3. Misconception About Immunity of Judiciary in Pakistan-An Analysis

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The Judicial Immunity has remained a widely discussed issue in Pakistan for many years. The discussion on the topic has created confusion not only for a lay man but experts on law have also been misled. The misleading aspect of the issue is as if Judiciary has been exempted from culpability of law and is immune from accountability. The terms like 'sacred cow' have been used for Judiciary in order to give an impression as if Judiciary cannot be brought before court of law being not susceptible to process of law and thereby violate the concept of rule of law. This discussion has taken a new turn when recently the Supreme Court of Pakistan in a judgment of *Gultiaz v Registrar Peshawar High Court and others*[2] ruled that no writ can be issued to a High Court or Supreme Court both in judicial and administrative matters leading to an impression as if the judgment has extended judicial immunity to superior judiciary before courts of law. One such write up in the form of a research paper has been written by a very learned teacher of a university in Pakistan namely Professor Muhammad Munir[3]. The said paper has thrashed out the history of different judgments of superior courts and has built up a case that how superior courts in Pakistan had been changing their stance over the years by holding that administrative/legislative actions of Superior Courts were subject to judicial review or not. A list of such cases with divergent views has been cited. The said list is reproduced below.

Muhammad Mohsin Siddiqi v Government of West Pakistan[4]

Abrar Hassan v Government of Sindh[5].

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[2] PLD 2021 SC 391

[3] Judging the Judges: Judicial Immunity in Pakistan published in Review of Human Rights Vol.6, No.1, Winter 2020

[4] PLD 1964 SC 64

[5] PLD 1976 SC 315

Malik Asad Ali v Federation of Pakistan[6]

Wukala Muhaz Barai Tahafaz Dastoor v Federation of Pakistan[7]

Asif Saeed v Registrar Lahore High Court[8]

Muhammad Iqbal v Lahore High Court[9]

Muhammad Akram v Registrar Islamabad High Court[10].

The said paper concluded that those employees or one judge victim of *Muhammad Akram* Case *supra* might not be compensated due to the overruling of said judgment in *Gultiaz* case *supra* which does not appear to be fair to the learned writer[11].

The learned writer has touched a topic which needs to be further debated in order to set the record right regarding immunity of judges and judiciary. I, with great respect for the learned Professor, would like to comment on his paper as per my understanding of the issue. The purpose of present paper is to clarify that how people including bench, bar and teachers of law have been favoring one view or the other which resulted in the form of judgments cited above over a period of almost 60 years and it appears that this confusion still exits and may lead to continuation of the trend of overruling the latest view. How this paper of mine is different and how can it stop the ongoing divergence on the issue in legal circles? This paper would strive to surmount the difficulty not from the intrinsic words used in the relevant provisions but from extrinsic sources like history of exemption of superior courts from writ jurisdiction which has never been approached from this angle so far as my knowledge goes. Another approach of this paper would be to highlight the kinds of jurisdictions under constitution and laws and difference between different jurisdictions. As a first step the history of Article 199(5) of the Constitution of Islamic Republic of Pakistan

[6] PLD 1998 SC 161
[7] 1991 MLD 2546
[8] PLD 1999 Lahore 350
[9] 2010 SCMR 632
[10] PLD 2016 SC 961.
[11] Ibid 3

1973, is to be traced which will help in understanding that why Superior Courts are exempted from this jurisdiction. It should be borne in mind that the divergent views of superior courts in Pakistan listed above pertain to susceptibility or otherwise of superior courts to Article 199 and not to any other law.

1. Whether non susceptibility to a particular forum or to a particular jurisdiction can be termed as immunity to law and legal process?

The exemption of superior courts from the purview of Article 199 of the Constitution of Islamic Republic of Pakistan 1973, does not mean that Superior Courts or judges are immune from culpability in law or not amenable to process of law. The legal system has raised multiple jurisdictions and different laws and all persons are not subject to all laws and every jurisdiction. For example, all the persons in employment of different bodies cannot be redressed in Service Tribunals and are not subject to their jurisdictions. This does not mean that their employers are immune from process of law. Moreover, it is assumed that most of these employers cannot be made subject to jurisdiction of Superior Courts under Article 199 of the Constitution. In order to get a particular person amenable to a jurisdiction we will have to first read the provision of law and if that person falls within the defined scope, then he is subject to that provision, otherwise not, regardless of any express ouster like Article 199(5) of the Constitution. But this never means that those persons who are not subject to a particular jurisdiction are immune from legal process. If we read Article 199, we will find that only those persons are subject to this jurisdiction who are performing functions in connection with affairs of the Federation, a province or a local Authority. This definition itself ousts many citizens from its purview. And if the wordings of definition brings some one within its scope, then the framers of law may expressly oust someone from that definition, keeping in view the nature and purpose of jurisdiction and scheme of law. The purpose and scheme of ouster of Superior Judiciary from the jurisdiction of Article 199 shall be dealt with in detail in later part of this paper.

There are number of special laws and courts for only those special persons who qualify the definition of that special law. If we go further deep into the common law system, we will find that a matter may be subject to both civil and criminal jurisdiction and decision of one jurisdiction has no impact on other jurisdiction. The example of famous American case of *O.J.Simpson* [12]who was acquitted in criminal trial for murder but civil case was decreed against him. The educated people of USA could not understand this scheme of law and this case was a hot topic for years to follow that how one court acquitted the accused and the other court decided against him[13]. Though this was a case not of susceptibility to criminal courts but the difference of standard of proof in criminal and civil courts of the same occurrence. The purpose of citing *O.J.Simpson* case is to highlight the complexity of judicial system that even acquittal under one jurisdiction does not mean exoneration from another available jurisdiction. Now we are to see whether executive orders passed by a High Court can be made subject to any other jurisdiction if not to Article 199? The answer is that the Service Tribunals constituted under Article 212 of the Constitution have the jurisdiction to examine these orders if passed against civil servants employed in the courts. The judicial officers of subordinate judiciary and ministerial staff of subordinate judiciary are civil servants and all administrative orders passed by a High Court relating to the terms and

[12] The People of the State of California v. Orenthal James Simpson [1995] was a criminal trial in Los Angeles County Superior Court in which former National Football League (NFL) player, broadcaster and actor O. J. Simpson was tried and acquitted for the murders of his ex-wife Nicole Brown Simpson and her friend Ronald Goldman. The pair were stabbed to death outside Brown's condominium in the Brentwood neighborhood of Los Angeles on the night of June 12, 1994. The trial spanned eleven months, from the jury's swearing-in on November 9, 1994. Opening statements were made on January 24, 1995, and Simpson was acquitted of both counts of murder on October 3 of the same year, despite overwhelming forensic evidence against him. The trial came shortly after the 1992 Los Angeles riots, and it is agreed that, controversially, the defense capitalized on the anger among the city's African-American community towards police to convince the majority-Black jury to acquit Simpson. The trial is often characterized as the trial of the century because of its international publicity, and has been described as the "most publicized" criminal trial in human history.

[13] ibid

conditions of these employees are examined and reviewed by these tribunals. These tribunals mostly consist of serving/retired judges of High Courts, members of subordinate judiciary and some executive officers.[14] This clearly suggests that High Courts are not immune from the process of law.

2. Why Superior Courts have been excluded under Article 199(5) of the Constitution of Islamic Republic of Pakistan 1973.

Under Article 199 (5) of the Constitution of Pakistan, 1973 the following five types of orders are issued by a High Court to a person (i) directing him not to do an illegal act (ii) directing him to do a legal act (iii) to declare any act without lawful authority and of no legal effect (iv) directing a person in custody to be brought before it (v) directing a person to show under what authority he holds an office.[15]These five orders are of the nature of prerogative writs used to be issued by King. Though initially the writs were only a written command issued by person in authority and "tested" or sealed by him in proof of its genuineness. The King's writ, soon after the Norman Conquest and the establishment of a strong, centralized monarchy, swallowed up, as it were, all the rival and inferior writs; and when people spoke of a "writ" they soon thought exclusively of the King's writ, just as a "shilling" came to mean exclusively a King's shilling, and a "chancellor" or "judge" (though other authorities had chancellors and judges) meant, unless the contrary was stated, the King's Chancellor, or one of his judges.[16]The story of evolution of writs is long one spreading over almost half a century. The development of these writs into modern form passing through different era is dealt with in the journal[17]. But to cut it short these writs became famous under the names of *prohibition, mandamus, certiorari, procedendo, habeas corpus and quo*

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[14] The Punjab, Sindh, The Khyber Pakhtunkhwa and Baluchistan Service Tribunals –The Punjab, Sindh, The Khyber Pakhtunkhwa, Baluchistan Subordinate Judiciary Service Tribunals

[15] Article 199 of the Constitution of Pakistan 1973

[16] Yale Law Journal, Volume XXXII, April 1923, No 6

[17] Yale Law Journal, Volume XXXII, April 1923, No 6

warranto. These prerogative writs then became part of legal system of India being under the rule of British empire. The powers of issuance of these writs were given gradually to Chartered Supreme Court at Calcutta[18] and then Chartered High Courts in India. The first High Court of the nature in present Pakistan was High Court of Judicature at Lahore raised by its letters patent in 1919.[19]Under these letters patent the High Court of Judicature at Lahore was given the powers to issue almost all the writs with their original names in vogue in England. To whom these writs were to be issued and who were exempt was not mentioned in these Letters Patent nor did rules explain this aspect[20]. But the courts used to issue writs only to those who were well known through development of jurisprudence on the subject in England. These were to be issued to inferior courts or known persons only[21]. It is also a matter of common sense that how King could issue writ to himself and for that matter the delegate of these prerogative writs could not issue writ to himself. Approaching this aspect of judicial authority issuing order/writ from another angle it is well known Latin phrase of dispensation of justice that no one can be a judge in his own cause[22].Under this phrase an issuing authority cannot issue command to himself. The High Court or Supreme Court for that matter is one entity irrespective of number of judges. Issuance of command to one judge is issuance of command to whole High Court or Supreme Court.[23] Similar is the case of federal or provincial government who are one entity and if any order/notification is issued by one ministry it is on behalf of whole government concerned. The internal working of such entities is performed by an individual or committee on behalf of whole entity under the delegation of powers or rules of business. In the case of High Courts in

[18] The Regulating Act of 1773 and Charter of 1774

[19]Letters Patent Constituting the High Court of Judicature at Lahore, for the Provinces of the Punjab and Delhi, Dated the 21st March, 1919.

[20] Rules For the Issue of Writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo Warranto and Certiorari framed under Clause 27 Of the Letters Patent

[21] Yale Law Journal, Volume XXXII, April 1923, No 6

[22] Nemo judex in causa sua

[23] Asif Saeed v Registrar Lahore High Court PLD 1999 Lahore 350

Pakistan, for instance, the executive and administrative business is performed either by committee of all judges or administration committee or one administration judge on behalf of the High Court under the Rules of business[24]. How then, a judge of High Court can be expected to issue writ against himself? As discussed above the known writs under known names were made part of chartered High Courts of India and there was no need of detailed rules or exceptions as to who were subject to these writs. This legislative tradition continued in Constitution of India[25] and Pakistan 1956[26]. But for the first time in Pakistan the well-known names of writs were done away with and instead different orders (without known names) fully defining their respective scopes were incorporated[27] and the same trend continued in the latest Constitution of Pakistan[28].The reason for this shift in legislation, it appears, was the evolving era where statutes gradually replaced the common law traditions. With this new tradition the specific wordings attributed to particular orders (not with known names) it became legislative necessity to oust the superior courts from the ambit of these orders and in Pakistan it was for the first time in Article 98(5) of Constitution of 1962 which continued in the form of Article 199(5) of the Constitution of 1973.This ouster was nothing new but continuation of old tradition. Now this background would help us in deciding which one of the two opinions as to amenability of administrative/legislative orders of Superior Courts in writ jurisdiction is correct. In fact, the issue mainly revolved around the judicial review of matters of appointment of employees of Superior Courts under Article 208 of the Constitution. Any aggrieved employee has no other special forum for redressal unlike judicial officers and employees of subordinate courts for the reason that they are not civil servants within the meanings of respective Civil Servants Acts[29]. The

[24] Chapter 10 Part A of Volume V of Rules for the Disposal of Executive and Administrative Business of Lahore High Court as applicable to almost all the High Courts in four provinces.
[25] Article 226 of the Constitution of India
[26] Article 170 of the Constitution of Pakistan 1956
[27] Article 98 of the Constitution of Pakistan 1962
[28] Article 199 of the Constitution of Pakistan 1973
[29] Registrar Supreme Court of Pakistan Islamabad v Wali Muhammad PLD 1997 SCMR 141

remedy lies in providing a judicial forum for redressal of their grievances pertaining to the terms and conditions of their service and not in twisting Article 199 in their favor. Same is the case of legislative, consultative authority of the High Courts/Supreme Courts. As a general law every right has a remedy[30]. This aspect needs further inquiry as to which forum can be approached for remedies when no special forum is available. Can forum of general jurisdiction be resorted to or not? But no entity is immune from legal process as is general perception. It is also clear that non availability of any forum is no justification for making superior courts amenable to Article 199 of the Constitution of Pakistan. This aspect is elaborated in *Gultiaz* case *supra* by referring to *Ikram Chaudhery and Others v Federation of Pakistan & Others* (PLD 1998 SC 103). Otherwise too, the writ jurisdiction is summary in nature and is not substitute of regular legal proceedings. This jurisdiction is discretionary and extraordinary in nature and is issued only when extraordinary circumstances are there and there is no need of further evidence and no other adequate remedy is available[31]. Non susceptibility to this extraordinary jurisdiction cannot be termed an immunity.

3. Judicial Immunity in other jurisdictions.

In the paper of learned Professor three foreign jurisdictions have been discussed i.e., UK, USA and India to highlight that to what extent Judiciary in these jurisdictions are immune. But the leaned writer with due respect has not appreciated that the issue under discussion is not of immunity but as discussed above non amenability to a particular jurisdiction. For the purpose of present discussion, a judgment of Supreme Court of India referred to in the said paper is relevant[32]. As per this judgment administrative orders of High Court are subject to writ jurisdiction of High Court. Now we are to see whether this judgment or recent judgment of Supreme Court of Pakistan in *Gultiaz* case *supra* is sound. As discussed above the approach of

[30] Ubi jus ibi remedium
[31] Dr Imran Khattak v Ms. Sofia Waqar Khattak, PSO to Chief Justice 2014 SCMR 122- Aftab Ahmed Khan v Muhammad Ajmal 2010 PLD SC 1066
[32] High Court of M.P v Mahesh Prakash and others, AIR 1994 SC 2599

this paper is not restricted to narrow rules of literal interpretation but going deep into the whole scheme of writs in historical perspective and known traditions. The Indian Judgment is the result of literal approach because Article 226 of Indian Constitution concerning writ jurisdiction is loosely worded in traditional style only mentioning the names of writs without any definition/explanation as was the case in Pakistan and joint India prior to 1962 Constitution. It is highlighted above that why in the Constitution of Pakistan, 1962 the traditional names of writs were substituted by orders with definitions and also exclusion clause to persons not subject to this jurisdiction. The Indian Judgment fell in error by declaring High Court subject to writ jurisdiction by following literal rule as there is no definition of writs nor exclusion clause in Article 226 of Indian Constitution. Had the approach been holistic the error could have been avoided. The anomaly of this judgment is apparent in the judgment itself when the concerned High Court challenged the decision of High Court on judicial side in the Supreme Court of India and it became an enigma that the Registrar of High Court is to defend judicial verdict of his own High Court or administrative order of his High Court. Paragraph 14 of this judgment is of worth perusal which is reproduced below

> *"14. The order that the first respondent challenged in the writ petition filed by him before the High Court was an order passed by the High Court on its administrative side. By reason of Article 226 of the Constitution it was permissible for the appellant to move the High Court on its judicial side to consider the validity of the order passed by the High Court on the administrative side and issue a writ in that behalf. In the writ petition the first respondent was obliged to implead the High Court for it was the order of the High Court that was under challenge. It was, therefore, permissible for the High Court to prefer a petition for special leave to appeal to this Court against the order on the writ petition passed on its judicial side. The High Court is not here to support the judicial order of*

> *its Division Bench passed but to support its administrative order which its Division Bench set aside. We find, therefore, no merit in what may be termed the preliminary objection to the maintainability of the appeal."*

It can be easily understood that what the same High Court will do in such situation in defending judicial verdict or administrative order. Further who decided in the High Court whether to defend her judicial or administrative order before the Supreme Court and who directed the Registrar to defend the administrative order and not judicial order? Whether it was the Chief Justice or full court or any committee of judges who instructed Registrar to defend administrative order and not judicial order. Arguably if it was allowed to do so then High Court was supposed to defend her judicial order in preference to administrative order. Whatever the case might be it is a paradox of highest degree and cannot be resolved except by adhering to long standing tradition that no command can be issued by a High Court to itself. The rationale behind non issuing of command to self is now clear from this example. In *Gultiaz* case *supra* issuance of writ to himself is discussed by referring to a judgment of Supreme Court of Pakistan in the following words

> *"the process involves the rather ludicrous position that judges are called upon themselves to show cause to themselves"33*

Another reason for Article 199(5) of the Constitution of Pakistan excluding High Court and Supreme Court from definition of 'Person' is non issuance of writ to Supreme Court by a High Court. If this exclusion was not there then there was no hurdle in the way of High Court to issue writ to Supreme Court which is against all judicial norms and comity amongst judges of superior judiciary. This aspect of comity amongst judges is also touched in

[33] Mian Jamal Shah v The Member Election Commission, Government of Pakistan, Lahore etc PLD 1966 SC 1

Gultiaz case *supra* by referring to same judgment mentioned above and the relevant part is reproduced below.

> *"Quite apart from the aspect of 'ludicrousness' there are other and more weighty consideration involved, such as the necessity of maintaining a high degree of comity among the judges of the Superior Courts, which could be urged in support of such a provision."* [34]

When an issue arose in another case as to the person to whom writ could be issued under Article 226 the Gujrat High Court instead of following literal approach resorted to holistic approach. The relevant paragraph is reproduced below

> *"Article 226(1) of the Constitution states:- Notwithstanding anything in Article 32 every High Court shall have power, throughout the territories in relation to which it exercise 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 II and for any other purpose The language of Article 226 is no doubt very wide. It states that a writ can be issued to any person or authority and for enforcement of right conferred by Part III and for any other purpose. However, the aforesaid language in Article 226 cannot be interpreted and understood literally. I cannot apply the literal rule of interpretation while interpreting Article 226. If I take the language of Article 226 literally it will follow that a writ can be issued to any private person or to settle even private disputes. If I*

[34] Ibid

> *interpret the word for any other purpose literally it will mean that a writ can be issued for any purpose whatsoever, e.g., for deciding private disputes, for grant of divorce, succession certificate etc. Similarly, if I interpret the words to any person literally it will mean that a writ can even be issued to private persons. However, this would not be the correct meaning in view of the various decisions of the Supreme Court in which it was held that a writ will lie only against the State or an instrumentality of the State vide Chander Mohan Khanna v. N.C.E.R.T (19 91) (4) SCC 578, Tekraj Vasandhi v. Union of India AIR 1988 SC 496, General Manager, Kisan Sahkari Chini Mills Ltd. v. Satrughan Nishad (2).”*[35]

This judgment is clear manifestation of ignoring words and following tradition for issuance of writ. In Pakistan after Article 98(2) of Constitution of 1962 the detail definition of orders/writs to be passed and exclusions have left little room for error even in following literal rule.

4. WHETHER JUDICIARY IN PAKISTAN IS ABSOLUTELY IMMUNE FROM LEGAL PROCESS?

In the said write up of learned Professor reference has been given to Judicial Officers’ Protection Act, 1850 by holding that there is absolute immunity to judicial officers and quasi-judicial officers. The following section from the said Act was reproduced.

“Section 1. Nonliability 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*

[35] Pummy Harshil Thakkar V State of Gujrat & 3 *https://indiankanoon.org*

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."

The above provision clearly makes the judicial officers and quasi-judicial officers accountable to law. The protection to these officers is qualified. This provision unequivocally protects only those officers who in good faith had belief of having jurisdiction at the time of doing their duty or passing the order complained of. Such type of protection is called qualified immunity. No absolute immunity is available to any judicial officer or quasi-judicial officer in Pakistan under any law. The learned writer while referring to USA and UK has referred to some cases which granted absolute immunity to judges in those jurisdictions[36]. The writer has gone to the extent that due to this 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[37] But in Pakistan there is no such immunity what to talk of absolute immunity. In the Constitution of Pakistan, the judges of superior judiciary have not been given any sort of immunity at all. But Executive in Pakistan has been given absolute immunity from process of law and all courts in all jurisdictions in exercise of powers and performance of functions of their respective offices under Article 248(1) of the Constitution of Pakistan, 1973. The said Sub-Article is reproduced below.

> *"248. Protection to President, Governor, Minister, etc.— (1) The President, a Governor, the Prime Minister, a Federal Minister, a Minister of State, the Chief Minister and a Provincial Minister shall not he answerable to any court for the exercise of powers and performance of functions of their respective offices or for any act done or*

[36] Pierson v Ray, 386 U.S. 547 (1967); Stump v Sparkman, 435 US. 349 (1978)
[37] Pierson v Ray, 386 U.S. 547 (1967); Stump v Sparkman, 435 US. 349 (1978)

> *purported to be done in the exercise of those powers and performance of those functions: Provided that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Federation or a Province."*

The constitutional and legal position in Pakistan is that the judges of superior judiciary have been made to follow a code of conduct and violation of which has made them to face inquiry and removal from service through a body known as Supreme Judicial Council.[38]This code of conduct is harsher than Code of Conduct for civil servants in Pakistan. This code of conduct for judges of superior judiciary covers not only performance of judicial and administrative functions but also private life.[39]

The removal of judges in India, US and UK is either through Parliament or impeachment by going through a rigid process. But in Pakistan it is through Supreme Judicial Council consisting of Judges.

Going back to Section 1 of Judicial Officers Protection Act, 1850 it is quite clear that this qualified immunity is form civil litigation and not criminal liability. Whereas all executive functionaries have been given qualified immunity from civil as well as criminal liabilities in many laws.

Some examples are given below.

KPK Local Government Act, 2013—Section 116. Action taken in good faith. ---"No suit, prosecution, or other legal proceedings shall lie against any public servant serving in local governments for anything done in good faith under this Act.

Explanation: The word "good faith" shall have the same meaning as given to it in section 52 of the Pakistan Penal Code."

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[38] Article 209 of the Constitution of Pakistan
[39] Code of Conduct issued by Supreme Judicial Council dated 2nd September 2009

KP Zakat and Usher Act 2011–Section 27. Indemnity and bar of jurisdiction. ---"(1) No suit, prosecution or other legal proceedings shall lie against any person for anything in good faith done or intended to be done under this Act or any rule framed thereunder."

Khyber Pakhtunkhwa Public Property Province (Public Property) Removal of Encroachment Act,1977.– Section 16. Indemnity. --

"No suit or legal proceeding shall lie against Government or any authority or person in respect of anything which is in good faith done or intended to be done under this Act."

This legal and constitutional scheme in Pakistan shows that Executive has been given more immunity than judiciary. It was then in the chapter of General Exceptions in the Pakistan Penal Code that a judge acting judicially has been made not liable to criminal liability but again subject to belief in good faith of the powers exercised by him (qualified immunity)[40].

The accountability of judicial officers in exercise of judicial function has been explained by Supreme Court of Pakistan. The relevant paragraph of the judgment of Supreme Court is reproduced below.

> *"However, in cases where judge(s) of the High Court, espouses an opinion that the judge of District Judiciary has exhibited grave incompetence or has misconducted himself in discharge of judicial duty and needs to be warned or proceeded against, the appropriate process is to inform the competent authority on the administrative side through a confidential note addressed to the Chief Justice of the Court, along with copies of the relevant judgment (s), and then leaving it to the discretion of the competent authority to take appropriate action against the judge concerned. This discreet and confidential*

[40] Section 77 of Pakistan Penal Code, 1860

processes is consistent with the deliberative character of the judicial system."[41]

The judicial officers in Pakistan are civil servants under different Civil Servants Acts[42]. They are subject to same code of conduct as one for civil servants and same disciplinary rules as that for civil servants[43].

Here I would like to mention that in all the referred provisions of Constitution and laws of Pakistan in this part of the paper there is no use of the word 'Immunity' but the words used are 'Protection', 'Indemnity' & 'Nonliability'. This is another discussion which is relevant and those interested in further elaboration may dig out the jurisprudence and legal consequences of these terms.

5. Judicial overruling

Now we will discuss the fate of those aggrieved of judgment of *Akram* case *supra* as pointed out in the paper of learned Professor about their compensation. This is not a case of first impression when *ratio* of earlier judgment is overruled. Every now and then the superior courts overrule the *ratio* of earlier judgments but the material decision is not changed having attained finality. The decision can only be altered in due course of judicial proceedings in appeals, revision and review etc. but subject to law of limitation. There are many such cases which attained finality and then *ratio* of the decision get altered in some other proceedings. The issue of prospective or retrospective overruling has been a topic in legal and judicial systems, especially in common law jurisdictions, world over[44]. The overruling process is a regular

[41] Miss Nusrat Yasmeen v Registrar, Peshawar High Court, Peshawar & Others PLD 2019 SC 719

[42] Punjab, Sindh, KPK, Baluchistan Service Tribunals –Punjab, Sindh, KPK, Baluchistan Subordinate Judiciary Service Tribunals

[43] In Khyber Pakhtunkhwa Province for instance KPK Government Servants (Conduct) Rules,1987 and KPK Government Servants (Efficiency & Discipline) Rules 2011

[44] Realist Jurisprudence and Prospective overruling By Beryl Harold Levy Published in University of Pennsylvania Law Review, Vol 109 November 1960, also see "Disturbing the Past and Jeopardizing the Future Retrospective and

feature world over in different legal and judicial systems as part of development of law and jurisprudence which, of course, is a dynamic phenomenon. These overruling include judgments of convictions and executions in criminal matters but could not be reopened due to prospective effect in different systems. If overruling is allowed retrospectively then there would be no end to litigations. Different jurisdictions have adopted different ways to ensure closure of litigation. In Pakistan a settled jurisprudence exists to meet this objective. The principles of *stare decisis* and *res judicata* are the main tools which help resolve the issue of judicial overruling in Pakistan. A balance has been struck between these two competing and supplementing principles in particular context of judicial overruling. The authoritative explanation of principles of *stare decisis* and *res judicata* by the Supreme Court of Pakistan has been made in the following words

> *"There is a distinction in what a case decides generally and as against all the world from what it decides between the parties themselves. Salmond "On jurisprudence", Twelfth Edition, at page 175. Brings out this distinction in these words:*
>
> *"What it decides generally is the ratio decidendi or rule of law for which it is authority; what it decides between the parties includes far more than just this. Since it would be obviously impracticable if there were no end to litigation and if either party to a legal dispute were at liberty to reopen the dispute at any time, the law provides that once a case has been heard and all appeals have been taken (or the time for appeal has gone by) all parties to the dispute and their successors are bound by the Court's finding on the issues raised between them and on questions of fact and law necessary to the decision of such issues. According to this principle, these matters are now*

Prospective Overruling" By Professor Johannes Chan Dean, Faculty of Law, the University of Hongkong.

> *res judicata between them and cannot be the subject of further dispute, but the Court's findings will not be conclusive except as between the same parties.... Third parties not involved in the original case, however, will not be bound nor will either of the original parties be bound in a subsequent dispute with a third party"*[45]

The rationale behind rule of *stare decisis* has been the need to promote certainty, stability and predictability of law. But this never means that this rule is inflexible. The following words of Justice Hamood ur Rehman are very much relevant.

> *"I am not unmindful of the importance of this doctrine but in spite of a Judge's fondness for the written word and his normal inclination to adhere to prior precedents I cannot fail to recognize that it is equally important to remember that there is need for flexibility in the application of this rule, for law cannot stand still nor can we become mere slaves of precedents-------It will thus be seen that the rule of stare decisis does not apply with the same strictness in criminal, fiscal and constitutional matters where the liberty of the subject is involved or some other grave injustice is likely to occur by strict adherence to the rule"* [46]

Such overruling (legislative and of precedents) are regular features both in substantive as well as procedural rules. The case of Akram supra overruled Iqbal case supra and Gultiaz supra overruled Akram case. These overruling are procedural in nature. And procedural overruling does not mean that respondents in Akram case supra had a good case on merits and they require compensation. As discussed above there are cases in which overruling is of substantive laws and aggrieved in such situations stand at a very high pedestal like conviction in criminal cases but

[45] Pir Bakhsh v Chairman Allotment Committee PLD 1987 SC 145
[46] Miss Asma Jilani v Government of the Punjab PLD 1972 SC 139

they are rarely compensated rather their decisions are mostly protected under principles of past and closed transaction and res judicata.