

## **Accountability of Chief Justice under Shariah and Constitution of Pakistan**

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### **Abstract**

Islam is a complete code of life. It has guidance over every aspect of life including judicial system. Islam has emphasized over justice (adl) to be maintained in the society. In order to ensure justice, judges (Qadhi) should not only be eligible/qualified but also be independent to work according to Shariah.

**Key Words:** guidance, judicial system, justice, qualified

### **Introduction**

Before going ahead, it will be fruitful to enumerate few of the Verses from Holy Quran and Ahadith of Prophet Muhammad (S.A.W.W) regarding judicial system:

*“Allah doth command you to render your trusts to those whom they are due; and when you 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 hearth and seethe all things”. (4:58)<sup>1</sup>*

*“We have sent down to thee the Book in Truth, that thou mightiest judge between men, as guided by Allah: so be not (used) as an advocate by those who betray their trust” (4:105)<sup>2</sup>*

*“O ye who believe! Stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be (against) rich or poor: For Allah can best protect both. Follow not the lusts (of your hearts), lest you swerve, and if ye distort (justice) or decline to do justice, verily Allah is well-acquainted with all that ye do”. (4:135)<sup>3</sup>*

*“O ye who believe! Stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to piety: and fear Allah. For Allah is well-acquainted with all that ye do. (5: 8).”<sup>4</sup>*

*“And o my people! Give just measure and weight, Nor withhold from the people the things that are their due: Commit not evil in the land with intent to do mischief.” (11:85)<sup>5</sup>*

*“Allah commands justice, the doing of good, and liberality to kith and kin, and He forbids all shameful deed, and injustice and rebellion: He instructs you, that ye may receive admonition.” (19:90)<sup>6</sup>*

*“O David! We did indeed make thee a vicegerent on earth: so judge though between men in truth (and justice): Nor follow thou the lusts (of thy heart), for they will mislead thee from the path of Allah: for those who wander astray from the path of Allah, is a penalty grievous, for that they forget the day of account”. (38:26)<sup>7</sup>*

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*“We sent a foretime our messengers with clear signs and sent down with them the Book and the Balance (of right and wrong), that men may stand forth in justice” (57:25)8*

In Bukhari and Muslim, it is reported that Prophet Muhammad (SAWW) has refrained from passing a judgment in an angry mood.

It is reported in Bukhari and Muslim that Prophet Muhammad (SAWW) said that when a person tries hard to give right decision and succeeds, so there are two rewards for him. But if he works hard and commit a mistake while delivering a judgment so there will be one award for him.

Ahmad, Tirmizi, Abu Daud and IbnMajah reported that Prophet Muhammad (SAWW) said that a person who is selected as judge is similar to being slaughtered without knife.

Tirmizi, Abu Daud and IbnMajahhas recorded an even of Hazrat Ali (R.A), when he was being sent to Yemen as Judge. He came to the Prophet Muhammad (SAWW) and complained regarding his appointment owing to his age and not required experience. The Prophet Muhammad (SAWW) encouraged him by saying that Allah will soon provide guidance into his heart and make your tongue strong. Also when two persons come for decision, do not give abrupt decision while just listening to first one rather hear both, which will enable you to reach a right decision.

In Muslim the Prophet Muhammad (SAWW) is recorded as saying: “Verily the just persons near Allah will be upon pulpits of light on the right side of the Merciful”.

Tirmizi, Abu Daud has reported very famous event of HazratMaaz Bin Jabad, who was being sent as Governor to Yemen. The Prophet asked him how will he decide? He replied as per Book of Allah. Again asked if you did not fin there then? He said as per Sunnah of the Prophet. Again asked if you did not find there then? He said according to my opinion in light of above two sources. The Prophet Muhammad SAWW was very pleased with his answer and prayed for him.

### ***Judges under Islam***

Justice in Islam is administered through Quzaa (singular Qazi) (judges). This word has been used numerously in the Holy Quran. It means, literally, “Finished a thing entirely”. It means to stand and take something to logical conclusion. It is

used in Quran and has different meaning with reference to context like “to intend, to fulfil, to fix a limit, to perform a religious duty, to give a judgement, to kill etc.” But in books of Fiqh it is used to mean “adjudication of disputes”, therefore, he is person who decides disputes among people.

#### ***Qualifications for Qadi***

Minimum qualification for the appointment as a Qadi is that he must be a competent witness i.e. Muslim, free and major. According to Imam Shafi, besides these he should be of virtuous character while Imam Abu Hanifa does not consider it as well as requirement of mujtahid as necessary condition for appointment.<sup>9</sup>

#### ***Qualities in a Qadi***

Dr. Muhammad Sharif Chaudhry says that

*“Caliph Ali is reported to have said that a person cannot become a qadhi, in the true sense of the word, unless he possesses five qualities; i.e. he is pious, sober, possessing the knowledge of the past events, consulting the wise and fearing Allah and none else”.*<sup>10</sup>

#### ***Appointment and removal of judges***

According to Dr. Sharif, caliph or head of an Islamic State will appoint Qadhi subject to eligibility for the post based on academics, character, trustworthy & honesty and devotion. Although head of state will appoint Qadi but after appointment he becomes independent in giving decisions. Hiring authority cannot interfere in his domain. However, he can be removed from office on solid grounds like misconduct but not at the discretion of head of state.<sup>11</sup>

#### ***Judiciary under Constitution of Pakistan***

Structure of judiciary is provided under the Constitution.<sup>12</sup> Accordingly the Supreme Court of Pakistan is the Apex Court, decision of which is final. It comprises of judges who are men of integrity and learning. They are appointed through a set procedure owing to their academics and experience in the field.

#### ***Judges: appointment & qualification of judges of Supreme Court***

Article 175-A read with Article 177 provide for the appointment of judges. The Judicial Commission of Pakistan (JCP) will recommend persons qualified to be appointed as

Judges to the President of Pakistan via Parliamentary Committee.

Article 177 (2) provides for qualification and appointment as judge of Supreme Court. In order to be appointed as Judge, a person must be a citizen of Pakistan with at least five years of service as Judge of High Court or for fifteen years been an advocate of High Court.

#### ***Removal of Judges***

Article 209 established Supreme Judicial Council comprising of Chief Justice of Pakistan, two senior most judges of Supreme Court and two senior chief justices of High Courts. This body can initiate proceedings, on report or on its own, against any judge on ground of incapacity or misconduct. The Council after inquiry will recommend to the President, who *may* act upon such recommendations.

#### ***Chief Justice of Pakistan: Removal?***

After reading these Articles it is clear that there is no explicit provision regarding accountability of Chief Justice of Pakistan. If a CJP is allegedly involved in misconduct, so cannot be inquired into in any forum. This was the case in 2007, when the then deposed Chief Justice challenged the authority of SJC but the Court did not give any clear judgment on this issue.<sup>13</sup>

#### ***Inconsistency with Islam and Constitution of Pakistan***

This is a dilemma and is against the teaching of Islam and spirit of the Constitution. Few of the relevant provisions are mentioned below:

##### ***Preamble***

There are various paragraphs in the Preamble which are expressing true teaching of Islam but the subject issue is inconsistent with like “....principles of..... Equality..... as enunciated by Islam, shall be fully observed; Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah; guaranteed fundamental rights, including equality of status, of opportunity and before law”.

##### ***Article 2***

declared Islam to be the State Religion. So teachings of Islam should be respected and implemented.

**Article 2-A**

In incorporated Objective Resolution as part and parcel of the Constitution, which binds the State to amend and bring all laws in conformity with teaching of Islam.

**Article 25**

deals with equality before law. When every is equal before law, why not chief justice of Pakistan be treated alike others.

**Article 227**

Says that existing laws will be brought in conformity with teaching of Islam.

**Recommendations**

From above discussion it is clear that judges are accountable. They cannot be given absolute powers because “power corrupt, absolute powers corrupt absolutely”<sup>14</sup>It is therefore, recommended that:

1. Article 209 may be amended as to make CJP also accountable for his actions. In that case Senior most judge of Supreme Court will act as Chairman of the Council.
2. Another body may be established comprising of President of Pakistan, Chairman Senate, Representative Bar Council and Senior most Chief Justice of High Court with Registrar Supreme Court as Secretary.
3. Thirdly, Article 47 may be amended to include impeachment of Chief Justice of Pakistan

**Conclusion**

It can be concluded that Judges are placed at a very higher esteem under Shariah. They have given special place and authority to work for justice. Their appointment is subject to certain required qualifications and qualities. Also they can be removed by head of an Islamic State. Whereas, Constitution of Pakistan has provided for appointment of Judges and also removal under Article 209. However, it is silent on the removal of Chief Justice of Pakistan. It is recommended to amend the same Article or Article 47 to include Chief Justice there and make him accountable.

**References**

<sup>1</sup> *Abdullah Yusuf Ali (1989). The Holy Quran: Text, Translation and Commentary. Amana Corporation USA, p. 203*

<sup>2</sup> *Ibid*, p. 220

<sup>3</sup> *Ibid*, pp. 228-229

<sup>4</sup> *Ibid*, p. 248

<sup>5</sup> *Ibid*, p. 533.

<sup>6</sup> *Ibid*, p. 661.

<sup>7</sup> *Ibid*, pp. 1166-1167

<sup>8</sup> *Ibid*, p. 1428

<sup>9</sup> Sir Abdur Rahim (1997). *Muhammadan Jurisprudence*. Mansoor Book House Lahore, p. 328

<sup>10</sup> Dr. Muhammad Sharif Chaudhry. *What is Islam?* Retrieved from [http://www.muslimtents.com/shaafi/b23/b23\\_05.htm#7.%20His%20appointment%20and%20deposition](http://www.muslimtents.com/shaafi/b23/b23_05.htm#7.%20His%20appointment%20and%20deposition): on 12.6.2016.

<sup>11</sup> Dr. Muhammad Sharif Chaudhry. *What is Islam?* Retrieved from [http://www.muslimtents.com/shaafi/b23/b23\\_05.htm#7.%20His%20appointment%20and%20deposition](http://www.muslimtents.com/shaafi/b23/b23_05.htm#7.%20His%20appointment%20and%20deposition): on 12.6.2016.

<sup>12</sup> Article 175 deals with "Establishment and Jurisdiction of Courts".

<sup>13</sup> Iftikhar Chaudhry vs. Pervez Musharraf.

<sup>14</sup> Montesquieu, a French Philosopher of the Nineteenth Century.