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Judging the Judges: Judicial Immunity in Pakistan

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Abstract
This work attempts to analyze what precisely is meant by judicial immunity and why is it necessary to protect judges for judging? Secondly, how did the jurisprudence of judicial immunity evolve in Pakistan? Presenting a thorough analysis of the decisions in recent cases, this article argues that although the juridical position on the question of judicial immunity has gone back and forth, the Supreme Court has finally laid down a judicial doctrine that extends judicial immunity to administrative, executive, consultative, and legislative decisions of judges of the High Court. It has also made clear that a High Court is not allowed to issue a writ against administrative, executive or consultative acts of its own or another High Court for the purpose of ensuring harmony in the working of judiciary.

Key words: Judicial immunity, judicial acts, non-judicial acts, Article 199(5), Pakistan, Supreme Court, High Court.

1. Introduction

Judicial immunity protects judges from civil liability for monetary damages in civil court, and for acts they perform pursuant to their judicial function. Judges have complete immunity from civil damages if she or he has jurisdiction over the subject matter in issue. Judicial immunity also protects a judge in criminal cases even if his or her decision is reversed by the higher court and is declared as wrong. The Supreme Court of Pakistan, as well as the High Courts, has ruled on many occasions that judges have immunity for their judicial functions. Superior Courts in Pakistan are of the opinion that non-judicial acts of judges are also protected and are not amenable to

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writ. The questions that are discussed in this work are: what is judicial immunity; what is judicial function or judicial act; what are non-judicial acts; is judicial immunity confined to judicial functions of the judge or does it also cover his or her administrative, consultative, legislative and executive functions; how did the jurisprudence of judicial immunity evolve in Pakistan; and what is the latest judicial pronouncement on this point by the Supreme Court?

2. Why is Immunity Given to Judges?

Judges must enjoy complete and absolute immunity for their judicial functions to be able to judge freely, independently and without any fear of prosecution or liability later on. Should there be no immunity for judges, they would not be judging in the first place and would pursue another career. Every legal system has, therefore, protected judges for their judicial functions or judicial acts. Although, there is no precise definition of what exactly constitutes a judicial act, it is clear that the immunity attaches to the act itself, not the person performing the act.[1] The scope of judicial immunity seems to have been settled by the Supreme Court of Pakistan's latest pronouncement in *Gul Taiz Khan Marwat v Registrar, Peshawar High Court*[2] which overruled the decision of a Full Bench of the Supreme Court reported as *Muhammad Akram v Registrar Islamabad High Court*[3] given in 2016. In the *Gul Taiz Khan* case the Supreme Court has expounded what constitutes judicial immunity; what is judicial function; whether a judge has immunity for judicial functions only and whether his or her immunity also encompasses his or her administrative and executive functions. The *Gul Taiz* case has overruled Muhammad Akram case but has restored the position pronounced many times earlier by the Supreme Court as well as the Lahore High Court.

3. Immunity or Impunity: Judicial Immunity in the U.S. and the U.K.

Judicial immunity in Pakistani legal system seems to have ignored the evolution of this doctrine in the United States, the United Kingdom as well as India. In Pakistan judicial immunity was given a very wide meaning by some decisions of higher courts. Thus, judges have to judge fellow judges. The Chief Justice of a High Court or the Supreme Court is given vast powers for administrative, executive

and legislative works of the respective court. Higher courts have to make rules and regulation for the smooth functioning of the courts. At the same time the Chief Justice of a higher court is the chief executive officer for the administration of the court. He has to supervise the functions of all those officials who work in the courts.

It may not be fair to judge Pakistani legal system and case law with American yardstick; some American cases are mentioned here to have an idea of how judicial immunity is evolved in the United States. Legal scholars and jurists in the United States are of the view that conduct not requiring judicial discretion is a non-judicial conduct.[4] In addition, non-judicial conduct includes administrative and legislative acts.[5] Since these acts do not involve any exercise of judicial discretion, judicial independence does not require that the law should provide absolute immunity to them.[6] Judges enjoy absolute immunity from civil liability for their judicial acts so long as they are not outside their jurisdiction.[7] Because of absolute immunity judges may not be sued for their wrongful judicial behavior, even if they act for purely corrupt or ulterior motives or malicious reasons[8] although it is difficult to defend the idea that a man who has an arguable case that a judge has acted corruptly or maliciously to his detriment, should have no cause of action against the judge.[9] At the same time, if judicial matters are drawn into question by frivolous and vexatious actions "there never will be an end of causes: but controversies will be infinite."[10] Moreover, it might lead to the possibility of an endless cycle and the burden placed on judges compelled to answer in civil actions for their judicial acts.[11]

4. History and Reasons of Judicial Immunity

There seems some exaggeration in the history of judicial immunity in the United States. In the U. S. case of *Pierson v Ray* (1967)[12] it was claimed that the doctrine of judicial immunity had been settled and accepted throughout the states by the year 1871.[13] Writing about the history of judicial immunity in the U.S., Shahman argues that "in 1871 there was substantial variation about judicial immunity from state to state."[14] He asserts that judicial immunity in the U.S. was far from being a settled area of law at that time. The leading modern American case on judicial immunity is *Stump v Sparkman*,[15] in which the Supreme Court held that a judge will remain absolutely immune from a damage suit if he acted within his jurisdiction, or even in

"excess of his jurisdiction,"[16] but not in the "clear absence of all jurisdiction."[17]

Once appeal was made available, any wrong made by the lower court judges was highlighted and they had to be protected from civil and criminal liability. In the historic English case of *Floyd v Barker*,[18] Lord Coke articulated that judges who served on English courts of record have judicial immunity. Lord Coke stated that judicial immunity serves the following purposes: first, it insures the finality of judgments; secondly, it protects judicial independence; thirdly, it avoids continual attacks upon judges who may be sincere in their conduct; and finally, it protects the system of justice from falling into disrepute.[19] Point number one, that is, finality of judgments, may be disputed in our times but point number two, that is, judicial independence is generally recognized as the most important purpose of judicial immunity.[20] Judges who decide contentious, twisted, controversial, and emotionally laden cases need judicial immunity from civil and criminal liability so that they should not be charged by disgruntled litigants for improper judicial behavior. In England judicial immunity is extended to defamatory remarks uttered by judges and other judicial officers[21] in the course of judicial proceedings. In addition, inferior courts enjoy the same immunity as superior courts.[22] However, judicial immunity in England is available for judicial acts only and is not extended "to administrative acts of Her Majesty's and Tribunals Service (HMCTS)."[23] Similarly, in England judicial immunity is also provided to officials who have 'quasi-judicial' functions. These include prosecutors,[24] arbitrators,[25] and military tribunals.[26]

5. Judicial Immunity in Pakistan: Immunity for Non-Judicial and Quasi-Judicial Acts

In Pakistan judges of the superior judiciary, that is, the Supreme Court and the High Courts are protected by Article 199(5) of the Constitution of the Islamic Republic of Pakistan of 1973. Article 199(5) of the Constitution gives the definition of 'person' and mentions that a 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…". In other words, the Supreme Court, a High Court or a military court or

tribunal are excluded from the definition of person and cannot be subjected to writ petitions under Article 199 of the Constitution. On the other hand, judicial officers and quasi-judicial officers are protected by the Judicial Officers' Protection Act, 1850. [27] Section 1 of the Act gives absolute immunity to judicial and quasi-judicial officers. It says:

> "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."[28]

There has been unanimity and consistency among the Superior Courts in Pakistan regarding their interpretations that the judicial functions or judicial acts of a judge of a High Court under Article 199(5) are absolutely immune. However, they have differed on whether the administrative, executive, and consultative acts or orders or functions of a judge are immune or not. In the earlier case of *Muhammad Mohsin Siddiqi v Government of West Pakistan*[29] the order of the Administrative Judge of the High Court was challenged in the writ and the question involved was, whether such an order could be so assailed. An employee of the District Court, Hyderabad had been dismissed by the District Judge on the basis of misconduct and misbehavour. The District Judge had himself conducted an enquiry and had dismissed the employee as a result. An Administrative Judge of the High Court had affirmed the dismissal order with some modification.[30] The said employee had challenged the administrative order of the Administrative Judge in a writ before the same High Court but the High Court dismissed the petition on the ground that it cannot issue a writ to itself to quash its Administrative order. The aggrieved employee challenged the decision of the High Court before the Supreme Court of Pakistan on the grounds that a complainant, the District Judge, was not supposed to be conducting the enquiry as this was against the established legal principle that

'no one shall be a judge in his own cause;' and that the Administrative order of the judge of the High Court was amenable to writ. The Supreme Court agreed with the petitioner and ruled that "the District Judge had made himself the Judge in his own cause"[31] and that its subsequent ratification by the Administrative Judge of the High Court has not cured the "patent defect by which the enquiry proceedings were allegedly affected."[32] The Supreme Court accepted the appeal and set aside the order of the Administrative judge of the High Court. Consequently, all proceedings and actions against the appellant were rendered void and of no legal effect.[33]

The Honorable Supreme Court ruled in *Abrar Hassan v Government of Sind*[34] that "It seems that intention of the Constitution-makers is to exclude, from the writ jurisdiction of the High Court, all actions, acts and orders made by the High Court or the Supreme Court, or by any Judge thereof in the exercise of the functions and powers of his office, but the immunity would not extend to the actions of a Judge in his private or individual capacity, in which capacity he continues to be amendable to the laws of the land like any other citizen."[35] In *Muhammad Ikram Chaudhry v Federation of Pakistan*,[36] the Supreme Court ruled that "There seems to be unanimity of view among the superior Courts on the question that a High Court or the Supreme Court cannot in exercise of its Constitutional jurisdiction under Article 199 of the Constitution interfere with an order passed by another Judge or another Bench of the same Court."[37] The word 'order' in this judgment is considered later on, as was seen in subsequent case law, to encompass all types of orders, that is, administrative, consultative, legislative, and judicial.

In *Malik Asad Ali v Federation of Pakistan*[38] the Supreme Court ruled that "the actions of the judge which relate to the performance of his duty and functions as a Judge of the Court or as a member of the Court, cannot be brought under challenge under Article 199 of the Constitution before the High Court. Only such actions of a judge of superior Court are amenable to the jurisdiction of High Court under Article 199 of the Constitution, which he performs in his personal capacity, having no nexus with his official functions as a Judge of the Court."[39] Thus, the Supreme Court seems to have overruled its earlier decision of *Muhammad Mohsin Siddiqi* [40] and established that any order of a High Court judge is immune no

matter it be judicial or administrative, legislative, executive, or consultative. The Supreme Court has taken a similar view in *Wukala Mohaz Barai Thafaz Dastoor v Federation of Pakistan*[41] where the Court provided protection to the superior judiciary and has placed as immune from challenging its administrative orders.[42]

In *Nusrat Elahi v The Registrar Lahore High Court*,[43] the Lahore High Court had ruled in 1991 that the Constitutional jurisdiction of the High Court "cannot be invoked by the employees of this Court [that is, the Lahore High Court] against the orders passed by the Chief Justice or the Registrar on behalf of the Court."[44] The Court ruled that "while defining 'person', sub-Article (5) of Article 199 of the Constitution excludes the Supreme Court, the High Court or a Tribunal established under a law relating to the Armed Forces of Pakistan from its purview. That being so, no petition can be entertained under Article 199 of the Constitution against the High Court itself."[45] This view was endorsed by a Full Bench of the same High Court eight years later in *Asif Saeed v Registrar Lahore High Court*. [46] In the latter case many petitioners had previously applied for license to practice as advocates of Lahore High Court under the Legal Practitioners and Bar Council Act, 1973. Under section 27 of the said Act "a person shall be qualified to be admitted as an advocate of a High Court" if he has (a) practiced as an advocate before a lower Court for at least two years; or (b) "he has practiced outside Pakistan as an advocate before any High Court" specified by the Pakistan Bar Council; or (c) "he has, for reason of his legal training or experience, been exempted by the Provincial Bar Council, with the previous approval of the High Court, from the requirements of clause (a) and clause (b)…"[47]. The licenses were declined by the Punjab Bar Council because the Lahore High Court did not grant its approval as required under section 27(c) of the said Act. Although there were different reasons for refusal of approval, the aggrieved petitioners had challenged the actions or orders of the Lahore High Court believing it to be administrative in nature. They wanted the High Court to declare the same illegal and unlawful. The petitioners made the High Court as a party to the case along with Punjab Bar Council. The learned Counsel for the petitioners argued that judicial orders of the High Court cannot be challenged under Article 199(5), however, administrative orders and actions of a judge of a High Court are always amenable to writ and sub article (5) would not

operate as a bar against the exercise of such jurisdiction. The learned counsel argued that powers of the High Court to make rules under Articles 202 and 208 of the Constitution, its supervision of subordinate courts under Article 203 and its powers of recruiting, transferring, and terminating of services of its employees and officers are administrative functions of the Court and if any mistake or error is committed, the same shall "always be assailed before and corrected by this Court in exercise of its judicial functions under Article 199."[48]

It is interesting to note that the two leading counsels for the petitioners differed themselves regarding the nature of the orders of the High Court, that is, refusal to approve the exemption under Section 27(c) of the Legal Practitioners and Bar Council Act, 1973. According to the learned counsel Syed Mansoor Ali Shah as he then was, it was administrative in nature but according to Hamid Khan, it was a consultative act. Both agreed that whether the act was administrative or consultative in nature it was not a judicial act and was thereby not protected under Article 199(5). It was also argued by the learned counsel Hamid Khan that Article 199(5) excludes "Person" only from the ambit of writ jurisdiction but not the "Authority", which is deliberately omitted, consequently, when an administrative order "has been passed by the High Court that violates any fundamental right of a citizen, a writ would be competent, because then the High Court would be acting as an "Authority" and not as a person."[49]

The Lahore High Court distinguished *Muhammad Mohsin Siddiqiue* case[50] discussed above and opined that "the order originally 'passed and assailed, which was the foundation of the case was quasi-judicial in nature, though passed in exercise of administrative function."[51] In other words, the Court admitted that a non-judicial or quasi-judicial order of the Court was administrative in nature. The Lahore High Court dismissed the petitions and ruled that Article 199(5) has excluded both the Supreme Court and the High Court from the definition of 'person' and if administrative orders of the High Courts are amenable to writ, "orders of the Supreme Court on its judicial side can be challenged before the High Court in writ, irrespective of sub-Article (5)."[52]

The reasons behind the ruling of the Court are reproduced in full:

> "Now if the interpretation of the petitioners that administrative order of the High Court *can in writ be challenged* [can be challenged in writ][53] is accepted, the same rule would also apply to the Supreme Court, situation may arise where a full Court of the apex forum takes a non-judicial decision then on the basis of above reasoning a Single Judge of this Court may issue writ to quash the same which would be just preposterous. This also applies to the administrative decision taken by the Full Court of a High Court, particularly, when the same Judge/Judges are party to such a decision. There can be numerous examples cited to show [the] fallacy of such an interpretation. If the same rule is allowed to prevail, rules made by the Supreme Court, under Article 191 and by the High Courts, under Articles 203, and 208 are not safe from attack and may become subject of every day's litigation leading to a hazardous situation."[54]

The Court went one step further and stated that judicial orders of the Supreme Court and the High Court "were already protected from the exercise of writ. It is only the administrative/executive or consultative functions/orders and acts which in fact have been saved under this sub-Article [5]. By plain reading of sub-Article (5) and by applying settled rules of interpretation, High Court cannot be deemed to be conferred with two distinct characters i.e. one judicial, which is immune from writ, and the other administrative which is amenable to the writ."[55] The Court ruled that "Under section 27(c) of the Legal Practitioners and Bar Councils Act, 1973, the requisite approval is to be obtained from the High Court not from any individual Judge of the Court so mentioned by designation or otherwise, not even from any Judge performing duties of an "Administrative Judge." The order passed is always of the High Court, not by a Judge having a character different than of a High Court."[56] The Court ruled that an "Administrative Judge does not act in his unofficial or personal capacity, but performs function for and on behest of the Court and acts as a High Court."[57] In other words, whether particular judge acts in his consultative, executive, or administrative capacity, he is acting as a High Court which is not amenable to writ under 199.

This decision grants blanket immunity to all actions and orders whatever their nature, that is, whether these are administrative, consultative, executive, legislative, judicial or non-judicial. All the above decisions that protect judges for their non-judicial acts are

unique as the Courts in the United States and the United Kingdom do not give any immunity to acts or functions of judges that are non-judicial in nature, that is, administrative, consultative, or legislative in nature. The jurisprudence of judicial immunity in these three countries provides immunity to judges only for their judicial acts.

In *Muhammad Iqbal v Lahore High Court*[58] the Supreme Court endorsed the Lahore High Court's decision, that is, *Asif Saeed case*, and ruled that:

> "We perfectly agree with the view taken by the 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. We are further of the view that if such orders are allowed to be challenged before the same High Court, it would lead to creating ludicrous situations and hazardous consequences."[59]

The Supreme Court has reproduced many paragraphs of *Asif Saeed case* in approval which has raised that decision to the status of an important precedent.

5. Overruling the Settled Law: Expounding A New Precedent

In *Muhammad Akram v Registrar Islamabad High Court*[60], a Petition in the nature of *quo warranto*, the Supreme Court took a different view. In this case the administrative actions taken by the Chief Justice of Islamabad High Court were challenged. The petitioner Muhammad Akram has relied on an Audit Report for the years 2010-2013 about the Islamabad High Court. It was alleged that the Chief Justice has either appointed the respondents without advertisement thus denying other capable candidates the right to openly compete for the said posts; or some individuals who were on deputation were absorbed in much higher scales; or some respondents were appointed in relaxation of rules. It was argued before the Court that "under Article 199(5) of the Constitution, the Supreme Court has no jurisdiction to question an order of a High Court since Article 199(5) provides blanket protection to all orders passed by this Court or the High Courts."[61] The Court stated that the orders challenged before the Supreme Court are the orders made by the Chief Justice of Islamabad High Court "in his capacity as the Chairman of the

Administration Committee and not the judicial orders passed by him in his capacity as a Judge."[62] The Court ruled:

> "The exercise of power in a manner that results in depriving meritorious citizens from the opportunity of competing for public offices, therefore, is beyond a shadow of doubt and is a matter of public importance. Such an unlawful exercise of power is also an abrogation of the fundamental rights guaranteed under Article 18 of the Constitution, which protects an individual's right to enter upon a lawful profession or occupation. The right conferred under Article 18 has to be read with Article 4 of the Constitution which provides every citizen the right to be dealt with in accordance with the law."[63]

The Supreme Court mentioned the word 'abrogation', instead of 'violation'. It is pertinent to note that fundamental rights under the Constitution can be violated by State's institutions but cannot be abrogated by them.[64] It is interesting to note that the petitioner had not been seeking any employment in the Islamabad High Court and thereby his right had not been violated by the actions of the Chief Justice of the Court.

The common contention of the respondents was that both judicial and non-judicial acts of the High Court and the Supreme Court are protected under Article 199(5) of the Constitution. The Court specifically referred to *Asif Saeed* case of the Full Bench of Lahore High Court of 1999 and *Muhammad Iqbal* case decided by the Supreme Court in 2010 but overruled both.[65] The Court ruled that "It is our considered view that the Constitution confers judicial powers (jurisdiction) on the High Court only under Article 199 and the administrative, consultative or executive powers are conferred on the High Court by virtue of the rules framed under Article 208."[66] The Court opined that the view of Lahore High Court in *Asif Saeed* case which was endorsed by the Supreme Court in *Muhammad Iqbal* case "is against the language of Article 192 and Article 199 of the Constitution" and that both decisions have overlooked the provisions of Article 208 which empowers the High Court as well as the Supreme Court to frame rules for both Courts respectively. The Court stated that the two decisions mentioned above have mixed up judicial powers and the powers that are executive/ administrative/ consultative in nature.[67] The Court concluded that this mixing up has led "to denial of remedy to an aggrieved person even in a case where codal formalities or eligibility or other mandatory requirements

have been blatantly disregarded."[68] In the opinion of the Court through Article 199(5) "the framers of Constitution envisaged judicial jurisdiction and not the extraneous administrative/ executive/consultative matters pertaining to the Establishment of the Courts."[69] The Court concluded that:

> "the provisions of Article 199(5) would bar a writ against a High Court if the issue is relatable to judicial order or judgment; whereas a writ may lie against an administrative/consultative/executive order passed by the Chief Justice or the Administration Committee, involving any violation of the Rules framed under Article 208, causing infringement of the fundamental rights of a citizen."[70]

It is pertinent to note that the Islamabad High Court had more or less adopted the Service Rules of Lahore High Court which had come under scrutiny time and again in that Court. It is interesting to reproduce Rule 16 of the Islamabad High Court (Establishment) Appointment and Conditions of Service) Rules, 2011 which says that "The Chief Justice may relax any of these rules, subject to reason in writing, if the Chief Justice is satisfied that a strict compliance of the rule would cause undue hardships and his decision shall be final on such matter."[71]

While dealing with the relaxation of Rule 16 the Supreme Court opined that "From the perusal of the above definitions in conjunction with the above-quoted Rules of Lahore High Court and Islamabad High Court, it can safely be held that absolute power to relax a certain service Rule has not been conferred on the Chief Justices of both the High Courts and this power is limited only to be exercised where it does not encroach upon the statutory rights of the other persons or employees."[72] The Court went one step further and ruled that:

> "These two Rules cannot be interpreted in such a manner as to bestow an absolute power upon the Chief Justices to deal with the case of a person/employee in a manner they like. The Chief Justices can exercise powers under these Rules only in a manner that may not cause injustice or prejudice to any individual/employee. In the case in hand, the learned Chief Justice of Islamabad High Court has exercised a power beyond the scope of the Rules and relaxed them under the garb of "relaxation of Rules" which cannot be permitted in any circumstances, especially when it impinges upon the statutory rights of the citizens and other employees of the High Court."[73]

The Court ruled that "the conditions for relaxation of the Rules which are "just and equitable" and "undue hardship" have not been met in relaxing the Rules for making appointments and absorptions in the Islamabad High Court."[74]

Although the Supreme Court was deciding the case of the powers exercised by the Chief Justice of the Islamabad High Court but it also addressed similar powers exercised by the Chief Justice of the Lahore High Court. It is important to note that *Muhammad Akram* case seems to suggest that the administrative, or executive, or legislative, or consultative orders of the Supreme Court can also be challenged. The Supreme Court has also dismissed the Review Petition No. 474 of 2016 of this decision *vide* judgment dated 20. 1. 2017. It is in this scenario that *Muhammad Akram* case laid down an unwelcomed precedent!

6. Restoration of the Settled Law Once Again

An application was filed under Section 12(2) of Code of Civil Procedure, 1908 challenging both Muhammad Akram case as well as the dismissal of its review petition. The Supreme Court, therefore, clubbed many similar petitions and gave one consolidated judgment reported as *Gul Taiz Khan Marwat v Registrar, Peshawar High Court*[75]. The Supreme Court dismissed the application under Section 12(2) of the CPC, however, it revisited paragraph 45 of *Muhammad Akram* case. Meanwhile a Criminal Original Petition[76] was brought in to the Supreme Court in which it was prayed that "contempt proceedings to be initiated against the respondents comprising of various learned High Courts [sic. Judges] and its employees for non-implementation of *Ch. Muhammad Akram*" case.[77] The August Supreme Court reproduced the entire Article 199(5), expounded the question against whom a writ can be issued by a High Court and mentioned that the key word used in this context is 'person' which has been defined in sub-Article (5) given below:

> "In this Article, unless the context otherwise requires, - person includes any body politic or corporate, any authority of or under the control of Federal Government or of a Provincial Government, or 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."[78] The Court opined that "From a bare reading of the foregoing sub-Article, there is no cavil to the proposition that as a general rule for the purposes of Article 199 of the Constitution, the Supreme Court and High Courts have been

excluded from the term 'person', and therefore no writ can be issued by a High Court under Article 199 *supra* to, the Supreme Court or to itself by any of the said Courts."[79] The Court reproduced the definitions of High Court and the Supreme Court as given in Articles 192(1) and Article 176 of the Constitution respectively and stated that "It is clear from the aforementioned provisions that a High Court and the Supreme Court both comprise of the respective Chief Justices and Judges, therefore the reverse that there can be no Court without the Chief Justice and Judges is necessarily true. Furthermore, the definitions do not draw any distinction between the judicial orders of a Court and its administrative, executive or consultative orders."[80] The Court cited *Asif Saeed* case discussed above and argued that if a High Court issued writ against the administrative orders of the Chief Justice of the same High Court it would be "diametrically opposed to the principles of comity and can lead to the complete destruction of judicial as well as administrative fabric of the institution."[81] The Supreme Court categorically disagreed with the assertions in *Muhammad Akram* case and held that "We differed with the view taken in the said judgment in the meaning, interpretation, scope, extent and interplay of Articles 199 and 208 of the Constitution."[82] The Court ruled that "no distinction whatsoever has been made between the various functions of the Supreme Court and High Courts in the Constitution and the wording is clear, straightforward and unambiguous in this regard. That there is no sound basis on which Judges acting in their judicial capacity fall within the definition of 'person' and Judges acting in their administrative, executive or consultative capacity do no fall within such definition."[83] The Court emphasized that "In essence, the definition of a High Court and Supreme Court provided in Articles 192 and 176 *supra* does not disclose such intention. It is expressly or by implication a settled rule of interpretation of constitutional provisions that the doctrine of *casus omissus* does not apply to the same and nothing can be "read into" the Constitution."[84] The Court warned that "If the framers of the Constitution had intended there to be such a distinction, the language of the Constitution, particularly Article 199 *supra*, would have been different. Therefore to bifurcate the functions on the basis of something which is manifestly absent is tantamount to reading into the Constitution which we are not willing to do."[85] The Court reasoned that "In our opinion, strict and faithful adherence to the words of the Constitution, specially so where the words are simple, clear and unambiguous is the rule. Any effort to

> supply perceived omissions in the Constitution can have disastrous consequences."[86] The Supreme Court also reproduced a very relevant paragraph from its own previous decision of 13 members Bench titled as *Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v President of Pakistan*[87] in which it was held that "What emerges from the provisions of clause (5) of Article 199 of the Constitution as also from some precedent cases is that writs should not issue from the High Court to another High Court or from one Bench of a High Court to another Bench of the same High Court because that could seriously undermine and prejudice the smooth and harmonious working of the Superior Courts."[88]

The Supreme Court has also distinguished many cases argued by the Advocate General of Sindh in support of his argument that administrative, executive and consultative actions of the Chief Justice of the High Court are not protected from writ under 199(5) of the Constitution, however, analysing the whole judgment and the lengthy reasons given by the August Court is beyond the scope of this work. It is pertinent to mention that *Muhammad Akram* case had huge repercussions as Justice Iqbal Hameedur Rehman, who had been the Chief Justice of the Islamabad High Court at the time of the appointment of 74 employees, had to resign from his post as a Judge of the Supreme Court almost a month after the decision the case.[89] Consequently, the employees in question had to pack up as well. For now, the most challenging task is implementation of *Gul Taiz Khan* case; how could the soreness inflicted on the 74 employees of the IHC would be made good? Let us suppose that the employees of IHC are provided the remedy one day but would it be possible to provide any justice to Iqbal Hameedur Rehman J., – who bowed out and became the ultimate victim of *Muhammad Akram* case?

It is pertinent to note that in India the administrative order of the High Court could validly be challenged on its judicial side. The Indian Supreme Court has ruled in *High Court of M.P. v Mahesh Prakash and others*[90] that a High Court could be moved on its judicial side to consider the validity of the order passed by it on the administrative side and a writ could be issued in that behalf. In other words, the administrative orders or acts of a High Court in India are not protected by judicial immunity, which only covers judicial acts or functions.

Conclusion

Superior Courts in Pakistan have ruled time and again that judicial as well as non-judicial acts of a judge of the High Court are protected and therefore, administrative, consultative, executive, and legislative functions and acts of the High Courts are immune under Article 199(5) of the Constitution. The Lahore High Court as well as the Supreme Court had held this view repeatedly. The two important cases in Pakistan upholding this view are *Asif Saeed* of the Full Bench of the Lahore High Court. The second case is *Muhammad Iqbal* which is a decision of the Supreme Court that maintained the view taken in *Asif Saeed*. In *Muhammad Akram v Registrar Islamabad High Court*[91] a full Bench of the Honourable Supreme Court of Pakistan in a Constitutional Petition overruled both *Asif Saeed* as well as *Muhammad Iqbal* cases and declared both cases to be against the provisions of the Constitution and *per incuriam*. The Supreme Court has ruled that only judicial decisions/orders/acts are protected under Article 199(5) of the Constitution and that administrative, consultative, executive, and legislative acts/functions of a High Court are not immune under the said Article; that these powers are conferred on the High Court by virtue of the rules framed under Article 208 of the Constitution and are therefore not immune; that citizens can challenge such orders of the High Court if these are in violation of their fundamental rights guaranteed under the Constitution. However, in *Gul Taiz Khan Marwat v Registrar, Peshawar High Court*[92] a larger Bench of the Honourable Supreme Court comprising of five Judges overruled *Muhammad Akram* case and restored the position that Judges have immunity not only for judicial works but also for their administrative, financial, consultative as well as legislative functions thereby no writ can be issued against these acts of a High Court by the High Court itself; that the issuance of such a writ would be against the principle of comity and could "lead to the complete destruction of judicial as well as administrative fabric of the institution."[93] The decision of *Gul Taiz Khan* case is yet to be implemented.

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Notes

[1] *See*, J. Randolph Block, "Stump v Starkman and the History of Judicial Immunity", (1980) *Duke Law Journal*, 879, at 916-21, and Joseph Romagnoli, "What Constitutes a Judicial Act for the Purpose of Judicial Immunity?", 53 *Fordham Law Review*, (1985), 1503, 1504.
[2] *Gul Taiz Khan Marwat v Registrar, Peshawar High Court*, PLD 2021 SC 391.
[3] *Muhammad Akram v Registrar Islamabad High Court*, PLD 2016 SC 961.
[4] See Jeffrey M. Shaman, "Judicial Immunity from Civil and Criminal Liability", *San Diego Law Review*, 27:1 (1990), at 9.
[5] See, *Forrester v White*, 484 U.S. at 228-30 (1988).
[6] *See McMillan v Svetanoff*, 793 F.2d (7th Cir. 1986), at 155.
[7] *See Pierson v Ray*, 386 U.S. 547 (1967); *Stump v Sparkman*, 435 U.S. 349 (1978).
[8] See *Pierson*, 386 U.S. at 554; *Stump* 435 U.S. at 356.
[9] See David Pannick, *Judges* (Oxford: Oxford University Press, 1988), 99.
[10] See *Floyd v Barker* (1607) 77 ER 1305 at 1306; and *Bradley v Fisher*, 80 U.S. (13 Wall.) 335, 349 (1872)
[11] *ibid*.
[12] See *Pierson*, 386 U.S. at 560.
[13] Ibid.
[14] See Note, "Liability of Judicial Officers Under Section 1983", *The Yale Law Journal* 79, no. 2 (1969): 322-37; Shahman, at 3.
[15] *Stump v Sparkman*, 435 U.S. 349 (1978).
[16] *Ibid.* at 356-57 (quoting *Bradley v Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872)).
[17] See *Stump*, at 360.
[18] *Floyd v Barker* (1607) 77 ER 1305.
[19] *Ibid*. at 1307.
[20] See Shahman, at 4; and Charles W. Wolfram, *Modern Legal Ethics*, (Minn: West Publishing Co. 1986), 970.
[21] See *R v Skinner* (1772) 98 ER 529, 530 [Lord Mansfield].
[22] See *Thomson v Sheriff Kenneth Ross and others* [2000] Scot CS 202.
[23] See Shimon Shetreet and Sophie Turenne, *Judges on Trial: The Independence and Accountability of Judges of the English Judiciary* (Cambridge: Cambridge University Press, 2013), 275.
[24] See *Hester v McDonald* [1961] SC 370.
[25] See *Sutcliffe v Thackrah* [1974] AC 727; *Arenson v Casson* [1975] 3 WLR.
[26] See *Dawkins v Lord Rockeby* [1873] LR 8 QB 255.
[27] The Judicial Officers' Protection Act, 1850, Act No. XVIII of 1850 available at <http://pakistancode.gov.pk/english/UY2FqaJw1-apaUY2Fqa-apaUY2Fvb50%3D-sg-jjjjjjjjjjjj> (last visited 11-10-2016).
[28] *Ibid*.
[29] *Muhammad Mohsin Siddiqi v Government of West Pakistan*, PLD 1964 SC 64.
[30] The Administrative Judge of the High Court declared the dismissed employee suitable for other jobs.

[31] *Muhammad Mohsin Siddiqi v Government of West Pakistan*, PLD 1964 SC 64 at 65 (*per* A.R. Cornelius, C.J. for the Full Bench. Other members of the Bench were B.Z. Kaikaus and Hamoodur Rahman, JJ.)
[32] Ibid. The Court stated that "The Whole proceeding in a departmental enquiry is required by the Rules to be conducted in accordance with the principles of justice." At 67.
[33] Ibid., at 68.
[34] *Abrar Hassan v Government of Sind*, PLD 1976 SC 315**.**
[35] Ibid., at 342-43 (*per* Anwarul Haq, J)
[36] *Malik Asad Ali v Federation of Pakistan*, PLD 1998 SC 103.
[37] Ibid., at 113 (*per* Ajmal Mian, CJ for the larger Bench. Other members of the Bench were Munawar Ahmad Mirza, Sh. Ijaz Nisar, Abdur Rehman Khan and Ch. Muhammad Arif, JJ).
[38] *Malik Asad Ali v Federation of Pakistan*, PLD 1998 SC 161.
[39] See ibid., at 295 (*per* Saiduzzaman Siddiqui, J for the ten Members Bench).
[40] *Muhammad Mohsin Siddiqi v Government of West Pakistan*, PLD 1964 SC 64.
[41] *Wukala Mohaz Barai Thafaz Dastoor v Federation of Pakistan*, PLD 1998 SC 1263.
[42] Ibid., at 1301.
[43] *Nusrat Elahi v The Registrar Lahore High Court*, 1991 MLD 2546 (M. Mahboob Ahmad, CJ and Malik Muhammad Qayyum, J for the Divisional Bench).
[44] Ibid., at 2549 (*per* Malik Muhammad Qayyum).
[45] Ibid., at 2548 and 2549.
[46] *Asif Saeed v Registrar Lahore High Court*, PLD 1999 Lahore 350. (Ihsanul Haq Chaudhry, Karamat Nazir Bhandari and Mian Saqib Nisar, JJ)
[47] Section 27 of Legal Practitioners and Bar Councils Act, 1973.
[48] *Asif Saeed v Registrar Lahore High Court*, PLD 1999 Lahore 350, at 355-56.
[49] See, ibid., at 357.
[50] *Muhammad Mohsin Siddiqi v Government of West Pakistan*, PLD 1964 SC 64.
[51] See, *Asif Saeed v Registrar Lahore High Court*, PLD 1999 Lahore 350, at 358.
[52] Ibid, at 359.
[53] The text seems to have some mistakes.
[54] See, *Asif Saeed v Registrar Lahore High Court*, PLD 1999 Lahore 350, at para. 15. (*Per* Mian Saqib Nisar for the Full Bench).
[55] *Ibid*. at para. 17.
[56] *Ibid*., at 360-61.
[57] Ibid., at 362.
[58] *Muhammad Iqbal v Lahore High Court*, 2010 SCMR 632 (Sardar Muhammad Raza Khan and Nasir-ul-Mulk, JJ for the Divisional Bench).
[59] *Ibid*., at 635-36 (*per* Sardar Muhammad Raza Khan, J)
[60] *Muhammad Akram v Registrar Islamabad High Court*, PLD 2016 SC 961.
[61] Ibid., at para. No. 35 at p. 978.
[62] Ibid., para. No. 37 at p. 979 (*per* Justice Amir Hani Muslim for the Full Bench. Other members of the Bench were Mushir Alam, and Dost Muhammad Khan, JJ).

[63] Ibid., para. 38 .
[64]Ibid. I presented this paper in the International Law Congress held in Istanbul on 20th October 2016 in the presence of Justice Amir Hani Muslim. I pointed out that the word abrogation was not suitable and violation was more appropriate. I had to show His Lordship the soft copy of the judgment that he had authored less than a month ago. He wanted to be sure whether he used the word 'abrogation' or not. His Lordship smilingly gestured that 'mistake is made in English language'.
[65] The Supreme Court described both decisions as *per incuriam* and against the provisions of the Constitution. See, *ibid*., para. No. 44.
[66] *Muhammad Akram v Registrar Islamabad High Court*, PLD 2016 SC 961 at para. No. 42.
[67] *Ibid*. at para. No. 43.
[68] Ibid., para. No. 43.
[69] Ibid., para. No. 44.
[70] Ibid., para. No. 45.
[71] The corresponding rule of Lahore High Court is similar. Rule 26 of the Lahore High Court says,
"Nothing in these rules shall be deemed to limit or abridge the powers of the Chief Justice to appoint or promote any person who has neither passed nor qualified at an examination held by the Public Service Commission or under these rules or to deal with the case of any person in such manner as may appear to him to be just and equitable."
[72] *Muhammad Akram v Registrar Islamabad High Court*, PLD 2016 SC 961, at para no. 51.
[73] Ibid.
[74] Ibid.
[75] *Gul Taiz Khan Marwat v Registrar, Peshawar High Court*, PLD 2021 SC 391.
[76] No. 125/2019.
[77] *Gul Taiz Khan Marwat v Registrar, Peshawar High Court*, PLD 2021 SC 391, para. 10.
[78] Article 199(5) of the Constitution of the Islamic Republic of Pakistan.
[79] *Gul Taiz Khan Marwat v Registrar, Peshawar High Court*, PLD 2021 SC 391, Para. 16.
[80] Ibid. para. 17.
[81] *Asif Saeed v Registrar Lahore High Court*, PLD 1999 Lah 350, para. 8.
[82] *Gul Taiz Khan Marwat v Registrar, Peshawar High Court*, PLD 2021 SC 391, para. 19.
[83] Ibid.
[84] Ibid.
[85] Ibid.
[86] Ibid.
[87] *Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v President of Pakistan*, PLD 2010 SC 61.
[88] Ibid., para. 101.
[89] See, https://www.thenews.com.pk/print/159520-SC-judge-Justice-Iqbal-Hameedur-Rehman-resigns (accessed April 4, 2021).
[90] *High Court of M.P. v Mahesh Prakash and others*, AIR 1994 SC 2599.
[91] *Muhammad Akram v Registrar Islamabad High Court*, PLD 2016 SC 961.

[92] *Gul Taiz Khan Marwat v Registrar, Peshawar High Court*, PLD 2021 SC 391.
[93] *Asif Saeed v Registrar Lahore High Court*, PLD 1999 Lah 350, para. 8 and *Gul Taiz Khan Marwat v Registrar, Peshawar High Court*, PLD 2021 SC 391 para 28.

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