

## Assessing the Efficacy of the Concept of Judicial Accountability Through the Lens of the Constitution of Pakistan

Muhammad Hassan Zia \*

Salman Naseer †

Faizan Dar ‡

**Abstract:** *Superior Courts judges are expected to have a higher standard of conduct. It is necessary for the judiciary as an institution, to maintain its probity and independence. The proposition that the Superior Court Judge is only responsible for his conduct and not that of his independent wife and children. This study makes clear that Judges are supposed to know the interests of members of their families in monetary terms. This work further explores an appealing hypothesis that the President should act in his discretion when authorizing an investigation against a Superior Court Judge under Article 48(2). The study concluded that under the Constitutional process for performing the executive function of authorizing an investigation into information against a Superior Court Judge, the President should act on the advice of the PM or the Cabinet under Article 48(1) of the Constitution and not invoke his discretionary power under Article 48(2).*

**Key Words:** Judiciary, Independence, Constitution, President, and Accountability

### Introduction

Constitution has guaranteed that every citizen has a right to be protected and treated according to law. One thing is clearly stated that according to the constitution, none is above the law, whether it be a judge or any other individual. The Supreme Judicial Council is a forum to address the grievances of the citizens against the judge of the Constitutional Court. However, it is maintained that judges, like every other individual, must be treated according to the law. These set rules must always be protected and considered supreme to show respect to the people of Pakistan who have adopted the constitution of Pakistan. Independence of the judiciary does not imply that the judges do have unfettered powers. Judicial independence and accountability complement each other. Isolation from other organs of the state and unchecked independence of the judiciary would lead to the Rule of judges, similarly putting a strict check and interference in the judiciary is expected to lead to injustice. Therefore it's necessary to keep the judiciary free and judges accountable. Being a Judge is a sacred position that has been given certain privileges and benefits. The same is enjoyed by his spouse and

family too. But it should be clarified that responsibility and obligation come along with benefits. A Judge cannot act as a layman, and he needs to keep a check on the financial affairs of his family members to keep the rights of the individual protected from State and society. This obligation comes as a result of the authority and power of the judge to grant reliefs, hold parties accountable, impose liabilities, and settle disputes between litigants. Owing to this authority, a huge responsibility falls on the judge to decide the cases fairly and according to the law. If he is well aware of the financial status of his near ones, he may save himself from accountability in a case that involves the pecuniary interest of his family members.. Security of office of judges and its tenure is indispensable for ensuring the independence of the judiciary. Any sort of interference with the tenure of and the office of the judge is unconstitutional intervention according to Articles 179 and 209(7). However, Article 209(5) of the Constitution allows President to formulate an opinion regarding the misconduct of the judge. Though he needs not to be certain that a Judge was guilty of the conduct alleged, his

\* Assistant Professor, Department of Law, University of the Punjab, Gujranwala Campus, Punjab, Pakistan.  
Email: [hasanzia489@hotmail.com](mailto:hasanzia489@hotmail.com)

† Assistant Professor, Department of Information Technology, University of the Punjab, Gujranwala Campus, Punjab, Pakistan.

‡ Advocate, Hight Court Lahore, Punjab, Pakistan.

opinion must be based on affirmative material, and necessary legal safeguards must be observed while preparing the reference. Therefore, the sensitivity of this office gets explicit from this fact that just for prima facie opinion about a Judge's guilt, the President has to ensure compliance with the rules, consult competent persons, gather sufficient material which shows the extreme care taken while preparing the reference.

### Research Methodology

Research design is meant to elaborate the structure of the study and helps in obtaining significant data on the relevant topic. (Kathuri & Pals, 1993). It provides the plan and strategy to the researcher and assists them in leading the study in a specific way (Crotty, 1998). In the present research, researchers have performed an exploratory study. The available literature on the chosen topic has been reviewed, and researchers adopted the qualitative method for meaningful understanding. The Qualitative analysis provides a deep insight into the topic and runs in-depth knowledge of the legal issues (Creswell & Poth, 2017). Besides, qualitative research describes and assists in comprehending the legal world (Tavallaei & Talib, 2010).

### Research Questions

1. Whether any wrong committed by the Superior Court Judge in his personal life has any connection whatsoever with his office, amounts to be misconduct?
2. What is the procedure for obtaining initial authorization to commence an investigation against a Superior Court Judge in a complaint falling under Article 209(5)?

### Accountability of Judge for the Financial Affairs of his Independent Wife and Adult Children

Judges are not like ordinary private citizens. Though there has been a proposition that "the days are long gone when a husband and wife were treated as one person in law, and the husband was that person" (Chief Justice of Gibraltar case [2009] UKPC 43 para-257), but the situation is different for public office holders as they enjoy the sacred trust. As per the need of their office, they are bestowed with power and authority, and therefore along with the benefits of the post; they need to fulfill the responsibilities that befall them. Superior Court Judge is entitled to these perks and benefits, which are also enjoyed by his spouse and family. Some of these benefits and privileges

available to the spouse and family of a Judge of the Superior Courts are:

#### A. During Service

- i. A medical allowance (ref: Rule 10 of [The Federal Service Medical Attendance Rules, 1990](#));
- ii. A travel allowance (ref: Rules 3(4)(i) and 4(i) of [The Supreme Court Judges \(Travelling Allowance\) Rules, 1958](#)); and
- iii. The use of a Government maintained residence and an official car at the residence (Rules 20 and 21 of Supreme Court Judges (Leave, Pension and Privileges) Order, 1997).

#### B. After Service

- i. A pension to the spouse after the death of the judge (ref: Clause 4 of the Fifth Schedule to the Constitution)
- ii. A medical allowance (ref: Rule 10 of [The Federal Service Medical Attendance Rules, 1990](#));
- iii. The services of a driver and an orderly (ref: Rule 25 Supreme Court Judges (Leave, Pension and Privileges) Order, 1997); and
- iv. Three thousand free local telephone calls in a month, 2000 units of electricity and 25HM3 of gas per month, free supply of water and 300 liters of petrol per month (ref: Rule 25 Supreme Court Judges (Leave, Pension and Privileges) Order, 1997).

As alluded to above, these privileges come with responsibilities and duties. One such duty is to maintain self-esteem, integrity, and discretion. The respect and recognition apart from the financial benefits that are enjoyed by the family members of the judge make it incumbent upon them to be careful, moderate, and fair in their dealings to avoid any controversy, which can be a source of embarrassment for the judge. Such responsibilities are attached with all public offices but more rigorously forced on the family of the judge owing to the expectations and demands of his office. A judge is considered to be the embodiment of wisdom, truth, honesty, caution, patience, and fear of God (ref: Article II of CoC). In other words, there are high standards of conduct to be followed by the judge and his family members. This is the reason that when a son of a learned judge was accused of impropriety, Justice Khilji Arif Hussain observed in Suo Motu Case No. 5 of 2012 (PLD 2012 SC 664) that:

Page 679: Although family members of public functionaries are, properly speaking, not performing State functions, the alleged facts of

this case highlight the necessity of extreme caution and discretion in their private and public dealings and conduct.

Therefore it is clarified here that family members of public office holders are not as private citizens. For this reason, the Guide to Judicial Conduct for Australian Judges states that the activities or careers of the close relatives of the judge can impact his reputation and may diminish the confidence of the people in the judicial system; therefore, a judge must always apply the principles identified in the Guide.

[Bangalore Principles of Judicial Conduct were endorsed in 2002](#), and later the United Nations Economic and Social Council also endorsed it in its Resolution 2006/23. According to the principle, "Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge." Moreover, it has been laid down that a judge must be aware of his personal, fiduciary, and family members' financial interests. Furthermore, the principle defines the family of a judge to include spouse, son, daughter, son in law, daughter in law or any person who is the companion of the judge and lives in his household.

Canon 3(C)(2) of the United States Code of Conduct for Federal Judges reinforces the obligation set in Rule 4. In spirit, these obligations emphasize a single notion that a judge has to make judicious efforts to gain awareness regarding the financial matters of his family members. This precautionary measure warns him beforehand that any sort of vested interests and external influence will not only impact his independence and credibility but also the "purity and honor" of the institution. (Justice Shaukat Ali's case (supra)). Moreover, having the knowledge of the financial interests of his fellow members is meant to prevent an influence on his opinions and views. This principle maintains judges' independence and integrity and safeguards the institution of the judiciary.

In case of having personal interests in the matter, the decision is expected to be doubtful, whereas according to a well-established principle, "justice should not only be done but manifestly and undoubtedly it should be seen to have been done." (ref: Government of NWFP v. Dr. Hussain Ahmad Haroon 2003 SCMR 104): Page 110. Another important move has been taken by the Pakistani Government that indirectly assists the aforementioned aims. According to the [Foreign Assets \(Declaration and Repatriation\) Act, 2018](#) ("the Act"), Pakistani citizens are motivated to disclose their foreign assets to be taxed at nominal rates. But this concession is not to be enjoyed by the holders of public office. Moreover, an important clause of this act is that it includes

assets of the spouse, dependent children, and possessions of public office holders as one. To simplify it, the sections of the Act are produced here: "The provisions of this Act shall apply to-(a) all citizens of Pakistan wherever they may be, except holders of public office, their spouses and dependent children;". This provision aims to avoid any efforts of the public office holders to whiten their undeclared wealth and ensures transparent accountability.

Though both the UN Resolution 2006/23 (endorsing the Principles) and the United States Code of Conduct make it incumbent upon the judges to make efforts to know their family members' monetary interests they don't elaborate upon the scope of this responsibility. It has been discussed repeatedly that judge needs to make efforts to know the financial concerns of the family members and the close people around him. But a judge can't claim to lack such knowledge. This owes to the fact, as described in the preamble of the COC that judges are the role models, and esteemed behavior is expected of them so they enjoy the trust and confidence of the people.

### Authorization for Investigation against Superior Court Judge

The [Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan PLD 2010 SC 61](#) is the authority for the proposition that authorization for investigating for any matter against Superior Court Judge could only have come from the President himself. According to clauses (5) and (6) of Article 209, there has to be a receipt of the physical or mental incapacity of the judge or of his misconduct available with the President no matter from which source he received it. Moreover, the President has to gather material to support his information, then he has to formulate an opinion regarding the incapacity of the judge, and then the President has to give direction to the council to inquire further into the matter. The sole purpose of this criterion is to ensure that material gathered to make an opinion of the President is authentic.

ROB does not deal with the matters related to the judges of the superior courts, and such issues are to be resolved by interpreting the constitutional provisions. The para 64 of the Chief Justice of Pakistan case (supra), while interpreting Article 209(5) of the Constitution, implies that approval for investigation a superior court judge must have to be taken from the President of Pakistan. However, logic dictates that the President cannot personally assess accusatory information against a Judge and instead requires assistance and advice in the matter. In this

respect, there is no law that lays down the procedure for obtaining such support for the President. Therefore, in such a situation, the Constitutional principles become relevant. To gather the Constitutional intent as to who is the competent authority for authorizing an investigation against a Superior Court Judge, Article 209(5) of the Constitution should be the starting point of the discussion. Accordingly,

- (5) If, on information from any source, the Council or the President is of the opinion that a Judge of the Supreme Court or of a High Court-
- (a) Maybe incapable of properly performing the duties of his office by reason of physical or mental incapacity; or
- (b) May have been guilty of misconduct, the President shall direct the council to, or the council may, on its own motion, inquire into the matter.

It must be noted here that Article 209 includes only two authorities for initiating a reference against Superior court judge, i.e., the SJC and the President. The SJC only gets involved after the reference has been forwarded to it by the President. In the case of the Chief Justice of Pakistan case (supra) though it was considered that it was decided on the basis of mala fide facts still the observation recorded regarding gathering the material against a judge gives fruitful guidance. Under the Constitutional scheme, the President cannot personally be responsible for authorizing an investigation into an allegation against a Judge. He does not exercise his official functions as he desires but instead acts on the advice of the PM or the Cabinet under Article 48(1) except for in situations where the Constitution has directed him to act in his discretion under Article 48(2). However, the sequence of steps noted in para-64 of the JCP judgment (supra) does not deal with the constitutional mechanism under which the President may authorize the collection of material against a Judge of the Superior Courts. At present, there are three methods under Article 48 of the Constitution by which the President may possibly authorize such an investigation. To dilate further on this matter, it would be appropriate to read Article 48:

#### 48. President to Act on Advice, etc.

- i. In the exercise of his functions, the President shall act on and in accordance with the advice of the Cabinet or the Prime Minister.

Provided that [after fifteen days] the President may require the Cabinet or as the case may be, the

Prime Minister to reconsider such advice, either generally or otherwise, and the President shall, within ten days, act in accordance with the advice tendered after such reconsideration.

- ii. Notwithstanding anything contained in clause (1), the President shall act in his discretion in respect of any matter in respect of which he is empowered by the Constitution to do so, and the validity of anything done by the President in his discretion shall not be called in question on any ground whatsoever."

It is an appealing hypothesis that the President should act in his discretion when authorizing an investigation against a Superior Court Judge. Indeed, there is a force in the proposition that the removal process of Judges must be as isolated from the executive as possible. However, this conclusion conflicts with the Constitutional scheme. Security of tenure of Judges and independence of the judiciary is most certainly assured by our Constitution. However, these can be enforced in accordance with the Constitutional scheme for the functioning of the Federal Government, which has significantly been altered by the 18th Amendment passed in the year 2010. A salient feature of this Constitutional Amendment is that it resets the balance of powers and functions between the President and the PM. After the 18th Amendment, almost all of the discretionary powers of the President have either been omitted or have been made exercisable on the advice of the PM or the Cabinet. Considering that President can authorize an investigation against a Judge in his own discretion will be doing violence to the language of the Constitution. Article 48(2) only applies where the President is explicitly authorized by the Constitution to act in his choice. No such command is given to the President in Article 209(5) of the Constitution, which governs the removal of Judges.

Moreover, the sending of a reference is an executive act performed by the Federal Government. To declare that the President is to authorize investigations into Superior Court Judges in his discretion would amount to inviting the President to arrogate powers in complete contradiction of the Constitutional scheme. The 18th Amendment has shifted the Government's decision-making in the working of the State. For ease of reference, it is produced below:

#### 90. The Federal Government

- i. Subject to the Constitution, the executive authority of the Federation shall be exercised in the name of the President by the Federal Government, consisting of the

Prime Minister and the Federal Ministers, which shall act through the Prime Minister, who shall be the chief executive of the Federation.

- ii. In the performance of his functions under the Constitution, the Prime Minister may act either directly or through the Federal Ministers."

Executive authority is now exercisable by the Federal Government, consisting of the PM and the Federal Ministers, in the President's name. Therefore, the President has been replaced as the central figure of the State by the PM. As a result, under the Constitutional process for performing the executive function of authorizing an investigation into information against a Superior Court Judge, the President should act on the advice of the PM or the Cabinet under Article 48(1) of the Constitution and not invoke his discretionary power under Article 48(2). Accordingly, Article 99(3) of the Constitution empowers the Federal Government to make rules for the allocation and transaction of its business. In exercise of such power, the Federal Government has framed the ROB that serves as a source of guidance on the instant subject. The ROB has constitutionally mandated rules and must be followed by the Government in carrying out its functions. Consequently, Rule 15-A of the ROB specifies the procedure to be followed for functions that are required by the Constitution to be performed by the President. Rule 15-A(1) deals with cases that require the orders or approval of the President on the advice of the PM. Accordingly, the same Rule refers to Schedule V-B, which sets out the list of cases in which the PM's advice is to be tendered. Serial number 35 of Schedule V-B reads: "Reference to Supreme Judicial Council." It is thus patent that the entire process of a Presidential reference falls under the advice of the PM according to the ROB. It is he who has to advise the President on the steps that need to be taken in a matter that bears relation to Article 209(5) of the Constitution. As a result, the approval by the President of the advice of the PM is necessary for commencing an investigation into a complaint made against a Judge of the Superior Court.

The initial authorization by the President on the advice of the PM to commence an investigation against a Judge in a complaint falling

under Article 209(5) is a legal requirement for sustaining the validity of a Presidential reference that is ultimately filed with the SJC. Such oversight by the highest Constitutional functionaries protects Judges from whimsical and arbitrary interference by Executive authorities in their judicial independence and privacy. Without valid authorization, the foundation of the reference suffers from initial illegality, which amounts to a Constitutional violation. Consequently, such infirmity is fatal to the superstructure that is erected on it.

## Conclusion

The integrity of the judicial process depends on judicial independence and judicial accountability. Complaints against a Superior Court Judge could be generated in one of three ways: a Presidential reference, a private complaint, and the exercise of suo moto jurisdiction by the Supreme Judicial Council. Since all three methods were distinct, therefore, the quality of their information/complaint would also be different. Presidential reference was articulated on a different level compared to a private complaint. When the President, as the Head of State, sent a reference against a Judge, he had at his disposal State agencies and access to competent legal advice. He could utilize these to verify that valid authorization for investigation had been granted and that materials that were relevant and reliable were available to support the reference. Any relaxation would give the executive the room to send frivolous references with the expectation that if some nexus between the material and the object of Article 209 of the Constitution was demonstrated, the Supreme Judicial Council would itself find substance in the reference. A reference sent by the President must contain authorized, serious, considered, and verified information to possess the gravity that should accompany a Presidential action. President could not authorize an investigation against a Judge at his own discretion. Sending of a reference was an executive act performed by the Federal Government. To declare that the President was to authorize investigations into Superior Court Judges in his discretion would amount to inviting the President to arrogate powers in complete contradiction of the Constitutional scheme.

## References

- Ahmed, A., & Ahmed, M. (2015). Accountability Structure: A Comparative Analysis, (PILDAT Report, 2015), 1-26. <https://ssrn.com/abstract=2592040>.
- Bangalore Principles of Judicial Conduct. 1-17. <https://www.unodc.org/documents/ji/training/bangaloreprinciples.pdf>
- Bovens, M. (2007). Analyzing and Assessing Accountability: A Conceptual Framework, *European Law Journal*, 13(4), 447-68. [https://www.academia.edu/28321605/Analyzing\\_and\\_Assessing\\_Accountability\\_A\\_Conceptual\\_Framework](https://www.academia.edu/28321605/Analyzing_and_Assessing_Accountability_A_Conceptual_Framework)
- Code of Conduct for United States Judges. (March 12, 2019). <https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>
- Chief Justice of Gibraltar case. [2009]. UKPC 43 para-257 <https://www.jcpc.uk/cases/docs/jcpc-2009-0016-judgment.pdf>
- Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan (November 3, 2009). PLD 2010 SC 61. [https://pakistanlaw.pk/case\\_judgements/31949/chief-justice-of-pakistan-iftikhar-muhammad-chaudhry-versus-president-of-pakistan-through-secretary?search=Correctness%20of%20Electricity%20Bill&searchMode=](https://pakistanlaw.pk/case_judgements/31949/chief-justice-of-pakistan-iftikhar-muhammad-chaudhry-versus-president-of-pakistan-through-secretary?search=Correctness%20of%20Electricity%20Bill&searchMode=)
- Crotty, M. [1998]. *The Foundations of Social Research: Meaning and Perspective in the Research Process*. London: SAGE Publications Inc.
- Creswell, J., & Poth, C. (2017) *Qualitative Inquiry and Research Design: Choosing among Five Approaches*. Sage, London.
- Dawood, J. (1994). *The Role of Superior Judiciary in the Politics of Pakistan*. (Karachi: Royal Book Company.
- Dennis, F., & Thompson. (1980). Moral Responsibility of Public Officials: The Problem of Many Hands," *The American Political Science Review* 74(4) 905-916. <https://doi.org/10.2307/1954312>
- Ewing, K. D. (2000). A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independent Judiciary. *Alberta Law Review*, 38(3), 708 -725. <https://albertalawreview.com/index.php/ALR/article/view/1430>
- Foreign Assets (Declaration and Repatriation) Act, 2018. [https://download1.fbr.gov.pk/Docs/20186131562020770ForeignAssets\(DeclarationandRepatriation\)Act,2018.pdf](https://download1.fbr.gov.pk/Docs/20186131562020770ForeignAssets(DeclarationandRepatriation)Act,2018.pdf)
- Gleeson, M. (1999) .The State of the Judicature', Speech to the Australian Legal Convention, Canberra, <http://www.hcourt.gov.au>
- Gleeson, M. (1995). Judicial Accountability 2 the Judicial Review 117, 1-75.
- Guide to Judicial Conduct (3rd Edition). (2020). <https://aija.org.au/publications-introduction/guidelines/guide-to-judicial-conduct/>
- Government of NWFP v. Dr. Hussain Ahmad Haroon 2003 SCMR 104
- Kasturi, N. J., & Pals, E. (1993). Introduction to education research. Njoro: Egerton University.
- Khurshid, K., (2011). *A Treatise on the Civil Service of Pakistan: The Structural-Functional History* (Lahore: Sang-e-Meel Publications, 342.
- Kousar, T. (2013). *Judicialization of politics and governance in Pakistan: constitutional and political challenges and the role of the Chaudhry Court," in Pakistan's Stability Paradox: Domestic, Regional and International Dimensions*(London: Routledge, <https://doi.org/10.4324/9780203804254>.
- Mehdi, T., & Mansor, T. (2010). A general perspective on the role of theory in qualitative research. *The Journal of International Social Research*, 3(11), 570-577.
- Mechtenberg, L., Muehlheusser G., & Roeder A. (2020). Whistleblower protection: Theory and experimental evidence. *European Economic Review* 126(c), [https://econpapers.repec.org/article/eeeeecrev/v\\_3a126\\_3ay\\_3a2020\\_3ai\\_3ac\\_3as0014292120300799.htm](https://econpapers.repec.org/article/eeeeecrev/v_3a126_3ay_3a2020_3ai_3ac_3as0014292120300799.htm)
- Peters, B., & Pierre, J. (2004). *The Politicization of the Civil Service in Comparative Perspective* (London: A Quest for Control, 1-312. <https://doi.org/10.4324/9780203799852>
- Suo Motu Case No. 5 of 2012 (PLD 2012 SC 664)
- The Federal Service Medical Attendance Rules. (1990). [https://na.gov.pk/uploads/documents/1363871600\\_486.pdf](https://na.gov.pk/uploads/documents/1363871600_486.pdf)
- The Supreme Court Judges (Travelling Allowance) Rules. (1958). <https://doj.gov.in/sites/default/files/SC%20Rules.pdf>
- Wilder, A. (2009). The Politics of Civil Service Reform in Pakistan. *Journal of International*

*Affairs*, 63(1), 19-37.  
<https://www.jstor.org/stable/24384170>  
Zafarullah, H., & Yeahia, A. (2001). Military Rule,  
Civilianisation and Electoral Corruption:

Pakistan and Bangladesh in Perspective,"  
*Asian Studies Review* 25(1), 73-94,  
<https://doi.org/10.1080/10357820108713296>