vs The Hon’ble Mr. Justice S. Ali*, AIR 1986 Pat 65.
279 Ibid.
280 *Delhi Judicial Service vs State Of Gujarat And Ors*, 1991 SCR (3) 936.
281 Ibid.
283 Ibid.
Case titled, ‘Dr. D.C. Saxena vs. Hon'ble the Chief Justice of India’,\(^{284}\) of Supreme Court of India authored by K Ramaswamy held that scurrilous abuse of judge or Court or personal attacks on a judge amounted to contempt.\(^{285}\) In this case petitioner had filed writ petition imputing motives to Chief Justice of India. Petitioner was sentenced to three months imprisonment for this act. \textit{M.b. Sanghi, Advocate v. High Court of Punjab and Haryana},\(^{286}\) held that imputing words to judge by an advocate who was refused stay was contempt of court. Apology of advocate was not accepted on the grounds that he was in habit of tendering such an apology.\(^{287}\)

In the case of \textit{J. R. Parashar, Advocate & Others vs Prasant Bhushan, Advocate & Others},\(^{288}\) a two member bench of Supreme Court of India in a judgment authored by Justice Ruma Pal while expounding provisions of contempt held that fair criticism could be directed against superior court judges but imputing motives to court and alleging harassment amounted to contempt.\(^{289}\)

The position in India relating to contempt is identical to that of Pakistan as both have not come of shadows of British Empire. Both Pakistan and India have inherited colonial laws and they continue to survive to this day due to lack of sensitivity by the appropriate legislatures. After independence, freedom has not come in real terms to both the nations as we are still slaves of the past. Imputing of motives can be challenged by way of defamation by any superior court judge just like any other ordinary citizen but power of contempt has been reserved by

\(^{284}\) Dr. D.C. Saxena Vs. Hon'ble The Chief Justice Of India, 1996 SCC (7) 216.

\(^{285}\) Ibid.


\(^{287}\) Ibid.


\(^{289}\) Ibid.
superior courts for itself to punish any delinquent by itself. This is brazenly manifest on the face of it and elevates judiciary to a higher pedestal.

Justice Markandey Katju, judge, Supreme Court of India in a brilliantly written essay titled, ‘Contempt Of Court: The Need For A Fresh Look’, has argued that, “the basic principle in a democracy is that the people are supreme. It follows that all authorities, whether judges, Legislators, Ministers, Bureaucrats, etc. are servants of the people, therefore, in a democracy the people have the right to criticize the judges.” Moreover England itself has reformed the law and now only obstruction of justice is contempt of court therefore India should follow suit. It is therefore proposed that India and Pakistan should come out of past vestiges and reform the law of contempt on the pattern of America and England where criticism of judge does not amount to contempt. A judge should be magnanimous proportionate to the prestigious office that is held by the superior court judges.

4.5 Rules making power of Superior Courts in the Constitution of India

Articles 145 & 146 govern the powers of Supreme Court in India to formulate rules regulating their procedure and relating to term and conditions of their court staff. Article 227 & 229 of Constitution of India regulate the power of High Courts to frame rules in this regard. The rules formulated by

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291 Ibid.
Supreme Court of India are subject to approval by the President of India while rules formulated by High Courts in India are subject to approval by the governor concerned.

Justifying the delegation of powers to superior courts in India to formulate rules, Justice Asok Kumar Ganguly in his separate note in case titled *University of Kerala versus Council, Principals', Colleges,Kerala & Others,* stated that,

‘The doctrine has been most directly incorporated in the U.S. Constitution by its provisions like "all legislative powers shall be vested in a Congress (Article I, Section 1), "The executive powers shall be vested in a President" (Article II, Section 1) and "the judicial powers shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish" (Article III, Section 1). Moreover, that the framers of our Constitution never wanted to introduce the doctrine of Separation of Powers rigidly to the extent of dividing the three organs into water-tight compartments.’

However, it was imperative that such watertight compartments introduced in the subcontinent to ensure that there is an end to institutionalized tyranny and freedom enlarged as free nations. Justice Asok Kumar Ganguly also added,

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293 Ibid.
‘The rationale of the doctrine of Separation of Powers, to my mind, is to uphold individual liberty and rule of law. Vesting of all power in one authority obviously promotes tyranny. Therefore, the principle of Separation of Powers has to be viewed through the prism of constitutionalism and for upholding the goals of justice in its full magnitude.’

This passage can be given the connotation that vesting of all powers in the judiciary relating to its workings on the pretext of judicial independence may promote tyranny and undermine fundamental rights. It is therefore proposed that legislature in India may consider taking back the power to promulgate rules of the superior judiciary to itself in the interest of masses.

4.6 Conclusion

It is proposed that following the lead in India where administrative orders are not immune constitutionally, Article 199(5) of the constitution of Pakistan may be deleted as its removal will serve the ends of justice and bring more clarity to the law. The problems of the world in the form of terrorism are increasing day by day and all this has roots in denying justice to people who than as a last resort take up arms. All this mandates doing away with the immunity provisions. In a functional democracy, people are supreme therefore their representative by implication should also enjoy supreme authority which

294 Ibid.
necessarily includes the power to criticize higher judiciary. It is proposed that India and Pakistan should come out of past vestiges and reform the law of contempt on the pattern of America and England where criticism of judge does not amount to contempt. Vesting of all powers in the judiciary relating to its workings on the pretext of judicial independence may promote tyranny and undermine fundamental rights. It is therefore proposed that legislature in India may consider taking back the power to promulgate rules of the superior judiciary to itself in the interest of masses.
CHAPTER FIVE

Appointment and Removal of the Superior Court Judges in India

5.1 Introduction

The superior judiciary in India has just like Pakistan tried to place all the powers with regard to appointment and removal of superior court judges with the superior judiciary on the pretext of independence of judiciary. This negates the concept of judicial accountability & checks and balance. If one sees closely the international instruments particularly the Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, one finds that there is nothing in these instruments which allows such a dispensation of appointment and removal by the superior judiciary itself. Article 1 of the instrument says that States shall ensure independence of judiciary. The next Article to this postulates that judiciary is to decide matters free from any biases. Removal of bias cannot be ensured unless the appointment and removal process of superior court judges is fully transparent and not entirely dependent on a single institution which may attract favoritism. The Bangalore principles on Judicial Conduct, 2002 Articles 1.3 and 1.4 relating to independence of judiciary also state the same and

296 Ibid.
mentions that a judge should appear free from connections and influence of judicial colleagues.\textsuperscript{297} True independence of judiciary can only be ensured if judiciary doesn’t carry predispositions regarding peer judges.

5.2 Appointment

Appointment of the superior court judges in India is dealt by Articles 124 and 217 of the Constitution of India. The relevant provisions relating to appointment state that judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the judges of the Supreme Court and of the High Court in the States as the President may deem necessary for the purpose. The High Court judge shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India the Governor of the State, and, in the case of appointment of a judge other than the Chief Justice, the Chief Justice of the High Court.\textsuperscript{298}

The first significant judgment impacting law in India, to dilate upon the appointment of judges is \textit{S.P Gupta vs Union of India and others}.\textsuperscript{299} This seven member bench judgment authored for majority by Justice P Bhagwati is a lengthy discourse touching inter-alia the questions of transfer and posting of judges from

other states, independence of judiciary and appointment of superior court judges. The judgment starts with the opening words that constitution is to be interpreted as it is and not what we think it ought to be. Thus laying down the law that nothing is to be imported out of the constitution to give it a new meaning. This is especially relevant in the Pakistani context where tendency is to interpret the law as it ought to be. This judgment laid an important piece of law by holding that President had the final say in appointment of judges. It was held that only by this method the judges will be people’s judges otherwise they will be merely ‘judges judge’. Furthermore, that this method of appointment by the executive fits the popular scheme of democracy. Another significant piece of law laid by this judgment was that transfer of judges from diverse states to a state was held to be conducive to justice and the constitutional scheme of Constitution of India. The finding of this judgment has extreme relevance for Pakistan today and the problems being faced by the judiciary. This judgment expressed the view that appointment by the executive of superior court judges ensures checks and balance and has nothing which militates against independence of judiciary. Moreover, that judges are fallible and this method of appointment by the executive of superior court judges ensures transparency. This judgment is a very good piece of law as it is scribed keeping in view accountability of judiciary so that the superior judiciary does not go out of its compass. The reasons proffered are also appealable as they take into account human frailties.

300 Ibid.
301 Ibid.
302 Ibid.
303 Ibid.
304 Ibid.
This judgment did not last long and was overruled in 1993 by nine member bench authored by Justice Verma in case titled, *Advocates-on-Record Association vs Union of India*.\(^{305}\) This judgment again utilized the services of theory of independence of judiciary to enhance its powers with respect to appointment of judges and concentrated all the powers with judiciary in this regard. This judgment devised a collegium system consisting of members of judiciary and held that Chief Justice of India will have the final say regarding appointments of judges to secure independence of judiciary.\(^{306}\) Executive through this judgment was made inconsequential just like the case of Pakistan where overtime all the powers relating to appointments of judges have been concentrated in the judiciary sidestepping checks and balances.

The third significant ruling by the Supreme Court of India on judicial appointments of superior court judges is on a Presidential Reference answered by nine judges.\(^{307}\) The President of India through this reference referred nine questions relating to judicial appointments of superior court judges to Supreme Court of India for determination. The reference authored by Justice S Bharucha declared that in matter of appointments, the Chief Justice of India has to consult four senior judges of Supreme Court of India for considering elevation to Supreme Court of India and in making transfers of High Court judges while for elevation to


\(^{306}\) Ibid.

High Courts, consultation with two senior most judges of Supreme Court of India is mandatory.\textsuperscript{308} These three pronouncements are known as judge’s cases in India.

Judiciaries of both the neighboring countries of India and Pakistan have shown a tendency to concentrate powers regarding elevation of judges in the judiciary on the pretext of independence of judiciary. However, what was really required that the process of elevation be infused with transparency. Appointment of superior court judges by the judges themselves casts a shadow on the elevation process and gives a wrong impression. It opens the door for favoritism. Selection of superior court judges is through either appointive or elective methods.\textsuperscript{309} The Universal Declaration on the Independence of Justice 1983 known as Montreal Declaration postulates that, ‘participation in judicial appointments by the Executive is in-accordance with judicial independence, so long as appointments of judges are made in consultation with members of the judiciary and the legal profession, or by a body in which members of the judiciary and the legal profession participate.’\textsuperscript{310} However, it is proposed that system of independent judicial commission for elevation to superior judiciary may be adopted if judiciaries in India and Pakistan are bent on concentrating powers with regard to appointment of judges to themselves. It is imperative that such dispensation adopts a transparent process inter-alia including exams for selection of suitable candidates. This will ensure independence of judiciary and also infuse transparency to the process of selecting higher judiciary so that also ordinary meritorious

\textsuperscript{308} Ibid.
\textsuperscript{310} Ibid.
lawyers can make it to higher judiciary. In a significant development in India, Constitution (Ninety-ninth Amendment) Act, 2014, s. 7 prescribed an independent judicial commission for selection of superior court judges which comprised of individuals other than the judges. Strangely, just like Pakistan, the amendment was struck down in the case of Supreme Court Advocates’ on Record Association Vs. Union of India, 311 on the premise of independence of judiciary. 312 This manifests that judiciaries of India and Pakistan are really sensitive in regard to their powers and just like colonial masters not inclined to part with the same in the interest of people.

5.3 Removal of Judges

The provisions of Constitution of India that entail the removal of superior court judges in India state that a judge shall not be removed from his office except by an order of the President delivered after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity. 313

312 Ibid.
To facilitate the operation of the Constitutional provisions, an Act has been also promulgated in India known as ‘The Judges (Inquiry) Act, 1968’. It sanctions peers of judiciary only to conduct inquiry against brother judges.\(^ {314} \)

On a complaint to CBI, charge was registered against a Chief Justice of High Court in India for corruption under Prevention of Corruption Act, 1947 for the judge possessed assets disproportionate to his sources of income. The judge then in case titled *K. Veeraswami vs. Union of India and Others*,\(^ {315} \) approached the superior courts for quashment of case on the pretext that such an exercise was against independence of judiciary.\(^ {316} \) The ten member bench of Supreme Court of India in a judgment authored by Justice K Shetty did not concur and held that superior court judges were Public Servants and could be prosecuted under the Prevention of Corruption Act, 1947 by the previous sanction of the President.\(^ {317} \) This is a significant development in India as opposed to Pakistan where judges cannot be prosecuted under the relevant corruption laws particularly the NAB laws wherein judges have been given immunity.

In the case of *Sub-Committee on Judicial Accountability Etc. vs Union of India and Ors., etc.*,\(^ {318} \) a nine member bench of Supreme Court of India in a judgment authored by Justice B Ray wherein the issue was whether motion that had been presented in the dissolved assembly for the removal of a superior court judge had extinguished or not, the Supreme court of India inter-alia decided that


\(^ {315} \) *K. Veeraswami vs. Union of India and Others*, 1991 SCR (3) 189.

\(^ {316} \) Ibid.

\(^ {317} \) Ibid.

\(^ {318} \) *Sub-Committee on Judicial Accountability Etc. vs Union of India and Ors., etc*, AIR 1992 SC 320.
such a motion does not lapse. Furthermore, it is only the authority of the Judiciary in India to declare what is the law. Moreover that the process of removal in India is governed in two steps i.e. first is statutory and the second governed by parliament.319 Thereby, practically the authority has been left with the judiciary alone in India to remove a judge as the peers of judiciary will only investigate the charges of misconduct against a superior court judge.

While defining misconduct and misbehavior, the four member bench of Supreme Court of India in the case of *M. Krishna Swami vs Union Of India & Ors.*,320 by a majority vote in a judgment authored by Justice Verma held that, “Every act or conduct or even error of judgment or negligent acts by higher judiciary per se does not amount to misbehaviour. Wilful abuse of judicial office, wilful misconduct in the office, corruption, lack of integrity, or any other offence involving moral turpitude would be misbehaviour. Misconduct implies actuation of some degree of mensrea by the doer. Judicial finding of guilt of grave crime is misconduct. Persistent failure to perform the judicial duties of the judge or wilful abuse of the office dolus malus would be misbehaviour. Misbehaviour would extend to conduct of the judge in or beyond the execution of judicial office. Even administrative actions or omissions too need accompaniment of mensrea.”321 Thus misconduct and misbehavior have been limitedly defined in India to protect the superior court judges on whom the fundamental rights of masses rest. Limited grounds for prosecution against judges have been prescribed in India for neglect of rights of people by the guardian judges.

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319 Ibid.
320 *M. Krishna Swami vs Union Of India & Ors*, AIR 1993 SC 1407.
321 Ibid.
C. Ravichandran Iyer vs Justice A.M. Bhattacharjee & Ors,\textsuperscript{322}

wherein correct course of action for Bar Associations against a High Court judge was under discussion, the Supreme Court of India in a judgment authored by K Ramaswamy held that, to discipline a High Court judge, in-house procedure should be utilized and complaint in this regards should be lodged with the Chief Justice of India who will then process the complaint or deal with the judge through other means like discussion with the judge.\textsuperscript{323} Thus stress was laid on the resolution of disputes through in-house procedures. This judgment also laid stress on self-accountability by the judiciary itself justifying it on the pretext of independence of judiciary. Again the trend was to keep the powers of removal of superior court judges with the judiciary and grab powers in this regard rather than delegating it to any other institution to inspire confidence of masses. It is proposed that to make the process less stringent, the removal of a superior court judge in India may be mandated by simple majority of parliament rather than prescribed 2/3\textsuperscript{rd}. It seems that parliamentary removal of judges is a better process than removal by peers of Judiciary as any shadow of predisposition is removed to a minimum.

\textbf{5.4 Conclusion}

\textsuperscript{322} C. Ravichandran Iyer vs Justice A.M. Bhattacharjee & Ors, 1995 SCC (5) 457.

\textsuperscript{323} Ibid.
Removal and appointment processes in India and Pakistan provide an impression that judiciary doesn’t want that any other institution or individual should meddle in its affairs or question its integrity. This means that judiciary should not be accountable to anyone except itself. It is against the principles of accountability and casts a shadow on the integrity of judiciary. Therefore, it is strongly the need of time that judiciary should come out of this perversity and ensure transparency and accountability by limiting its immunities. This will be in line with all the international instruments and declarations and principles of propriety and transparency. The fundamental rights of individuals are at stake with the judiciary and any infringement therein should be accountable in accordance with justice and equity.
CHAPTER SIX

Judicial Immunity of Superior Courts under Islamic Law

6.1 Introduction

Islamic law has special reference in the context of Pakistan. Article 227 of the Constitution of Pakistan postulates that all laws promulgated must be in accordance with Quran and Sunnah. The clause (2) of Article 227 mentions that effect shall be given to Article 227 under the provisions of part in which Article 227 is present. This means only legislature under the advice of Islamic ideological Council is competent to enact Islamic laws as under article 229 of the Constitution of Pakistan, legislature along with president and governor only are competent to refer a question regarding repugnancy to injunction of Islam to the Islamic ideological council. The advice of Islamic ideological council can be converted to legislation by parliament on its discretion. However, the exercise has largely been undertaken by the judiciary in the present times of judicial activism by pronouncements on Islamic Law. Objective resolution which is now a substantive part of the Constitution of Pakistan also states that Muslims in Pakistan shall be enabled to order their lives as per the injunctions of Islam. Since Islam is the state religion in Islam and all laws have to be in conformity with Islam therefore this chapter will examine judicial immunity in the light of Islam & Sharia.
6.2 Judicial Immunity in the Times of Prophet Muhammad (P.B.U.H)

Prophet Muhammad (P.B.U.H) is the last in the line of Prophets. He (P.B.U.H) was divinely guided, therefore, absolute judicial immunity was attached to his actions. This is evident from the following Quranic verse.

“But no, by the Lord, they can have no (real) faith, until they make thee judge in all disputes between them, and find in their souls no resistance against Thy decisions, but accept them with the fullest conviction.”324

Thus the decision of Prophet Muhammad (P.B.U.H) was not questionable by anyone. Finality was attached to the verdicts of Prophet Muhammad (P.B.U.H) but no such finality is attracted in the case of other judges which is also manifest from this verse as it limits finality to Prophet Muhammad (P.B.U.H) only. No judicial immunity could be inferred for other judicial offices or worthy personalities during the times of Holy Prophet (P.B.U.H). It is evident from the extracts of the Quran and Sunnah of the Prophet Muhammad (P.B.U.H).

Quran 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.”

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;”

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) as has
been guided by Allah in the Quran. 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.”

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

325 Quran 4: 58.
326 Quran 4: 105.
327 Quran 5: 49.
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.

There are elaborate references expounding judicial immunity in the Sunnah of Holy Prophet (P.B.U.H). 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.

“Narrated 'Urwa:

When a man from the Ansar quarrelled with AzZubair, the Prophet said, "O Zubair! Irrigate (your land) first and then let the water flow (to the land of the others)." "On that the Ansari said, (to the Prophet), "It is because he is your aunt's son." On that the Prophet said, "O Zubair! Irrigate till the water reaches the walls between the pits around the trees and then stop (i.e. let the water go to the other's land)." I think the following verse was revealed concerning this event: "But no, by your Lord they can have No faith until they make you judge in all disputes between them."328

This tradition like the earlier verse suggests that there was absolute judicial immunity for the verdicts of Prophet Muhammad (P.B.U.H) and they cannot be questioned by anyone.

Narrated 'Amr bin Al-'As:

That he heard Allah's Apostle saying, “If a judge gives a verdict according to the best of his knowledge and his verdict is correct (i.e. agrees with Allah and His Apostle's verdict) he will receive a double reward, and if he gives a verdict according to the best of his knowledge and his verdict is wrong, (i.e. against that of Allah and His Apostle) even then he will get a reward.”\[329\]

This tradition indicates that there is pardon for an unintentional mistake by a judge for a verdict that is pronounced in all honesty.

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.”\[330\]

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

\[329\] Sahih Bukhari 92:450.
\[330\] Sahih Bukhari 81:778.
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”. 331

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.” 332

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.’ 333

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. Judges liability to

331 James Robson, Mishkat al Masabih (Lahore: Muhammad Ashraf, 1975), 780.
332 Ibid.
pronounce a correct verdict can also be gleaned from the following traditions of Prophet of Allah(P.B.U.H):

“Yahya related to me from Malik from Hisham ibn Urwa from his father from Zaynab bint Abi Salama from Umm Salama, the wife of the Prophet, may Allah bless him and grant him peace, that the Messenger of Allah, may Allah bless him and grant him peace, said, "I am but a man to whom you bring your disputes. Perhaps one of you is more eloquent in his proof than the other, so I give judgement according to what I have heard from him. Whatever I decide for him which is part of the right of his brother, he must not take any of it, for I am granting him a portion of the Fire.”

“Malik related to me from Yahya ibn Said from Said ibn al-Musayyab that Umar ibn al-Khattab had a dispute brought to him between a muslim and a jew. Umar saw that the right belonged to the jew and decided in his favour. The jew said to him, "By Allah! You have judged correctly." So Umar ibn al-Khattab struck him with a whip and said, "How can you be sure." The jew said to him, "We find that there is no judge who judges correctly but that there is an angel on his right side and an angel on his left side who guide him and give him success in the truth as long as he is with the truth. When he leaves the truth, they rise and leave him.” Absolute immunity attached to last in line of Prophets Muhammad (P.B.U.H) can also be said to be recommendatory as the Prophet Muhammad (P.B.U.H) did not wish to claim this immunity which can be gleaned from following tradition:

It is also reported from Hazrat Umar,

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‘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 hirn, 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.’

6.3 Judicial Immunity in the times of Caliphs following Prophet Muhammad (P.B.U.H)

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. This shows that he did not claim immunity for his decisions. He also said that judge must not give judgment in anger. 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. 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. A concise passage from Hazrat Ali letter to Malik al-Ashtar al-Nakha’i narrates,

337 James Robson, Mishkat al Masabih (Lahore: Muhammad Ashraf, 1975),793.
339 Ibid.
'then select the best of people for the post of qadi, such as one with whom the matters do no become narrow and difficult and whom the litigants cannot infuriate. He who does not brood on 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'.

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. Caliph Umar reported from Prophet of Islam, “The one among God’s servants who will have the best position with God on the day of resurrection will be a just and kind imam but the man who will have the worst position with God on the day of resurrection will be a tyrannical and harsh imam.” 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:

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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 Halil 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 hirn, 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.\(^{342}\)

There is another example of illustrious caliph Hazrat Umar wherein he was held liable and did not wish to claim immunity for himself though being chief justice and head of Islamic state. The story goes thus that, “Abdul-Razzaq, from Ma`mar,\(^{342}\)Mohammad Redha, *Al- Farouk Omar Ibn Al-Khattab* (Beirut – Lebanon: Dar Al-Kotob Al-Ilmiyah 1999), 29-30.
from Matar al-Warraq, and others, from al-Hasan, that he said: `Umar sent after a promiscuous woman who used to receive men, he did not accept this. So when they got to her place, they called on her: "Come answer to `Umar!" She said: "Woe to me! What have I done to `Umar!??" And while on her way, she was painful, and entered a house and dropped her child, so he cried twice then died.

Umar consulted the companions of the Prophet (SAWS), and some of them said to him: "You are not deserving of punishment, your duty is only to discipline them as the ruler." but `Ali was silent, so `Umar approached him and asked: "What is your opinion?" `Ali replied: "If this is their opinion then they erred, and if they said this to you knowing that you wanted to hear it, then they did not give you sound advice. I see that you must pay the blood money (Diyyah) for him, because you scared her and she dropped her child as a result." so he ordered `Ali to distribute the money between Quraysh because he was wrong."343 Another version of the same legend goes as thus, “From what al-Hafiz abu `Abdullah granted me the Ijazah to narrate, is that abu al-Walid al-Faqih told them, he said: al-Masirjisiy abu al-`Abbas told us, Shayban told us, Sallam told us, he said: I heard al-Hasan say: That it had reached `Umar that a promiscuous woman was receiving men, so he sent her a messenger, and the messenger said to her: "Come answer to Ameer al-Mu'mineen!" So she got scared and it affected her womb, and her child moved, and when she left she suddenly dropped her fetus.

`Umar was informed of this he sent after the emigrants and told them her story, he asked: "What do you think?" they said: "We see no fault on you O Ameer al-

Mu'mineen, your job is only to discipline and teach." and `Ali was among the folks and he was silent. `Umar said: "O abu al-Hasan, what do you think?" `Ali replied: "I say: if they spoke only what you desired to hear, then they are sinful, and if they had thought and reached this opinion, then they are wrong. O Ameer al-Mu'mineen, I see that you must pay the blood money (Diyyah)." `Umar said: "You speak truth! Go and divide it among your folks." 344

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.

6.4 Judicial Immunity and Muslim Jurists

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

344 Ibid.
witness. He also suggests that appointing authority should refrain from appointing fasiq (one who violates commandments of Allah) as a judge.\textsuperscript{345} Ibn Qudama, the Hanbalite jurist also postulates qualifications for a judge and mentions that a fasiq cannot be a judge.\textsuperscript{346} 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), (10) (to run away from the battle-field), (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) (ascripting false statement 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

\textsuperscript{346} Ibid, 250.
slaughtered-), (32) (robbery with use of criminal force), (33) (sorcery), and (34) (gambling).” 347

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). 348 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 except the Hanafis 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. 349 Al Kasani a Hanafi jurist says that state is to compensate the wronged party as wakil of the qadi in case of an unjust decision.” 350 This shows that jurists of Islam do not 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

347 Ibid, 257.
350 Ibid.
where he is of notorious misconduct.\textsuperscript{351} 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.\textsuperscript{352} 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.\textsuperscript{353}

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.’\textsuperscript{354}

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

\textsuperscript{352} Ibid.
\textsuperscript{353} Ibid.
\textsuperscript{354} Ibid, 503.
justice to the judges and they may be taken to task in case of an erroneous verdict.\textsuperscript{355} 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.\textsuperscript{356} 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.\textsuperscript{357} 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. Imam al Shawkani a distinguished Hanbali jurist in his fiqh manual postulates pre-conditions for a judge giving judgments.\textsuperscript{358} 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

\textsuperscript{355} Syed Ameer Ali, 	extit{Fatawa Alamgiri} (Lahore: Maktaba Rahmania), 141.
\textsuperscript{356} Ibid, 142.
\textsuperscript{357} Ibid, 142-143.
mal. However, Imam al Kasani has written meticulously on conditions which warrant dismissal of a judge from his office. 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.

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, 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 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. This function can also be mandated to an independent judicial ombudsman over sighting superior courts. It is reported that

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359 Imam Kasani, *Bada'i Al-Sana'i Fi Tartib Al-Shara'I*, trans. Dr Mehmood ul Hassan ( Lahore: Diyal Singh Trust, 1997), 58.
360 ibid.
Ibraheem Bin Batha ombudsman Baghdad when crossed the house of Chief Justice and saw people waiting for Chief Justice gave directions that people should not be left waiting in the sun and Chief Justice should attend to them. The above discussion can be summed up in the words that jurists of Islam proposed monetary liability from state exchequer in case of an erroneous decision by the judge who can be consequently removed by the executive. Such a modus operandi can also be adopted in present time’s stricto senso to give effect to jurists’ conclusion on judicial immunity if legislators wish to follow close interpretation of Islam. This would be in consonance with Article 227 prescribing Quran and Sunnah as the source of all laws in contradiction to common law.

6.5 Conclusion

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. Islam does not grant immunity to anyone except the Prophet of Allah (P.B.U.H). Everyone is to be judged as per his deeds. It is therefore proposed that during the elevation of judges they are to be checked whether they obey the mandatory commands of Allah and are imbued with the basic knowledge of shariah. Moreover, amendments should be made in the constitution of Pakistan which detail that judges will be liable 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

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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.
CHAPTER SEVEN

Conclusion and Recommendations

7.1 Conclusion

Article 199(3) & (5) should be referred to the Parliament for the repeal of said Articles so that army and judiciary do not enjoy a higher status than other organs of state. It is imperative in the light of recent developments in the case law relating to judicial immunity. 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. It is recommended that power of promulgation of rules of superior courts may be relegated back to the parliament so that effective checks can be ensured on the workings of superior courts. It is also in-consonance with separation of powers theory and as a result things would be put in their proper perspective. This would also curtail the legislative tendencies as seen in Pakistan of the superior judiciary.
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 stratum 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. 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 influence. The problems of the world in the form of terrorism are increasing day by day and all this has roots in denying justice to people who than as a last resort take up arms. All this mandates doing away with the immunity provisions. In a functional democracy, people are supreme therefore their representative by implication should also enjoy supreme authority which necessarily includes the power to criticize higher judiciary. It is proposed that India and Pakistan should come out of past vestiges and reform the law of contempt on the pattern of America and England where criticism of judge does not amount to contempt.

Removal and appointment processes in India and Pakistan provide an impression that judiciary doesn’t want that any other institution or individual should meddle in its affairs or question its integrity. This means that judiciary should not be accountable to anyone except itself. It is against the principles of accountability and casts a shadow on the integrity of judiciary. Therefore, it is strongly the need of time that judiciary should come out of this perversity and
ensure transparency and accountability by limiting its immunities. This will be in line with all the international instruments and declarations and principles of propriety and transparency. The fundamental rights of individuals are at stake with the judiciary and any infringement therein should be accountable in-accordance with justice and equity.

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 meaning that he doesn’t obey the mandatory commandments of Allah. Islam does not grant immunity to anyone except the Prophet of Allah (P.B.U.H). Everyone is to be judged as per his deeds. It is therefore proposed that during the elevation of judges they are to be checked whether they obey the mandatory commands of Allah and are imbued with the basic knowledge of shariah. Moreover, amendments should be made in the constitution of Pakistan which detail that judges will be liable for removal on becoming fasiq. Fasiq should interalia mean, pronouncing an erroneous decision which is not inconformity with commandments of Allah.

7.2 Recommendations

Revisions of judicial immunities available to superior court judges are in the interest of masses and the judicial system is extremely necessary as we
have seen in the foregoing chapters therefore; it is proposed and recommended as follows: 363

1. It is proposed that Article 199(3) & (5) of the Constitution of Pakistan 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 as it is also imperative in the light of recent developments in the case law relating to judicial immunity where judiciary has gone beyond its mandate in satisfying its conscience for justice by making redundant article 199(5) of the constitution of Pakistan. It is also 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.

2. It is recommended that Article 68 of the Constitution of Pakistan restricting discussion in Parliament with respect to the conduct of any Judge of High Court and Supreme Court may be repealed keeping in view Islamic values, international instruments on freedom of speech and democratic values of equality. Justice Dost Muhammad Khan in the case of District Bar Association Rawalpindi vs Federation of Pakistan, 364 maintained that since parliamentary committee for judicial appointments is contradictory to article 68 of constitution of Pakistan which prohibited discussion regarding the conduct of a judge therefore, article 175(A) was offensive to article 68 and liable for striking down.

363 These recommendations have been converted into an article which were approved for publication in ‘Pakistan Vision’ on 15/1/2019 in one of any forthcoming issue.
364 District Bar Association Rawalpindi vs Federation of Pakistan, PLD 2015 SC 863.
Though this was not the majority view in the judgment however, such provision like article 68 undermine the powers of parliament which represents the will of people therefore, article 68 constitution of Pakistan warrants repeal in this context also.

3. It is proposed & recommended that Article 204 should be reformed by the parliament in the following terms in line with said Islamic values, international instruments on freedom of speech and democratic values of equality so that criticism of judges does not amount to contempt and only such actions are amenable to contempt that arise with imminent obstruction of justice in or in relation to the court proceedings:

**Proposed Change**

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.

4. It is recommended that power of promulgation of rules of superior courts may be relegated back to the parliament so that effective checks can be ensured on the workings of superior courts. It is also in-consonance with separation of powers theory and as a result things would be put in their proper perspective and legislative tendencies would be curbed in the judiciary and justice within the
parameters of law would follow from the judgments as judges would know their exact domain.

5. The existing process of appointment of judges reflects in a way that the appointment process is carried out on discretion and lacks transparency and merit. The forwarding of names by the Chief Justice of respective province as sole prerogative manifests arbitrariness as judicial commission usually acts as a rubber stamp and has no authority of suggesting names of prospective appointees. The making of redundant of parliamentary committee on the pretext of judicial independence makes the whole process of selection of Justices an in-house procedure. Judiciary has been separated from executive in the constitutional scheme of Pakistan, however, this separation may be seen as granting judiciary the power to adjudicate exclusively and not the separation in letter and spirit as has been seen in the case of interpreting judicial independence. It is, therefore, 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.365 This is also suggested that the candidates should be considered for elevation from

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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.

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 may be 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 High Court. Short-listed recommendations were lastly forwarded to the CJP, for due consideration by the Judicial Commission.”

Currently in Pakistan, the whole process of selection of superior court judges within a few hands gives an impression of strategic selection. The judges of superior court after their retirement also get lucrative vacancies which have been reserved for them under respective laws e.g.

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environmental tribunals and customs tribunal etc., therefore, there are all the more reasons for selection of superior court judges on merit.

6. It has recently been held in the case of *Justice Shaukat Aziz Siddiqui and others vs Federation of Pakistan and others,*\(^{367}\) that security of tenure is linked to judicial independence and a critical precondition for such independence. Elucidating further the judgment holds that reason for a cumbersome procedure for removal is to ensure judicial independence. This has been explained earlier in the thesis also that judicial independence should be seen through the prism of impartial judicial decision making and not more than this as judicial independence in its true spirit connotes fair and impartial judiciary and is a tool to promote fair decisions. Any Justice departing from this process of fair judicial decision making in accordance with letter and spirit of law should be taken to task and therefore, regarding the impeachment of superior court judges, it is proposed as follows:

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

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\(^{367}\) *Justice Shaukat Aziz Siddiqui and others vs Federation of Pakistan and others,* PLD 2018 SC 538.
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.”

In the case of Pakistan the House of Commons may be suitably amended with National Assembly and House of Lords with the Senate. Such an envisioned process may ensure checks and balance on the superior judiciary. Judges deciding their own fate against their brother judges who are their colleagues is against the principle of natural justice and fairness therefore, requires necessary amendment in the above said terms.

or

At-least the existing laws may be amended if judiciary really requires to satisfy its penchant on judicial independence as has been interpreted by itself, then mandatory time frame regarding disposal of reference against judges may be provided of not more than three months. Moreover, proceedings before Supreme Judicial Council should be made open to general public to inspire confidence.

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Justice Mian Saqib Nisar in the case of *District Bar Association Rawalpindi vs Federation of Pakistan*,\(^{369}\) remarked that, other countries like India, England and USA had a system where superior judiciary was responsible to parliament and removal mandated to parliament but in Pakistan superior judiciary was answerable to itself, therefore, such power should be exercised with restraint and wisdom. Enforcement of fundamental rights of people rest with the judiciary therefore, restraint is not the proper prerogative which should be exercised by the supreme judicial council and it is proposed that any deviation of the law should be dealt with accordingly as heavy costs are involved in superior court litigations which may amount to the whole life saving of an average household. Appointments and removal of superior court judges are not challengeable before any of the courts in Pakistan including Supreme Court of Pakistan; therefore, a thorough revision in this regard as proposed is required.

7. Independence of judiciary implies that judiciary is impartial and fair in its decisions making and remains within the parameters of law. This is evident from the definitions of independence of judiciary postulated in international instruments. In the Pakistani context, the definition has been understood in literal terms and independence of judiciary has been taken to mean independence from everything under the sun. This has resulted in decisions like *Maulvi Tamizuddin Case, Dosso Case, Nusrat Bhutto case* and *Zafar Ali Shah case* wherein justice was seen under the

\(^{369}\) *District Bar Association Rawalpindi vs Federation of Pakistan*, PLD 2015 SC 863.
clout of executive and judges escaped accountability. It is recommended that doctrine of independence of judiciary should be reviewed by the higher judiciary of both India and Pakistan so that checks and balances can also be ensured on the superior judiciary. Independence of judiciary should also be adjusted with checks and balances so that accountability is also guaranteed.

8. It is proposed that ‘fasiq’ (one who violates injunctions of Islam) may be incorporated constitutionally as a ground for impeachment of a judge in Islamic Republic of Pakistan.

9. It is also recommended that judicial immunity may be reformed in light of opinions of illustrious jurists of Islam and the doctrine of maqasid sharia (purposes of islam) wherein protection of religion, life, progeny, wealth and intellect are above any immunity; so as to make state and qadi liable to compensate the wronged.

10. It is proposed that while elevating judges of superior courts they be tested whether they obey the mandatory commands of Allah and are imbued with the basic knowledge of sharia.

11. It is proposed that Judicial Officers Protection Act, 1850 may be repealed and at-least one damages suit may be provided against judges of superior judiciary. This will encourage litigants to go to higher forums for redressal of their grievance in-case of a wrong decision. It will also be in accordance with due process clause of Constitution of Pakistan which guarantees adjudication by an impartial tribunal.
Numerous other professionals such as physicians, attorneys and police officers’ carryout their responsibility effectively with the threat of lawsuits ever present. In case such a damages suit fails than law should mandate that it be accompanied with heavy costs or fine if there were reasonable grounds to believe that suit was frivolous or tainted with malafide.  

12. It is proposed and recommended that independent constitutional court be formed in the center with benches in respective provinces so that superior courts are available to redress the grievances of litigants and do not remain busy deciding constitutional cases neglecting litigants fundamental rights as is the order of today.

13. It is proposed and recommended that an independent supervisory body which may be designated as judicial ombudsman should be formed at federal and provincial level to oversee actions of superior court judges. It should inter-alia ensure that judges don’t trespass law and remain proactive in redressing the grievance of litigants. This can be done by mandating the function of writing annual confidential reports of the judges to such judicial ombudsman and delegating power of issuing necessary reminders to superior court judges.

14. It is proposed that review of Supreme Court’s judgments should be heard by a bench of Supreme Court judges other than the one which

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pronounced the judgment. This will ensure removal of bias if any in the verdict and chances of a more fair decision.

15. It is proposed that suo-motto powers should be exercised by a bench of Supreme Court consisting of not less than three judges on rotation basis and right of appeal should be provided against the exercise of suo-motto jurisdiction. This is extremely important as Supreme Court of Pakistan has been traversing article 203 constitution of Pakistan by directly supervising subordinate judiciary. Moreover, five judges dominate in the recent times all the proceedings under article 184(3) of constitution of Pakistan which throws a negative shadow on the working of the judiciary. It was also seen in the recent prosecution of ex-prime minister Nawaz Sharif that Justice Azmat Saeed was deputed to supervise the proceedings of NAB courts which also militates against article 203 constitution of Pakistan. All this mandates the proposed change to article 184(3) of the constitution of Pakistan so that letter and spirit of law is implemented by the courts and the superior judiciary does not acquire despotic powers.

16. Recently the Supreme Court of Pakistan has more than often invoked article 184(3) to usurp the powers of executive in Pakistan which is against the scheme of constitution of Pakistan. The Chief Justice of Pakistan Mian Saqib Nisar visits to hospitals and other institutions are outside the powers vested by constitution and there is no provision in constitution and law to stop judiciary from this practice. No aggrieved person has approached executive initially and then approached the
Supreme Court under article 184(3) for redress of grievances. It is proposed that Article 184(3) of the constitution of Islamic Republic of Pakistan be suitably amended so that Supreme Court of Pakistan can take notice only on an ‘application’ by any aggrieved party in cases of public importance involving breach of fundamental rights where remedy was exhausted by the aggrieved party and could not get amelioration from executive, and not independent of application for self-publicity and self-indulgence for either party be entertained where executive was not approached initially for redress of grievance.

17. It is proposed that misconduct of a superior court judge should inter-alia imply trespassing the settled law.

18. It is proposed that superior court should be monitored by an independent supervisory body as suggested above which inter-alia should check whether superior courts are active in redressing the grievance of litigants or merely dismissing the cases based on technicalities. Such supervisory body may also be mandated to monitor the indiscriminate exercise of suo-motto powers as was seen in the case of famous actress case where she was found in possession of a bottle of wine and suo-motto powers were exercised.
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“U”

University of Kerala versus Council, Principals', Colleges, Kerala & Others,
Annexures

Annex A

The Judicial Officers’ Protection Act, 1850¹
ACT No. XVIII OF 1850

[4th April, 1850]

An Act for the protection of Judicial Officers

Preamble. For the greater protection of Magistrates and others acting judicially;

It is enacted as follows:–

1. Non-liability to suit of officers acting judicially, for official acts done

in good faith, and of officers executing warrants and orders. No Judge, Magistrate,
Justice of the Peace, Collector or other person acting judicially shall be liable to be
sued in any Civil Court for any act done or ordered to be done by him in the
discharge of judicial duty, whether or not within the limits of his jurisdiction:
Provided that he at the time, in good faith, believed himself to have jurisdiction to
do or order the act complained of; and no officer of any Court or other person,
bound to execute the lawful warrants or orders of any such Judge, Magistrate,
Justice of the Peace, Collector or other person acting judicially shall be liable to be
sued in any Civil Court, for the execution of any warrant or order, which he would
be bound to execute, if within the jurisdiction of the person issuing the same. ²

¹Short title given by the Short Titles Act, 1897 (14 of 1897).

The Act has been declared to be in force in all the Provinces and the Capital of the
Federation except the Scheduled Districts, by the Laws Local Extent Act, 1874 (15
of 1874), s. 3.

It has been declared in force in the Baluchistan by the British Baluchistan Laws
Regulation, 1913 (2 of 1913), s. 3.

It has also been declared, by notification under s. 3(a) of the Scheduled Districts
Act, 1874 (14 of 1874), to be in force in the following Scheduled Districts,
namely:-

Sind . . . . . . See Gazette of India, 1878, Pt. I, p. 482.
The Districts of Hazara, Peshawar, Kohat, Bannu, Dera Ismail Khan and Dera Ghazi Khan. [Portions of the Districts of Hazara, Bannu. Dera Ismail Khan and Dera Ghazi Khan and the Districts of Peshawar and Kohat now form the N.W.F.P., see Gazette of India. 1901 Pt. I, p. 857. and ibid., 1902. Pt. I, p. 575; but its application has been barred in that part of the Hazara District know as Upper Tanawal, by the Hazara (Upper Tanawal) Regulation, 1900 (2 of 1900), s. 3.]

2As to procedure for instituting criminal prosecutions against Judges and public servants, see the Code of Criminal Procedure, 1898 (Act 5 of 1898), section 197.
Annex B

Article 199 of the Constitution of Pakistan. Jurisdiction of High Court

(1) Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law,-

(a) on the application of any aggrieved party, make an order-

  (i) directing a person performing, within the territorial jurisdiction of the Court, functions in connection with the affairs of the Federation, a Province or a local authority, to refrain from doing anything he is not permitted by law to do, or to do anything he is required by law to do; or

  (ii) declaring that any act done or proceeding taken within the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of the Federation, a Province or a local authority has been done or taken without lawful authority and is of no legal effect; or

(b) on the application of any person, make an order-

  (i) directing that a person in custody within the territorial jurisdiction of the Court be brought before it so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or
(ii) requiring a person within the territorial jurisdiction of the Court holding or purporting to hold a public office to show under what authority of law he claims to hold that office; or

(c) on the application of any aggrieved person, make an order giving such directions to any person or authority, including any Government exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II.

(2) Subject to the Constitution, the right to move a High Court for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II shall not be abridged.

(3) An order shall not be made under clause (1) on application made by or in relation to a person who is a member of the Armed Forces of Pakistan, or who is for the time being subject to any law relating to any of those Forces, in respect of his terms and conditions of service, in respect of any matter arising out of his service, or in respect of any action taken in relation to him as a member of the Armed Forces of Pakistan or as a person subject to such law.

(4) Where- the Court shall not make an interim order unless the prescribed law officer has been given notice of the application and he or any person authorised by him in that behalf has had an opportunity of being heard and
the Court, for reasons to be recorded in writing, is satisfied that the interim order-

(a) an application is made to a High Court for an order under paragraph (a) or paragraph (c) of clause (1), and

(b) the making of an interim order would have the effect of prejudicing or interfering with the carrying out of a public work or of otherwise being harmful to public interest or state property or of impeding the assessment or collection of public revenues,

(i) would not have such effect as aforesaid; or

(ii) would have the effect of suspending an order or proceeding which on the face of the record is without jurisdiction.

(4A) An interim order made by a High Court on an application made to it to question the validity or legal effect of any order made, proceeding taken or act done by any authority or person, which has been made, taken or done or purports to have been made, taken or done under any law which is specified in Part I of the First Schedule or relates to, or is connected with, State property or assessment or collection of public revenues shall cease to have effect on the expiration of a period of six months following the day on which it is made:

Provided that the matter shall be finally decided by the High Court within
six months from the date on which the interim order is made.

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

(5) In this Article, unless the context otherwise requires,-

"person" includes any body politic or corporate, any authority of or under the control of the Federal Government or of a Provincial Government, and any Court or tribunal, other than the Supreme Court, a High Court or a Court or tribunal established under a law relating to the Armed Forces of Pakistan;

and "prescribed law officer" means

(a) in relation to an application affecting the Federal Government or an authority of or under the control of the Federal Government, the Attorney-General, and

(b) in any other case, the Advocate-General for the Province in which the application is made.

Article 68 Constitution of Pakistan. Restriction on Discussion in Majlis-e-Shoora (Parliament).

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.

Article 204 of Constitution of Pakistan. Contempt of Court.
(1) In this Article, "Court" means the Supreme Court or a High Court.
(2) A Court shall have power to punish any person who,
   (a) abuses, interferes with or obstructs the process of the Court in any way or disobeys any order of the Court;
   (b) scandalizes the Court or otherwise does anything which tends to bring the Court or a Judge of the Court into hatred, ridicule or contempt;
   (c) does anything which tends to prejudice the determination of a matter pending before the Court; or
   (d) does any other thing which, by law, constitutes contempt of the Court.
(3) The exercise of the power conferred on a Court by this Article may be regulated by law and, subject to law, by rules made by the Court.

Article 202 of Constitution of Pakistan. 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.

The Supreme Court and the Federal Shariat Court, with the approval of the President and a High Court, with the approval of the Governor concerned, may make rules providing for the appointment by the Court of officers and servants of the Court and for their terms and conditions of employment.

(1) There shall be a Judicial Commission of Pakistan, hereinafter in this Article referred to as the Commission, for appointment of Judges of the Supreme Court, High Courts and the Federal Shariat Court, as hereinafter provided.

(2) For appointment of Judges of the Supreme Court, the Commission shall consist of--

(i) Chairman Chief Justice of Pakistan;

(ii) Members four most senior Judges of the Supreme Court;

(iii) Member a former Chief Justice or a former Judge of the Supreme Court of Pakistan to be nominated by the Chief Justice of Pakistan, in consultation with the four-member Judges, for a period of two years;

(iv) Member Federal Minister for Law and Justice;

(v) Member Attorney-General for Pakistan; and

(vi) Member a Senior Advocate of the Supreme Court of Pakistan nominated by the Pakistan Bar Council for a term of two years.

(3) Notwithstanding anything contained in clause (1) or clause (2), the President shall appoint the most senior Judge of the Supreme Court as the Chief Justice of Pakistan.
(4) The Commission may make rules regulating its procedure.

(5) For appointment of Judges of a High Court, the Commission in clause (2) shall also include the following, namely:

(i) **Member** Chief Justice of the High Court to which the appointment is being made;

(ii) **Member** the most senior Judge of that High Court;

(iii) **Member** Provincial Minister for Law; and

(iv) **Member** an advocate having not less than fifteen years practice in the High Court to be nominated by the concerned Bar Council for a term of two years:

**Provided** that for appointment of the Chief Justice of a High Court the most Senior Judge mentioned in paragraph (ii) shall not be member of the Commission:

**Provided** futher that if for any reason the Chief Justice of a High Court is not available, he shall be substituted by a former Chief Justice or former Judge of that Court, to be nominated by the Chief Justice of Pakistan in consultation with the four member Judges of the Commission mentioned in paragraph (ii) of clause (2)
(6) For appointment of Judges of the Islamabad High Court, the Commission in clause (2) shall also include the following, namely:

(i) **Member** Chief Justice of the Islamabad High Court; and

(ii) **Member** the most senior Judge of that High Court

**Provided** that for initial appointment of the Chief Justice and the Judges of the Islamabad High Court, the Chief Justices of the four Provincial High Courts shall also be members of the Commission:

**Provided further** that subject to the foregoing proviso, in case of appointment of Chief Justice of Islamabad High Court, the provisos to clause (5) shall, *mutatis mutandis*, apply.

(7) For appointment of Judges of the Federal Shariat Court, the Commission in clause (2) shall also include the Chief Justice of the Federal Shariat Court and the most senior Judge of that Court as its members:

**Provided** that for appointment of Chief Justice of Federal Shariat Court, the provisos to clause (5) shall, *mutatis mutandis*, apply.

(8) The Commission by majority of its total membership shall nominate to the Parliamentary Committee one person, for each vacancy of a Judge in the Supreme Court, a High Court or the Federal Shariat Court, as the case may be.
(9) The Parliamentary Committee, hereinafter in this Article referred to as the Committee, shall consist of the following eight members, namely:-

(i) four members from the Senate; and

(ii) four members from the National Assembly

Provided that when the National Assembly is dissolved, the total membership of the Parliamentary Committee shall consist of the members of the Senate only mentioned in paragraph (i) and the provisions of this Article shall, mutatis mutandis apply.

(10) Out of the eight members of the Committee, four shall be from the Treasury Benches, two from each House and four from the Opposition Benches, two from each House. The nomination of members from the Treasury Benches shall be made by the Leader of the House and from the Opposition Benches by the Leader of the Opposition.

(11) Secretary, Senate shall act as the Secretary of the Committee.

(12) The Committee on receipt of a nomination from the Commission may confirm the nominee by majority of its total membership within fourteen days, failing which the nomination shall be deemed to have been confirmed:

Provided that the Committee, for reasons to be recorded, may not confirm
the nomination by three-fourth majority of its total membership within the said period:

Provided further that if a nomination is not confirmed by the Committee it shall forward its decision with reasons so recorded to the Commission through the Prime Minister:

Provided further that if a nomination is not confirmed, the Commission shall send another nomination.

(13) The Committee shall send the name of the nominee confirmed by it or deemed to have been confirmed to the Prime Minister who shall forward the same to the President for appointment.

(14) No action or decision taken by the Commission or a Committee shall be invalid or called in question only on the ground of the existence of a vacancy therein or of the absence of any member from any meeting thereof.

(15) The meetings of the Committee shall be held in camera and the record of its proceedings shall be maintained.
(16) The provisions of Article 68 shall not apply to the proceedings of the Committee.

(17) The Committee may make rules for regulating its procedure.

**Article 209 Constitution of Pakistan. Supreme Judicial Council.**

(1) There shall be a Supreme Judicial Council of Pakistan, in this Chapter referred to as the Council.

(2) The Council shall consist of,

(a) the Chief Justice of Pakistan;

(b) the two next most senior Judges of the Supreme Court; and

(c) the two most senior Chief Justices of High Courts.

Explanation:- For the purpose of this clause, the inter se seniority of the Chief Justices of the High Courts shall be determined with reference to their dates of appointment as Chief Justice otherwise than as acting Chief Justice, and in case the dates of such appointment are the same, with reference to their dates of appointment as Judges of any of the High Courts.

(3) If at any time the Council is inquiring into the capacity or conduct of a Judge who is a member of the Council, or a member of the Council is absent or is
unable to act due to illness or any other cause, then

(a) if such member is a Judge of the Supreme Court, the Judge of the Supreme Court who is next in seniority below the Judges referred to in paragraph (b) of clause (2), and

(b) if such member is the Chief Justice of a High Court; the Chief Justice of another High Court who is next in seniority amongst the Chief Justices of the remaining High Courts, shall act as a member of the Council in his place.

(4) If, upon any matter inquired into by the Council, there is a difference of opinion amongst its members, the opinion of the majority shall prevail, and the report of the Council to the President shall be expressed in terms of the view of the majority.

(5) If, on information from any source, the Council or the President is of the opinion that a Judge of the Supreme Court or of a High Court-

(a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or

(b) may have been guilty of misconduct,

the President shall direct the Council to, or the Council may, on its own motion, inquire into the matter.
(6) If, after inquiring into the matter, the Council reports to the President that it is of the opinion,

(a) that the Judge is incapable of performing the duties of his office or has been guilty of misconduct, and

(b) that he should be removed from office, the President may remove the Judge from office.

(7) A Judge of the Supreme Court or of a High Court shall not be removed from office except as provided by this Article.

(8) The Council shall issue a code of conduct to be observed by Judges of the Supreme Court and of the High Courts.
The Judges (Protection) Act, 1985

1. Short title and extent.—(1) This Act may be called The Judges (Protection) Act, 1985.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

2. Definition.—In this Act, “Judge” means not only every person who is officially designated as Judge, but also every person—

(a) who is empowered by law to give in any legal proceeding a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive; or

(b) who is one of a body of persons which body of persons is empowered by law to give such a judgment as is referred to in Clause (a).

3. Additional protection to Judges.—

(1) Notwithstanding anything contained in any other law for the time being in force and subject to the provisions of sub-section (2), no Court shall entertain or continue any civil or criminal proceeding against any person who is or was a Judge.
for any act, thing or word committed, done or spoken by him when, or in the
course of, acting or purporting to act in the discharge of his official or judicial duty
or function.

(2) Nothing in sub-section (1) shall debar or affect in any manner the power of the
Central Government or the State Government or the Supreme Court of India or any
High Court or any other authority under any law for the time being in force to take
such action (whether by way of civil, criminal, or departmental proceedings or
otherwise) against any person who is or was a Judge.

4. Saving.—The provision of this Act shall be in addition to, and not in derogation
of, the provisions of any other law for the time being in force providing for
protection of Judges.
Article 32 of the Constitution of India. Remedies for Enforcement of Rights Conferred by this Chapter.

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part. (3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2). (4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

Article 226 of the Constitution of India. Power of High Courts to Issue Certain Writs

(1) Notwithstanding anything in article 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including [writs in the nature of
habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.]

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

2[(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without—

(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

(b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last
day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.]

(Part. VI.—The States.—Arts. 226-227.)

[(4)] The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.]

**Article 121 of the Constitution of India. Restriction on Discussion in Parliament**

No discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge as hereinafter provided.

**Article 129 of the Constitution of India. Supreme court to be a Court of Record**

The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.

**Article 215 of Constitution of India. High courts to be Courts of Record.**

Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.
Article 145 of the Constitution of India. Rules of Court etc

(1) Subject to the provisions of any law made by Parliament, the Supreme Court may from time to time, with the approval of the President, make rules for regulating generally the practice and procedure of the Court including— (a) rules as to the persons practising before the Court; (b) rules as to the procedure for hearing appeals and other matters pertaining to appeals including the time within which appeals to the Court are to be entered; (c) rules as to the proceedings in the Court for the enforcement of any of the rights conferred by Part III; [(cc) rules as to the proceedings in the Court under [article 139A];] (d) rules as to the entertainment of appeals under sub-clause (c) of clause (1) of article 134; (e) rules as to the conditions subject to which any judgment pronounced or order made by the Court may be reviewed and the procedure for such review including the time within which applications to the Court for such review are to be entered; (f) rules as to the costs of and incidental to any proceedings in the Court and as to the fees to be charged in respect of proceedings therein; (g) rules as to the granting of bail; (h) rules as to stay of proceedings; (i) rules providing for the summary determination of any appeal which appears to the Court to be frivolous or vexatious or brought for the purpose of delay; (j) rules as to the procedure for inquiries referred to in clause (1) of article 317.

(2) Subject to the 1[provisions of 2*** clause (3)], rules made under this article may fix the minimum number of Judges who are to sit for any purpose, and may provide for the powers of single Judges and Division Courts. (3) The minimum number] of Judges who are to sit for the purpose of deciding any case involving a
substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under article 143 shall be five: Provided that, where the Court hearing an appeal under any of the provisions of this Chapter other than article 132 consists of less than five Judges and in the course of the hearing of the appeal the Court is satisfied that the appeal involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the appeal, such Court shall refer the question for opinion to a Court constituted as required by this clause for the purpose of deciding any case involving such a question and shall on receipt of the opinion dispose of the appeal in conformity with such opinion.

(4) No judgment shall be delivered by the Supreme Court save in open Court, and no report shall be made under article 143 save in accordance with an opinion also delivered in open Court.

(5) No judgment and no such opinion shall be delivered by the Supreme Court save with the concurrence of a majority of the Judges present at the hearing of the case, but nothing in this clause shall be deemed to prevent a Judge who does not concur from delivering a dissenting judgment or opinion.

**Article 146 of the Constitution of India. Officers and Servants and Expenses of the Supreme Court.**

(1) Appointments of officers and servants of the Supreme Court shall be made by the Chief Justice of India or such other Judge or officer of the Court as he
may direct: Provided that the President may by rule require that in such cases as may be specified in the rule, no person not already attached to the Court shall be appointed to any office connected with the Court, save after consultation with the Union Public Service Commission.

(2) Subject to the provisions of any law made by Parliament, the conditions of service of officers and servants of the Supreme Court shall be such as may be prescribed by rules made by the Chief Justice of India or by some other Judge or officer of the Court authorized by the Chief Justice of India to make rules for the purpose:

Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the President.

(3) The administrative expenses of the Supreme Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the Consolidated Fund of India, and any fees or other moneys taken by the Court shall form part of that Fund.

**Article 227 of the Constitution of India. Power of Superintendence of High Courts over Subordinate Courts**

(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

(2) Without prejudice to the generality of the foregoing provision, the High Court may—

(a) call for returns from such courts;
(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein:

Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.

(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces.

Article 229 of the Constitution of India. Officers and Servants and the Expenses of the High Courts.

(1) Appointments of officers and servants of a High Court shall be made by the Chief Justice of the Court or such other Judge or officer of the Court as he may direct: Provided that the Governor of the State may by rule require that in such cases as may be specified in the rule no person not already attached to the Court shall be appointed to any office connected with the Court save after consultation with the State Public Service Commission.

(2) Subject to the provisions of any law made by the Legislature of the State, the conditions of service of officers and servants of a High Court shall be such as may
be prescribed by rules made by the Chief Justice of the Court or by some other Judge or officer of the Court authorised by the Chief Justice to make rules for the purpose: Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the Governor of the State.

**Article 124 of the Constitution Of India Concerning Appointment of Supreme Court Judges**

(1) There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges.

(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal on the recommendation of the National Judicial Appointments Commission referred to in article 124A] and shall hold office until he attains the age of sixty-five years:

[Provided that]—

(a) a Judge may, by writing under his hand addressed to the President, resign his office;

(b) a Judge may be removed from his office in the manner provided in clause (4).

[(2A) The age of a Judge of the Supreme Court shall be determined by such authority and in such manner as Parliament may by law provide.]

(3) A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and—

(a) has been for at least five years a Judge of a High Court or of two or more such Courts insuccession; or (b) has been for at least ten years an advocate of
a High Court or of two or more such Courts in succession; or
(c) is, in the opinion of the President, a distinguished jurist.

Explanation I.—In this clause “High Court” means a High Court which exercises, or which at any time before the commencement of this Constitution exercised, jurisdiction in any part of the territory of India.

Explanation II.—In computing for the purpose of this clause the period during which a person has been an advocate, any period during which a person has held judicial office not inferior to that of a district judge after he became an advocate shall be included.

(4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

(5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge under clause (4).

(6) Every person appointed to be a Judge of the Supreme Court shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.
Supreme Court shall plead or act in any court or before any authority within the
territory of India.

[124A. (1) There shall be a Commission to be known as the National Judicial
Appointments Commission consisting of the following, namely:—

(a) the Chief Justice of India, Chairperson, *ex officio*;
(b) two other senior Judges of the Supreme Court next to the Chief Justice of
India—Members, *ex officio*;
(c) the Union Minister in charge of Law and Justice—Member, *ex officio*;
(d) two eminent persons to be nominated by the committee constiting of the Prime
Minister, the Chief Justice of India and the Leader of Opposition in the House of
the People or where there is no such Leader of Opposition, then, the Leader of
single largest Opposition Party in the House of the People— Members:

Provided that one of the eminent person shall be
nominated from amongst the persons belonging to the Scheduled Caste, the
Scheduled Tribes, Other Backward Classes, Minorities or Women: Provided
further that an eminent person shall be nominated for a period of three years and
shall not be
eligible for renomination.

(2) No act or proceedings of the National Judicial Appointments Commission shall
be questioned or be invalidated merely on the ground of the existence of any
vacancy or defect in the constitution of the Commission.

124B. It shall be the duty of the National Judicial Appointments Commission to—

(a) recommend persons for appointment as Chief Justice of India, Judges of the
Supreme Court, Chief Justices of High Courts and other Judges of High Courts;
(b) recommend transfer of Chief Justice and other Judges of High Courts from one High Court to any other High Court; and 

(c) ensure that the person recommended is of ability and integrity.

124C. Parliament may, by law, regulate the procedure for the appointment of Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and empower the Commission to lay down by regulations the procedure for the discharge of its functions, the manner of selection of persons for appointment and such other matters as may be considered necessary by it.]

Article 217 Concerning Appointment of High Court Judges in India
(1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal on the recommendation of the National Judicial Appointments Commission referred to in article 124A], the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and 2[shall hold office, in the case of an additional or acting Judge, as provided in article 224, and in any other case, until he attains the age of 3[sixtytwo years]]:

Provided that—

(a) a Judge may, by writing under his hand addressed to the President, resign his office;
(b) a Judge may be removed from his office by the President in the manner provided in clause (4) of article 124 for the removal of a Judge of the Supreme Court;

(c) the office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.

(2) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and—

(a) has for at least ten years held a judicial office in the territory of India; or

(b) has for at least ten years been an advocate of a High Court or of two or more such Courts in succession;

Explanation.— For the purposes of this clause—[(a) in computing the period during which a person has held judicial office in the territory of India, there shall be included any period, after he has held any judicial office, during which the person has been an advocate of a High Court or has held the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law; [(aa)] in computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person has held judicial office or the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law] after he became an advocate;

(b) in computing the period during which a person has held judicial office in the territory of India or been an advocate of a High Court, there shall be included any period before the commencement of this Constitution during which he has held
judicial office in any area which was comprised before the fifteenth day of August, 1947, within India as defined by the Government of India Act, 1935, or has been an advocate of any High Court in any such area, as the case may be.

(3) If any question arises as to the age of a Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final.]
Annex E

Supreme Judicial Council Procedure of Enquiry 2005 (Pakistan)

1. Title and application:

(1) The procedure of enquiry shall be called “The Supreme Judicial Council Procedure of Enquiry 2005”.
(2) It shall only apply to the Supreme Judicial Council and its proceedings.

2. Scope:

The Procedure shall provide for effective implementation of Article 209 of the Constitution and regulate all inquiries required to be undertaken and all other matters which need to be addressed there under.

3. Definitions:
In the present Procedure, unless the context provides otherwise, the following expressions used in the Procedure will have the meanings as assigned to them hereunder;

(a) “Any matter”, includes all matters and facts associated with the enquiry that the Council may carry out.

(b) “Any other source”, includes all sources through which information is received in respect of the conduct of a Judge.

(c) “Code of conduct”, means the code of conduct issued by the Supreme Judicial Council in terms of Article 209(8) of the Constitution of Islamic Republic of Pakistan.

(d) “Chairman”, means and includes the Chief Justice of Pakistan.

(e) “Incapacity”, will include all forms of physical or mental incapacity howsoever described or narrated, which render the Judge incapable of performing the duties of his office.

(f) “Conduct”, will include series of facts associated with the matter being inquired into by the Council, including the facts which are attributed to the person of the Judge.

(g) “Guilty”, will include arriving at an opinion by the Council that a Judge has been guilty of misconduct.

(h) “Opinion”, will include arriving at a conclusion by the Council, that misconduct has or has not taken place.

(i) “Information”, includes any material, facts, documentation, photographs, video or audio tapes, affidavits, letters or any other reasonable evidence that has come to the knowledge of any Member of the Council or the Council itself sufficient to
initiate an enquiry.

(j) “Enquiry”, means the consideration of any matter, in relation to conduct of a Judge, by the Council, or any Member of the Council.

(k) “Member”, means Member of the Supreme Judicial Council.

(l) “Misconduct”, includes,

(i) conduct unbecoming of a Judge,

(ii) is in disregard of the Code of Conduct issued under Article 209(8) of the Constitution of Islamic Republic of Pakistan,

(iii) is found to be inefficient or has ceased to be efficient.

(m) “Report of the Council”, includes the findings of the enquiry proceedings carried out by the Council including recommendations for the President of Pakistan for removal of the Judge or otherwise.

(n) “Secretary”, means the Registrar, Supreme Court or any person appointed by the Council.


4. The Headquarters of the Council shall be at Islamabad, but the Council may hold its meeting or enquiry into reference or a complaint at any other place in Pakistan, as the Chairman may deem convenient.

5. Receiving of Information:--

(1) Any member of public may bring to the notice of the Council or any of its Members or the Secretary, information alleging incapacity or misconduct of a
Judge.

(2) The allegation may be supported by material which is sufficient in the opinion of the Council to commence enquiry.

(3) The person providing the said information shall identify himself properly.

(4) The information may be received through any mode by the Council or any Member of the Council, without being restricted to any of the following sources such as;

(a) Print or electronic media;

(b) Written Complaint.

(5) Information received under sub-para (4) shall be entered in the Register maintained by the Secretary.

6. Cognizance by the Council:

Without prejudice to the general requirement of receiving information in the manner provided for above, nothing in this Procedure shall be read to curtail or limit the jurisdiction of the Council to initiate an enquiry against a Judge.

7. Procedure for scrutinizing information:

(1) Once any information in respect of enquiry into the conduct of a Judge is received by any Member or the Council, it shall be presented to the Chairman of the Council, who; shall
(a) refer the same to any Member of the Council to look into the said information; and to express his opinion in relation to sufficiency or otherwise of the information.

(b) if the Council is satisfied that the information prima facie discloses sufficient material for an enquiry, it shall proceed to consider the same.

(2) The Member, to whom the Chairman has referred the information, will examine the same and ascertain if the information so received discloses specific particulars of misconduct, and provides factual details necessary to form prima facie opinion in respect of the guilt of the Judge.

(3) If the Member forms an opinion that the information does reveal sufficient material to commence enquiry, he shall inform the Council accordingly and the information shall be placed before the Council.

(4) If the Member comes to a conclusion that the information is false, frivolous, concocted or untrue, he shall inform the Council accordingly and may recommend action against the person who initiated the information.

8. Enquiry by the Council:--

(1) The Chairman may, call the meeting of the Council, for discussion and enquiry into the information received.

(2) The information in respect of the conduct of a Judge shall be placed before the Council for examination.

(3) If the Council is of the view that before forming an opinion, it should also hear
the Judge under enquiry, it shall require the said Judge to present himself before the Council. The Council shall provide him the information and material received against him.

(4) If the Council is of the opinion that it requires more material or seeks additional information before it can form any opinion, it shall direct accordingly.

(5) The Council may, if necessary, secure the attendance of the person who has provided the information, for enquiry into any aspect of the information provided.

(6) The Council may summon any expert, where the enquiry is in respect of the incapacity of a Judge and may order any medical investigation by local or foreign expert.

(7) Without prejudice to the foregoing, the Council shall have inherent powers to adopt any procedure specific to the enquiry which is considered by the Council to be just and proper in the circumstances.

9.(1) If the Council decides to proceed against a Judge, a show cause notice shall be issued to him along with supporting material calling upon him to explain his conduct within 14 days.

(2) On receipt of reply from the Judge, Council shall convene its meeting to proceed further with the matter.

10.(1) The Attorney-General for Pakistan and in his absence a senior counsel of the Supreme Court, instructed by him, shall conduct a reference.

(2) The Council may require the Attorney-General for Pakistan or any other counsel to appear and assist the Council in relation to smooth and efficient conduct of its proceedings.
11. Procedure of Council:--

(1) In the event of a difference of opinion amongst the members of the Council regarding, further enquiry, granting right of hearing to the Judge concerned, securing attendance of the person providing information and related matters, opinion of the majority shall prevail.

(2) In the event of a difference of opinion amongst the members of the Council whether the Judge concerned is guilty of misconduct, opinion of the majority shall prevail.

12. Report to the President of Pakistan:--

If the Council in its meeting, on conclusion of the proceedings forms an opinion, that the Judge concerned has been guilty of misconduct or incapacitated in the performance of his duties properly, it shall express its views accordingly and the same shall be communicated by the Chairman to the President as a Report of the Council for action under Article 209(6) of the Constitution of Islamic Republic of Pakistan.

13. Proceedings of the Council not to be reported:--

(1) Proceedings of the Council shall be conducted in camera and shall not be open to public.

(2) Only the findings of the proceedings shall be allowed to be reported.
(3) Proceedings of the meetings of the Council or any other steps that Council may take shall not be reported, unless directed otherwise.

14. Punishment for frivolous information:--

(1) Whenever the Council finds that the information or evidence provided to it was false in material particulars or with the sole intention to malign a Judge, or scandalizing the Court or to undermine it in any form whatsoever, it may direct action against all those who are found to have provided the said information, or evidence as the case may be.

(2) For this purpose, the Council may direct the Secretary of the Council to pursue the course of action against the offender.

15. Council Secretariat:--

(1) The Council shall have a permanent secretariat and in order to carry out the affairs and functions, the Council may appoint such officials and staff as deemed fit and proper.

(2) The Council shall have a perpetual seal which shall be retained in the custody of the Secretary.

(3) The Secretary of the Council shall be the custodian of the record and proceedings of the Council.

16. Powers to issue directions:--
The Council shall have the power to issue any directive, pass any order and prescribe the procedure for achieving the objects of the Council.

17. This procedure shall, mutatis mutandis, apply to proceedings against other office holders, who can be removed from office in the manner prescribed by Article 209 of the Constitution.
The Judges (Inquiry) Act, 1968 (India)

1. Short title and commencement.—

(1) This Act may be called the Judges (Inquiry) Act, 1968.

(2) It shall come into force on such date¹ as the Central Government may, by notification in the Official Gazette, appoint.

2. Definitions.—In this Act, unless the context otherwise requires,—

(a) “Chairman” means the Chairman of the Council of States;

(b) “Committee” means a Committee constituted under section 3;

(c) “Judge” means a Judge of the Supreme Court or of a High Court and includes the Chief Justice of India and the Chief Justice of a High Court;

(d) “prescribed” means prescribed by rules made under this Act;

(e) “Speaker” means the Speaker of the House of the People.

3. Investigation into misbehaviour or incapacity of Judge by Committee.—

(1) If notice is given of a motion for presenting an address to the President praying for the removal of a Judge signed,—

(a) in the case of a notice given in the House of the People, by not less than one hundred members of that House;

(b) in the case of a notice given in the Council of States, by not less, than fifty members of that Council, then, the Speaker or, as the case may be, the Chairman may, after consulting such persons, if any, as he thinks fit and after considering such materials, if any, as may be available to him either admit the motion or refuse to admit the same.
(2) If the motion referred to in sub-section (1) is admitted, the Speaker or, as the case may be, the Chairman shall keep the motion pending and constitute as soon as may be for the purpose of making an investigation into the grounds on which the removal of a Judge is prayed for, a Committee consisting of three members of whom—

(a) one shall be chosen from among the Chief Justice and other Judges of the Supreme Court;

(b) one shall be chosen from among the Chief Justices of the High Courts; and

(c) one shall be a person who is in the opinion of the Speaker or, as the case may be, the Chairman, a distinguished jurist: Provided that where notices of a motion referred to in sub-section (1) are given on the same day in both Houses of Parliament, no Committee shall be constituted unless the motion has been admitted in both Houses and where such motion has been admitted in both Houses, the Committee shall be constituted jointly by the Speaker and the Chairman: Provided further that where notices of a motion as aforesaid are given in the Houses of Parliament on different dates, the notice which is given later shall stand rejected.

(3) The Committee shall frame definite charges against the Judge on the basis of which the investigation is proposed to be held.

(4) Such charges together with a Statement of the grounds on which each such Charge is based shall be communicated to the Judge and he shall be given a reasonable opportunity of presenting a written Statement of defence within such time as may be specified in this behalf by the Committee.

(5) Where it is alleged that the Judge is unable to discharge the duties of his office efficiently due to any physical or mental incapacity and the allegation is denied,
the Committee may arrange for the medical examination of the Judge by such Medical Board as may be appointed for the purpose by the Speaker or, as the case may be, the Chairman or, where the Committee is constituted jointly by the Speaker and the Chairman, by both of them, for the purpose and the Judge shall submit himself to such medical examination within the time specified in this behalf by the Committee.

(6) The Medical Board shall undertake such medical examination of the Judge as may be considered necessary and submit a report to the Committee stating therein whether the incapacity is such as to render the Judge unfit to continue in office.

(7) If the Judge refuses to undergo medical examination considered necessary by the Medical Board, the Board shall submit a report to the Committee stating therein the examination which the Judge has refused to undergo, and the Committee may, on receipt of such report, presume that the Judge suffers from such physical or mental incapacity as is alleged in the motion referred to in sub-section (1).

(8) The Committee may, after considering the written Statement of the Judge and the medical report, if any, amend the charges framed under sub-section (3) and in such a case, the Judge shall be given a reasonable opportunity of presenting a fresh written Statement of defence.

(9) The Central Government may, if required by the Speaker or the Chairman, or both, as the case may be, appoint an advocate to conduct the case against the Judge.

4. Report of Committee.—
(1) Subject to any rules that may be made in this behalf, the Committee shall have power to regulate its own procedure in making the investigation and shall give a reasonable opportunity to the Judge of cross-examining witnesses, adducing evidence and of being heard in his defence.

(2) At the conclusion of the investigation, the Committee shall submit its report to the Speaker or, as the case may be, to the Chairman, or where the Committee has been constituted jointly by the Speaker and the Chairman, to both of them, stating therein its findings on each of the charges separately with such observations on the whole case as it thinks fit.

(3) The Speaker or the Chairman, or, where the Committee has been constituted jointly by the Speaker and the Chairman, both of them, shall cause the report submitted under sub-section (2) to be laid, as soon as may be, respectively before the House of the People and the Council of States.

5. Powers of Committee.—For the purpose of making any investigation under this Act, the Committee shall have the powers of a civil court, while trying a suit, under the Code of Civil Procedure, 1908, in respect of the following matters, namely:—

(a) summoning and enforcing the attendance of any person and examining him on oath;
(b) requiring the discovery and production of documents;
(c) receiving evidence on oath;
(d) issuing commissions for the examination of witnesses or documents;
(e) such other matters as may be prescribed.

6. Consideration of report and procedure for presentation of an address for removal of Judge.—
(1) If the report of the Committee contains a finding that the Judge is not guilty of any misbehaviour or does not suffer from any incapacity, then, no further Steps shall be taken in either House of Parliament in relation to the report and the motion pending in the House or the Houses of Parliament shall not be proceeded with.

(2) If the report of the Committee contains a finding that the Judge is guilty of any misbehaviour or suffers from any incapacity, then, the motion referred to in subsection (1) of section 3 shall, together with the report of the Committee, be taken up for consideration by the House or the Houses of Parliament in which it is pending.

(3) If the motion is adopted by each House of Parliament in accordance with the provisions of clause (4) of article 124 or, as the case may be, in accordance with that clause read with article 218 of the Constitution, then, the misbehaviour or incapacity of the Judge shall be deemed to have been proved and an address praying for the removal of the Judge shall be presented in the prescribed manner to the President by each House of Parliament in the same session in which the motion has been adopted.

7. Power to make rules.—

(1) There shall be constituted a Joint Committee of both Houses of Parliament in accordance with the provisions hereinafter contained for the purpose of making rules to carry out the purposes of this Act.

(2) The Joint Committee shall consist of fifteen members of whom ten shall be nominated by the Speaker and five shall be nominated by the Chairman.

(3) The Joint Committee shall elect its own Chairman and shall have power to regulate its own procedure.
(4) Without prejudice to the generality of the provisions of sub-section (1), the Joint Committee may make rules to provide for the following among other matters, namely:—

(a) the manner of transmission of a motion adopted in one House to the other House of Parliament;

(b) the manner of presentation of an address to the President for the removal of a Judge;

(c) the travelling and other allowances payable to the members of the Committee and the witnesses who may be required to attend such Committee;

(d) the facilities which may be accorded to the Judge for defending himself;

(e) any other matter which has to be, or may be, provided for by rules or in respect of which provision is, in the opinion of the Joint Committee, necessary.

(5) Any rules made under this section shall not take effect until they are approved and confirmed both by the Speaker and the Chairman and are published in the Official Gazette, and such publication of the rules shall be conclusive proof that they have been duly made.
Article 22 Constitution of Pakistan 1956. Remedies for Enforcement of Rights Conferred by this Part.

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue to any person or authority, including in appropriate cases any Government, directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) The right guaranteed by this Article shall not be suspended except as otherwise provided by the Constitution.

(4) The provisions of this Article shall have no application in relation to the Special Areas.

Article 170 Constitution of Pakistan 1956. Power of High Courts to Issue Certain Writs, etc.

Notwithstanding anything in Article 22, each High Court shall have power, throughout the territories in relation to which it experiences jurisdiction, to issue to any person or authority, including in appropriate cases any Government, directions orders or writs, including writs in the nature of habeas corpus, mandamus,
prohibition, quo warranto and certiorari, for the enforcement of any of the rights conferred by Part II and for any other purpose.

Article 56 Constitution of Pakistan 1956. Privileges, etc., of Members of the National Assembly.

(1) The validity of any proceedings in the National Assembly shall not be questioned in any court.

(2) No officer or member of the National Assembly in whom powers are vested for the regulation of procedure, or the conduct of business, or the maintenance of order in the Assembly, shall in relation to the exercise by him of any of those powers, be subject to the jurisdiction of any court.

(3) No member of the National Assembly, and no person entitled to speak therein, shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the Assembly or any committee thereof.

(4) No person shall be liable to any proceedings in any court in respect of the publication by or under the authority of the National Assembly of any report, paper, vote or proceedings.

(5) Subject to this Article, the privileges of the National Assembly, the committees and members thereof, and the persons entitled to speak therein, may be determined by Act of Parliament.
Article 176 Constitution of Pakistan 1956. Supreme court and High Courts to be Courts of Record.

The Supreme Court and each High Court shall be a court of record and shall have all the powers of each a court, including the power to make any order for the investigation or punishment of any contempt of itself.


(1) Every Judge of High Court shall be appointed by the President, after consultation with the Chief Justice of Pakistan, the Government of the Province to which the appointment relates, and if the appointment is not that of the Chief Justice, the Chief Justice of the High Court of that Provinces.

(2) Subject to Articles 169 and 173, a judge of a High Court shall hold office until he attains the age of sixty years.

(3) A person who has held office as a permanent Judge of a High Court shall not act before that court or any court or authority within its jurisdiction.


(1) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of Pakistan and ------
(a) has been, for at least ten years, an advocate or a pleader of a High Court, or of two or more High Courts; or

(b) is a member of the Civil Services of Pakistan of at least ten years standing, who has for at least three years served as, or exercised the powers of, a District Judge; or

(c) has for at least ten years held a Judicial office in Pakistan.

Provided that a person shall not qualified for appointment as a permanent Chief Justice of a High Court unless ------

(i) he is, or, when first appointment to a Judicial office, was, an advocate or a pleader in a High Court; or

(ii) he has served for not less than three years as a Judge of a High Court in Pakistan.

Provided further that a person who was immediately before the Constitution Day a Judge of High Court shall not be disqualified from continuing as such on the ground only that he is not a citizen of Pakistan.

(2) For the purpose of computing any period referred to in sub-clause (a) of clause (1) there shall be included -----

(a) Any period during which a person has held Judicial office after he became an advocate or a pleader; and

(b) Any period during which a person was an advocate or a pleader of a High Court in British India.
(3) For the purpose of computing any period referred to in sub-clause (c) of clause (1) there shall be included any period during which a person held Judicial office in British India.


A Judge of a High Court shall not be removed from his office except by an order of the President made on the ground of misbehavior or infirmity of mind or body, if the Supreme Court on reference being made to it by the President, reports that the Judge ought to be removed on any of those grounds.

Article 149 Constitution of Pakistan 1956. Appointment of Judges of the Supreme Court.

(1) The Chief Justice of Pakistan shall be appointed by the President, and the other Judge shall be appointed by the President after consultation with the Chief Justice.

(2) A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of Pakistan, and—

(a) Has been for at least five years a Judge of High Court or two or more High Courts in succession; or

(b) Has been for at least fifteen years an advocate or a pleader of a High Court, or of two or more High Courts.

(3) For the purpose of computing any such period as is referred to in sub-clause (a) of clause (2) there shall be included any period during which a person has been a Judge of a High Court in Pakistan before the Constitution Day.
(4) For the purpose of computing any such period as is referred to in sub-clause (b) of clause (2) there shall be included any period during which a person was an advocate or a pleader of a High Court in Pakistan before the Constitution Day or of any High Court in British India.

**Article 150 Constitution of Pakistan 1956. Age of Retirement and Disabilities of Judges of the Supreme Court.**

(1) Subject to Article 151 and 173, a Judge of the Supreme Court shall hold until he attains the age of sixty-five years.

(2) A person who has held office as a permanent Judge of the Supreme Court shall not plead or act before any court or authority in Pakistan.

**Article 151 Constitution of Pakistan 1956. Removal of Judges of the Supreme Court.**

(1) A Judge of the Supreme Court shall not be removal from his office except by an order of the President made after an address by the National Assembly, supported by the majority of the total number of members of the Assembly and by the votes of not less than two-thirds of the members present and voting, has been presented to the President for the removal of the Judge on the ground of proved misbehavior or infirmity of mind or body;

Provided that no proceedings for the presentation of the address shall be initiated in the National Assembly unless notice of the motion to present the address is supported by not less than one-third of the total number of members of the Assembly.
(2) Parliament may by law prescribe the procedure for the presentation of an address and for the investigation and proof of misbehavior of infirmity or mind or body of a Judge, and until such a law is made the President may by order prescribe the said procedure.

(1) A High Court shall have such jurisdiction as is conferred on it by this Constitution or by law.

(2) Subject to this Constitution, a High Court of a Province may, if it is satisfied that no other adequate remedy is provided by law----

(a) On the application of any aggrieved person, make an order----

(i) Directing a person performing in the Province functions in connection with the affairs of the Centre, the Province or a local authority to refrain from doing that which he is not permitted by law to do, or to do that which he is required by law to do; or

(ii) Declaring that any act done or proceeding taken in the Province by a person performing functions in connection with the affairs of the Centre, the Province or a local authority has been done or taken without lawful authority, and is of no legal effect; or

(b) On the application of any person make an order------

(i) Directing that a person in custody in the Province be brought before the High Court so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or

(c) On the application of any aggrieved person, make an order giving such directions to any person or authority, including any Government, exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court as may appropriate for
the enforcement of any of the fundamental rights conferred by Chapter 1 of Part II of this Constitution.

(3) An order shall not be made under clause (2) of this Article.
   (a) An application made by or in relation to a person in the Defense Services of Pakistan in respect of his terms and conditions of services, in respect of any matter arising out of his service or in respect of any action taken in relation to him as a member of the Defense Services of Pakistan.; or
   (b) On application made by or in relation to any other person in the service of Pakistan in respect of his terms and conditions of services, except a term or condition of service that is specified in this Constitution.

(4) Where ------
   (a) application is made to High Court for an order under paragraph (a) or Paragraph of clause (2) of this Article;
   (b) the Court has any reason to believe that the making of an interim order would have the effect of prejudicing or interfering with the carrying out of a public work or of otherwise being harmful to the public interest.

The Court shall not make an interim order unless the prescribed law officer has been given notice of the application and the Court, after the law office or any person authorized by him in this behalf has been given an opportunity of being heard, is satisfied that the making of the interim order would not have the effect referred to in paragraph (b) of this clause.

(5) In this article, unless the context otherwise requires ------ “person” includes anybody public or corporate, any authority of or under the control of the
Central Government or of a Provincial Government and any Court or tribunal, other than the Supreme Court, a High Court or a Court or tribunal establishment under a law relating to the Defence Services of Pakistan; “prescribed law officer” mean ----

(a) In relation to an application affecting the Central Government or an authority of or under the control of the Central Government ---- the Attorney-General; and

(b) in any other case ---- the Advocate-General of the Province in which application is made.

Article 111 Constitution of Pakistan 1962. Privileges, etc, of Assemblies.

(1) The validity of any proceedings in an Assembly shall not be questioned in any Court.

(2) An officer or member of an Assembly in whom powers are vested for the regulation of procedure, the conduct of business or the maintenance of order in the Assembly shall not, in relation to the exercise by him of any of those powers, be subject to the jurisdiction of any Court.

(3) A member of, or a person entitled to speak in, an Assembly shall not be liable to any proceedings in any Court in respect of anything said by him, or any vote given by him, in the Assembly or in any committee of the Assembly.

(4) A person shall not be liable to any proceedings in any Court in respect of the publication by or under the authority of an Assembly of any report, paper, vote or proceedings.
(5) A person issued by a Court or other authority shall, except with the leave of
the Speaker of the Assembly, be served or executed within the precincts of
the place where a meeting of an Assembly is being held.

(6) Subject to this Article, the privileges of an Assembly, of the committees and
members of an Assembly and of the persons entitled to speak in an
Assembly may be determined by law.

**Article 123 Constitution of Pakistan 1962. Contempt of Court.**

(1) In this article, “Court” means the Supreme Court or a High Court.

(2) A Court shall have power to punish any person who -----

   (a) Abuses, interferes with or obstructs the person of the Court in any way
       or disobeys any order of the Court;

   (b) Scandalized the Court or otherwise does anything which tends to bring
       the Court or a Judge of the Court into hatred, ridicule or contempt;

   (c) Does anything which tends to prejudice the determination of a matter
       pending before the Court; or

   (d) Does any other thing which, by law, constitutes contempt of the Court.

(3) The exercise of the power conferred on a Court by this Article may be
    regulated by law and, subject to law, by rules made by the Court.

**Article 127 Constitution of Pakistan 1962. Officers and Servants of Courts.**

(1) In this Article, “Court” means the Supreme Court or a High Court.

(2) A Court may (with the approval of the President in the case of the Supreme
    Court, and the Governor in the case of a High Court) make Rules providing

(1) The Chief Justice of the Supreme Court shall be appointed by the President, and the other Judges shall be appointed by the President after consultation with the Chief Justice.

(2) A person shall not be appointed as a Judge of the Supreme Court unless he is a citizen of Pakistan and ------

(a) He has for a period of, or for periods aggregating, not less than five years been a Judge of a High Court (including a High Court that existed in Pakistan at any time before the commencing day);

or

(b) He has for a period of, or for periods aggregating not less than five years been Judge of a High Court (including a High Court that existed in Pakistan at any time before the commencing day);

or

(c) He has for a period of, or for periods aggregating, not less than fifteen years been an advocate or pleader of a High Court (including a High Court that existed in Pakistan at any time before the commencing day and any High Court that existed in British India before the fourteenth day of August, One thousand nine hundred and forty seven).

A judge of the Supreme Court shall hold office until he attains the age of sixty-five years unless he sooner resigns or is removed from office in accordance with this Constitution.


(1) A Judge of a High Court shall be appointed by the President after consultation -----

(a) With the Chief Justice of the Supreme Court;

(b) With the Governor of the Province concerned; and

(c) Except where the appointment is that of Chief Justice----with the Chief Justice of the High Court.

(2) A person shall not be appointed as a Judge of a High Court unless he is a citizen of Pakistan and -----

(a) He has for a period, or for periods aggregating, not less than then years been an advocate or pleader of a High Court (including High Court that existed in Pakistan at any time before the commencing day and any High Court that existed in British India before the fourteenth day of August, one thousand nine hundred and forty-seven);

(b) He is, and has for a period of not less than ten years been, a member of a civil services prescribed by law for the purposes of this paragraph and has for a period of not less than three years, served as or exercised the functions of a District Judge on Pakistan; or
(c) He has, for a period of not less than ten years, held judicial office in Pakistan.

(3) In this Article, “District Judge” means Judge of a principal civil Court of original jurisdiction.

**Article 94 Constitution of Pakistan 1962. Retiring Age.**

A Judge of a High Court shall hold office until he attains the age of sixty years unless he sooner resigns or is removed from office in accordance with this Constitution.

**Article 128 Constitution of Pakistan 1962. Supreme Judicial Council.**

(1) There shall be a Supreme Judicial Council of Pakistan, in this Article referred to as “the Council”.

(2) The Council shall consist of ----

(a) The Chief Justice of the Supreme Court;
(b) To two next most senior Judges of the Supreme Court; and
(c) The Chief Justice of each High Court.

(3) If, at any time, the Council is inquiring into the capacity or conduct of a Judge who is a member of the Council, or a member of the Council is absent or is unless to act as a member of the Council due to illness or some other cause, the Judge of the Supreme Court who is next seniority below the Judges referred to in paragraph (b) of clause (2) of this Article shall act as a member of the Council in his place.

(4) The council shall issue a code of conduct to be observed by judges of the Supreme Court and of the High Courts.
(5) If, on information received from the Council or from any other source, the President is of the opinion that a Judge of the Supreme Court or of a High Court——

(a) May be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or

(b) May have been guilty of gross misconduct, the President shall direct the Council to inquire into the matter.

(6) If, after inquiring into the matter, the Council reports to the President that it is of the opinion——

(a) That the Judge is incapable of performing the duties of his office or has been guilty of gross misconduct; and

(b) That he should be removed from office, the President may remove the Judge from office.

(7) A judge of the Supreme Court of a High Court shall not be removed from office except as provided by this Article.