

Judges' right to freedom of expression – An analysis in view of the Islamic Injunctions and the principles of *Adab-al-Qadi* and the practice under the contemporary western judicial systems and prevalent codes of conduct

Ahmad Farooq Malik
Barrister-at-Law

This article explores the right of judges to exercise freedom of expression and the extent to which such right is available to them. Part I discusses the doctrine of freedom of expression of an individual as recognized in Islam and the freedom as derived from such principles with its permissible limits and imposed restrictions specifically seen in purview of Adab-al-Qadi which may be viewed as the foundations of any contemporary code of conduct for judges. Part II analyses the subject issue with specific references to the prevalent judges' Code of Conduct in Pakistan and likewise worldwide practice. While recognizing the importance of individual rights and freedoms, human dignity, vindication of truth and public interest, it is concluded that both rules of Shari'ah as well as the contemporary judicial codes of conduct practiced in different countries confirm and uphold judges' freedom of expression – albeit to be exercised with extreme caution in tone, language and content. For an alternative of judicial silence is undesirable.

“Every word has consequences. Every silence, too” - Jean-Paul Sartre

PART – I

Freedom of expression in its various forms and corollaries is universal. The fundamental idea of this freedom, in an objective sense, is common to all legal systems¹. It is available to everyone

¹ In Pakistan, the freedom is guaranteed in Article 19 of the Constitution of Pakistan, 1973 which states: “Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defense of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, or incitement to an offence.”

A few of the very early judgements given on the issue of freedom of speech under the Constitution of 1956, by the Pakistani courts include *Mehtab Jan v. Municipal Committee, Rawalpindi* [PLD 1958 Lah.929]: para 11: as per M. R. Kayani, C. J.: “Thus Article 8 gives the right of free speech and expression subject to reasonable restrictions imposed by law in the interest of decency and morality. The only reason for express mention of decency and morality in this Article can be that decency and morality may be more or less directly involved in the exercise of the right guaranteed by this Article.”

regardless of the status or rank of the person albeit to be exercised subject to settled yet evolving metes and bounds. Islam also does not treat and confer the freedom of expression in any different manner. “Islam’s view of *hurriyah*² is rooted in the postulate that the individual enjoys liberty in all things provided that this does not violate the rights of others and the collective interest (*maslahah*)³ of the community. When liberty exceeds these limits, it turns into transgression and becomes liable to restriction or even a total ban.....When the exercise of freedom by one person harms another, it becomes an instrument of *darar*, in which case it must be eliminated or curtailed.”⁴ Perhaps the best example to start with is of the Prophet (PBUH) himself. God did not even grant the Prophet (PBUH) absolute freedom of speech. For the Prophet (PBUH) was also given specific guidance as to the way He (PBUH) must propagate his call and communicate with people through good advice and courteous methods of persuasion.”⁵

Hussain Bakhsh Kausar v. The State [PLD 1958 Pesh. 15]: as per Muhammad Shafi, J: “Freedom of speech, subject to the restrictions mentioned above is essential, because without it the society based on the ideas of peace, order, or justice, cannot take shape, nor can the people who wish to live in freedom can be assured of greater security guaranteed to them under the Constitution. Constitution, as is clear from the wording of Article 8, has been very careful to secure to even most repellent of the citizens the common right of free expression so long as it does not transgress the limitations placed by law.”“Freedom of expression of one's views is a gift of the Constitution, and it cannot be abridged by the people in authority so long as it is not intended to create a chaos in the country or disrupt or destroy it. In my view, it is permissible for a citizen to hold up the men who are charged or have been charged with the executive Government of our country and the care of her destinies to ridicule and contempt if they are guilty of mal-administration. It will be absurd to suggest that a citizen has no right to advocate the change of the Government of one political party, even if it commits blunders and betrays the trust reposed in it. It is high time that the people in power realized that they have no absolute power over the lives and conduct of the persons who reside within their jurisdiction. A man is entitled to his opinion and is within his right to express it. The citizens of Pakistan are free and they must be allowed to live in freedom and the law of the land should conform to this freedom.”

Begum Zeb-un-Nisa v. Pakistan [PLD 1958 SC (Pak) 35]: as per Muhammad Munir, C.J: “The Constitution expressly provides that the freedom of speech and expression is subject to reasonable restrictions to be imposed by law and it can never be contended that the right to free speech includes the right to defame or the right of the Press to undermine the security of the State.”

² Translated into English as ‘Freedom’. Also see freedom of speech (*hurriyat al-bayan*; *hurriyat al-qawl*), freedom of opinion (*hurriyat al-ra’y*), freedom of thought (*hurriyat al-takfir*), freedom to criticise (*hurriyat al-Mu’aradah*), freedom of belief (*hurriyat al-aqidah*), freedom of conscience.

³ *Maslahah* is a concept in *Shari’ah* regarded as a basis of law. It forms a part of extended methodological principles of Islamic jurisprudence, and denotes prohibition or permission of a thing according to necessity and particular circumstances, on the basis of whether it serves the public interest of the Muslim community.

⁴ Mohammad Hashim Kamali, *Freedom, Equality and Justice in Islam*, Revised Edition 2010, p.7.

⁵ Mohammad Hashim Kamali, *Freedom of Expression in Islam*, Revised Edition 2010, p.129.

In the Islamic perspective, freedom of speech is about the inherent right of every human to be free⁶ laden with the duty from God⁷ and the Prophet (PBUH)⁸ to speak the truth so that justice shall prevail⁹ and human dignity is upheld.¹⁰ These commands make the basis of a Muslim's right to freedom of speech and it cannot be argued that the best use of this freedom is for *hisbah*¹¹ so that a just and dignified Muslim society be established.

CONCEPT OF *HISBAH*

Surah Ali-Imran¹² encapsulates the concept of *hisbah*. In addition to God's words, the Prophet (PBUH) has also ordered us to implement *hisbah* in three ways: "If any of you sees something evil, he should set it right with his hand, if he is unable to do so, then with his tongue, and if he is unable to do even that, then (let him denounce it) in his heart. But this is the weakest form of faith."¹³ Scholars have generally interpreted this as placing duties upon Muslims at both the institutional level and the personal level wherefor in both instances, collective and individual obligations are imposed. At the institutional level, *hisbah* is intended as a mechanism to ensure the welfare of society and to combat harm, including crime. At the personal level, it is intended to instill in each individual the wish to act to prevent something bad from happening, or, if it is not possible to prevent it oneself, to denounce it and call on others to act in order to prevent it.¹⁴

⁶ "Every child is born in the natural state of freedom" - Prophet (PBUH) as quoted by Mohammad Hashim Kamali, Freedom, Equality and Justice in Islam, Revised Edition 2010, p.7.

⁷ Surah Al-Baqarah, Verse 42: "And do not mix the truth with falsehood or conceal the truth while you know [it]. Another translation reads as: "and do not confound truth with falsehood, and do not hide the truth when you know (it)" <https://quran.com/2>

⁸ "Tell the truth even if it be unpleasant" - Prophet (PBUH): Al-Suyuti, al-Jami al-Saghir, Vol 1, p.111

⁹ Surah Al-Ahzab, Verse 70: "O you who have believed, fear Allah and speak words of appropriate justice." <https://quran.com/33>

¹⁰ Surah Al-Isra Verse 70: "And We bestowed dignity on the children of Adam". <https://quran.com/17>

¹¹ An act which is performed for the common good, or with the intention of seeking a reward from God. It is an obligation placed on every Muslim to call for what is good or right and to prevent or denounce what is bad or wrong.

¹² Verse 104: "There has to be a group of people from among you who call towards the good and bid the Fair and forbid the Unfair. And it is these who are successful" Another translation reads as: "And there may spring from you a nation who invite to goodness, and enjoin right conduct and forbid indecency. Such are they who are successful" <https://quran.com/3>

¹³ Muslim, Mukhtasar Sahih Muslim, p.16, Hadith No.34

¹⁴ "VIII. The enforcement of Shari'a and the role of the hisbah" https://www.hrw.org/reports/2004/nigeria0904/8.htm#_ftn205

Although *hisbah* is a much broader doctrine, the freedom of expression holds central significance to it, as in absence of the freedom it would be inconceivable to command good or forbid evil. The four acts of enforcing *hisbah*, which may be used successively (if the first one fails to achieve the purpose), are (i) oral or written intimation to the person committing the wrong; (ii) warning the person; (iii) using harsh words with the person; and (iv) expressing anger or use of force against the person (only to be used when absolutely necessary and the force adopted must be proportionate to preventing the evil). A partial exemption from the acts of *hisbah* is arguably allowed in the case of one's father, husband and the head of the state. In such cases, it is advised *hisbah* may not to be carried out through either the third or the fourth act i.e. through harsh words or anger or use of force. An exception to the exception in the opinion of the majority of Islamic scholars is that harsh words may even be used towards the head of the state and officials¹⁵, even if there is a fear of inciting harm, provided that the likely harm is restricted to the person concerned and not the public. In other words, *hisbah* should not be attempted if it will cause a greater harm as that would defeat the purpose of *hisbah*.¹⁶

Therefore, it can be concluded that every Muslim is bound to do his duty of *hisbah* and it is in the backdrop of this requirement, the extent of one's freedom of expression must be assessed, for there is a logical nexus between *hisbah* and one's right to exercise his freedom of expression which encapsulates other freedoms.¹⁷ This article however is restricted to the discussion of the freedom of expression and more specifically as exercisable by judges.

¹⁵ Also see *Hussain Bakhsh Kausar v. The State* [PLD 1958 Pesh. 15]: as per Muhammad Shafi, J: "Freedom of expression of one's views is a gift of the Constitution, and it cannot be abridged by the people in authority so long as it is not intended to create a chaos in the country or disrupt or destroy it. In my view, it is permissible for a citizen to hold up the men who are charged or have been charged with the executive Government of our country and the care of her destinies to ridicule and contempt if they are guilty of mal-administration.

¹⁶ Mohammad Hashim Kamali, *Freedom of Expression in Islam*, Revised Edition 2010, p.32.

¹⁷ freedom of speech (*hurriyat al-bayan; hurriyat al-qawl*), freedom of opinion (*hurriyat al-ra'y*), freedom of thought (*hurriyat al-takfir*), freedom to criticise (*hurriyat al-Mu'aradah*), freedom of belief (*hurriyat al-aqidah*), freedom of conscience.

FREEDOM OF EXPRESSION: CRITICISM (*Hurriyat al-Mu'aradah*)

Quran orders obedience to lawful government when it states in Surah An-Nisa¹⁸ “O you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and best in result.” However, Quran clearly does not bar or over-rule a citizen to take issue with his leaders and the government. In Surah Al-Ankabut, Quran also orders us to “not debate with the people of the Book unless it is in the best manner, except with those of them who commit injustice.”¹⁹ The Quran thus encourages us through its commands to indulge in courteous debate.

This duty to courteous debate stems out of the doctrine of freedom to criticise (*hurriyat al-Mu'aradah*) which is part and parcel of the broader freedom of expression. In the context of an individual's relationship with the state, it allows the individual to speak the truth and uncover transgression by state (or individuals) even if that means going against the ruling authorities. Prophet (PBUH) proclaimed that “the best form of *jihad* is to utter a word of truth to a tyrannical ruler”²⁰ Several instances of the grant of freedom to criticise the government have been reported from the times of Hazrat Abu Bakr (RA)²¹ and Hazrat Umar (RA).²² All such examples confirm and conclude that Islam entitles, permits and in fact commands a citizen to monitor the activities of the head of the state and the state officials in respect of all that they do and also all that they omit to do. Therefore, any deviations from public duty should be criticized and all those who

¹⁸ Verse 59. Another translation reads as: “O you who believe, obey Allah and obey the Messenger and those in authority among you. Then, if you quarrel about something, revert it back to Allah and the Messenger, if you believe in Allah and the Last Day. That is good, and the best at the end” <https://quran.com/4>

¹⁹ Verse 46. Another translation reads as: “And do not argue with the People of the Scripture except in a way that is best, except for those who commit injustice among them” <https://quran.com/29> Also Surah An-Nahl, Verse 125: “And argue with them in a way that is best,”

²⁰ Ibn Majah, *Sunan*, Kitab al-Fitan, *Bab al-amar bi'l-ma'ruf wa'l-nahy an al-munkar*, Hadith No.41

²¹ In his inaugural speech, Hazrat Abu Bakr (RA) is reported to have said: “O people, I have been entrusted with authority over you, but I am not the best of you. Help me if I am right and correct me when I am wrong.” Mohammad Hashim Kamali, *Freedom of Expression in Islam*, Revised Edition 2010, p.50-51. Another version reads as: “Oh people, I was chosen by you to govern you, though I am not the best amongst you. When I act well, help me and obey me, but when I act badly, stop me and correct me.” Ibn-Hisham, (1997) *Al-Sira Al-Nabaweyyah*, Darul-Kotub Al-Elmeyya, Beirut, part 4, p. 450

²² In his inaugural speech, Hazrat Umar (RA) is reported to have told the people to ‘rectify any aberration’ they might see in him. Another version reads as: “You will not be right if you do not advise me, and I will not be right if I do not listen to your advice.” Al-Jawzi Ibnul-Kayyem (1996), *Mnakeb Ameerul-Mo'mineen Omar Ibnul-Khattab*, Dar Ibn-Khaldoun, Alexandria, p. 148

neglect should be warned. While exercising this freedom of expression through criticism, care must however be taken that the freedom is not used for the sake of mere opposition or political gains. Further, the freedom to criticise must not be exercised without reason, to disunite, confuse, or as a means of self-promotion or simply because someone else is doing the same. This has also been ordered by the Prophet (PBUH) when He (PBUH) said, “Rather, make up your mind for yourselves and if people do something good, do it too, but if they do something unjust, do not do it yourself”²³ To conclude, there are three conditions which must be satisfied for freedom to criticise to be validly exercised: (i) criticism is essential to establish the facts; (ii) critic must be convinced of the moral uprightness of his opinion; and (iii) words used and the manner of criticism should fit the occasion. The last requirement is further conditioned by the pre-requisites of tone or language of criticism being neither too harsh nor too feeble and at the same time having the elements of courtesy and effectiveness.²⁴

SILENCE

Another corollary of the freedom of expression and freedom to criticise is the choice to remain silent. As mentioned above, in respect of *hisbah* where a greater harm to the public is likely as a result of exercising *hisbah* the same may not be carried out. That is one form of silence or perhaps inaction. Another aspect is where the freedom to express or criticise, although based on the truth may not yield any positive result i.e. no useful purpose is served. Prophet (PBUH) commanded us that “whoever believes in God and the Last Day, let him utter what is good or remain silent.”²⁵ Another *hadith* states: “Part of beauty of a person’s Islam is that they remain silent about that which does not concern them.”²⁶ One of the most illuminating *hadith* in this regard states: “When a servant of God says that which is clear and correct (i.e. having given thought to whether it is beneficial or not), through (his words) he is distanced from the Fire by a distance greater than what is between sunrise and sunset.”²⁷ Various Muslim philosophers have also propounded the desirable act to remain silent when the speech would not be purposeful. It

²³ Al-Tirmidhi in al-Tabrizi, *Mishkat al-Masabih*, III, 1418, Hadith No.5129

²⁴ Mohammad Hashim Kamali, *Freedom of Expression in Islam*, Revised Edition 2010, p.53.

²⁵ Muslim, *Mukhtasar Sahih Muslim*, Hadith No.844

²⁶ Al-Tabrizi, *Mishkat*, Vol III, Hadith No.4839

²⁷ Al-Nawawi, *Riyad al-Salihin*, p. 483 referred to at p 129-130 by Mohammad Hashim Kamali, *Freedom of Expression in Islam*, Revised Edition 2010.

therefore will not be incorrect to conclude in this section that a person's choice to remain silent, does not always put him in contravention of his other duties to do *hisbah* or to speak the truth, therefore, perhaps a better and desirable approach is to choose silence when the likelihood of exercising the freedom of expression will lead to harm to others and will not promote any good or prevent any wrong.

ADAB-AL-QADI

Based on the brief introduction to the principles of *hisbah*, the freedom of expression through criticism and the choice to remain silent, the desirable compliance of *hisbah* by a judge through exercise of his freedom of expression or alternatively his choice to remain silent require an assessment. However, before such an analysis is carried out a brief reference to the historical evolution of judiciary and the concept of a judicial system in Islam is necessary to understand the subject matter of this article. Surah An-Nisa in Quran upholds the office of judiciary and commands: "O you who believe, be upholders of justice - witnesses for Allah, even though against (the interest of) your selves or the parents, and the kinsmen. One may be rich or poor, Allah is better caretaker of both. So do not follow desires, lest you should swerve. If you twist or avoid (the evidence), then, Allah is all-aware of what you do."²⁸

In the early days post advent of Islam, the Prophet (PBUH) himself was responsible for dispensation of justice in the state of Medina. He (PBUH) subsequently appointed several of his Companions as judges and it was through the Prophet's (PBUH) teachings, commands, supervision and training in the etiquette of juridical practice that the appointed ones fulfilled their duties as judges.²⁹ In the era of the four Caliphs, Hazrat Abu Bakr (RA) following the footsteps

²⁸ Verse 135. Another translation reads as: "O ye who believe! stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be (against) rich or poor: for Allah can best protect both. Follow not the lusts (of your hearts), lest ye swerve, and if ye distort (justice) or decline to do justice, verily Allah is well-acquainted with all that ye do." <https://quran.com/4>

²⁹ Hazra Ali (RA) as judge of Yemen; Hazrat Muadh bin Jabal (RA) as Governor of Yemen; Hazrat Ula bin al-Hadrami (RA) as judge of Bahrain; Hazrat Maqal bin Yasar (RA) to decide certain cases; Hazrat Amr bin al-As (RA) to decide a case; Hazrat Uqbah bin Amir al-Juhani (RA) to decide a case; Hazrat Hudhayfah bin al-Yaman (RA) appointed to decide a case; Hazrat Utab bin Usayd (RA) appointed the Governor and judge of Makkah; Hazrat Dahyah bin Khalifah al-Kalbi (RA) as judge in an area in Yemen; Hazrat Abu Musa al-Ashari (RA) as judge of Yemen; Hazrat Umar Farooq (RA); Hazrat Ubayy bin Kab (RA); Hazrat Zayd bin Thabit (RA); Hazrat Abdullah bin Masud (RA) as mentioned in Justice (Retd) Dr. Munir Ahmad Mughal, Islamic Perspective of Administration of Justice in early periods. https://www.academia.edu/1250576/ISLAMIC_PERSPECTIVE_OF_Administration_of_Justice_in_early_periods?

of the Prophet (PBUH) is reported to have carried out the duties of a judge himself. He (RA) also appointed Hazrat Umar (RA) as a judge. Hazrat Umar's (RA) legacy also includes increasing the judiciary by appointing many as judges³⁰ thus expanding and developing the judicial system in the Muslim world which was in its nascent stages of development at that point in history. Hazrat Umar's (RA) advice to Abu Musa (RA) who was appointed judge of Basra is considered by some "to be the 'constitution of the judiciary' for ensuing periods."³¹ Further, a letter from Hazrat Umar (RA) to Abu Musa Ashari (RA) who was designated as the governor of Kufa is also considered as the bedrock of a judicial system.³² Hazrat Usman Ghani is reported to have sought counsel from other noble men of his times while adjudicating upon legal cases.³³ Hazrat

[email work card=title](#) Another reference is Hassan Abdul Latif El-Shafei, Judicial Training in Islamic Jurisprudence published in Criminal Justice in Islam – Judicial Procedure in the Sharia (2018) edited by Muhammad Abdel Haleem, Adel Omar Sherif & Kate Daniels.

³⁰ "Al-Khassaf narrates that 'Umar wrote to Mu'adh ibn Jabal and to Abu Ubayda, saying: 'Seek out the men of knowledge, those who are pious amongst you, and use them in the service of the judiciary, showing them generosity in respect of payments.' as quoted in Hassan Abdul Latif El-Shafei, Judicial Training in Islamic Jurisprudence published in Criminal Justice in Islam – Judicial Procedure in the Sharia (2018) edited by Muhammad Abdel Haleem, Adel Omar Sherif & Kate Daniels – p.181. Further, "...during the time of Umar, the office of judgeship a greater sense of authority and independence, as well as financial and administrative organization." – p.181.

³¹ *Ibid* p - 180.

³² In the author's opinion, reference to the complete text of the letter (as translated) is essential to understand the legal knowledge and wisdom which was passed on to the judges:

"Henceforth, the right to adjudication is an absolute duty and one that is followed by the *Sunnah*. Investigate any case you suspect, for Right without execution (or remedy) is futile. Equalise (or be equal) between the parties before you (or let equality be manifest) in your expression (or demeanour) and in your judgment. Your judgment should not be the basis for the noble (or powerful) to hope in your favour, and for the poor (or the weak) to despair from your justice. The burden of proof is on the accuser, and he who negates should be asked to take the oath. Reconciliation is desirable among Muslims except where there is agreement on something which legitimises that which is prohibited or prohibits that which is legitimate. He who claims even a doubtful right and proves it, accord him the right, but if he cannot provide it then rule against him:' for (in both cases) it is the best that you can do. If you render a judgment and after a period of time you find it to be unjust, do not hesitate to revise it, unless it is so old that no one can change it. The revision of judgments is better than preserving injustice. The Muslims are witnesses unto one another except those who are well known for being liars and those who have been condemned for a *hadd*, or those who are close to authority (meaning the excludability of those in authority). Only Almighty Allah knows the intention of each one of us, and we therefore can only judge (and condemn) on the basis of proof. If a case is presented to you and you cannot find an applicable rule clearly stated in the Holy Qu'ran or the *Sunnah*, you can reason the solution, contemplate (or deliberate judiciously), try to find an analogy, and study the work of the wise and then render your judgement accordingly. Beware of anger, anxiety, monotony, disgust, and do not be biased against or for anyone even if he be your ally (or friend). Just judgment is rewarded by God, and rendering good judgment is appreciated by the people. If one is devoted (or pious) to God and adheres to the Right, even when it is against one's own interest, then God will save him. He who pretends, God will punish him. God accepts from the believers only the Good. Remember God rewards in riches and compassion (or forgiveness). Peace and blessings be on you." Translation by M. Cherif Bassiouni available in his article, "Crimes and the Criminal Process", *Arab Law Quarterly*, 12:3 (1997), pp. 269-286 at 275-276 relied upon by Prof. Dr. Muhammad Munir, Fundamental Guarantees of the Rights of the Accused in the Islamic Criminal Justice System, Hamdard Islamicus Page 45, Vol XL, No.4 available at <https://ssrn.com/abstract=3093026>

³³ When a case was brought before him (Hazrat Usman Ghani (RA)), he used to direct the parties to go and call Hazrat Ali (RA), Hazrat Talhah bin Ubaydullah (RA) and Hazrat Zubay bin al-Awwam (RA) and Hazrat Abdur

Ali (RA) was blessed with remarkable intelligence, acumen and judicial depth of vision. Acknowledging his prominence and excellence in dealing with complex legal matters and legislative issues, it is reported that the Prophet (PBUH) had stated that ‘the best versed in *qada* is Ali’.³⁴

Despite the start of a somewhat proper judicial system from the times of Hazrat Umar (RA), no proper code of conduct for judiciary (*adab al-qadi*) for the administration of justice was formally put together. With the passage of time and the spread of Islam beyond the borders of Arabia, Muslim jurists of different times felt the need to formulate manuals for judges which established codes for regulating the conduct of judges. More than sixty³⁵ and some more³⁶ such writings came into being from different schools of jurisprudence. “In summary, perhaps the most distinguished and invaluable of all the compilations in this field are those of al-Khassaf the Hanafi, Ibn Abi Dam the Shafi’I, Ibn Farhun the Maliki, and Ibn Qayyim the Hanbali.”³⁷

Of the most significance are the eleven commentaries titled *Adab al-Qadi* written during different times by al-Khassaf. This code presented by al-Khassaf, laid down some affirmative rules for Muslim judges. Amongst others, the rules relevant for the purposes of this article stated that a judge should be strict in the matters of religion, but not harsh in speech;³⁸ he may attend general banquets;³⁹ and he must not deviate from the truth for fear of someone’s anger.”⁴⁰

Rahman bin Auf (RA). When all appeared he asked the parties to state their cases respectively. After hearing their respective statements, Hazrat Usman (RA) asked opinion of the four above named and if Hazrat Usman (RA) agreed with their view, he decided the case accordingly otherwise he adjourned it to reconsider as stated in Justice (Retd) Dr. Munir Ahmad Mughal, Islamic Perspective of Administration of Justice in early periods. https://www.academia.edu/1250576/ISLAMIC_PERSPECTIVE_OF_Administration_of_Justice_in_early_periods_email_work_card=title

³⁴ as quoted in Hassan Abdul Latif El-Shafei, Judicial Training in Islamic Jurisprudence published in Criminal Justice in Islam – Judicial Procedure in the Sharia (2018) edited by Muhammad Abdel Haleem, Adel Omar Sherif & Kate Daniels – p.181.

³⁵ Muhammad Ibrahim H.I. Surty, The Ethical Code and Organised Procedure or Early Islamic Courts, with Reference to al-Khassaf’s *Adab al-Qadi* published in Criminal Justice in Islam – Judicial Procedure in the Sharia (2018) edited by Muhammad Abdel Haleem, Adel Omar Sherif & Kate Daniels.

³⁶ *Ibid*

³⁷ Hassan Abdul Latif El-Shafei, Judicial Training in Islamic Jurisprudence published in Criminal Justice in Islam – Judicial Procedure in the Sharia (2018) edited by Muhammad Abdel Haleem, Adel Omar Sherif & Kate Daniels – p.183.

³⁸ Al-Khassaf’s *Adab al-Qadi*, I, p.36-37

³⁹ Al-Khassaf’s *Adab al-Qadi*, I, p.103 also see Shaukat Hayat, An Islamic Code of Judicial Conduct, 2019: “....if a judge accepts an invitation to a banquet he must refrain from engaging in an unnecessary and nonrestrictive communication with people in such banquet. This will save him from making new relationship that may likely be

The teachings, commands, and training of judges in the times of the Prophet (PBUH) and four Caliphs, and the subsequent codes of conduct articulated by the Muslim scholars directly deal with the judge's conduct inside the court room and do not per se discuss his extra-judicial activities i.e. his activities outside the court room. Therefore, the specific question whether a judge is entitled to freedom of expression especially in respect of his extra-judicial activities largely remains unanswered under the Islamic jurisprudence. Similar is the situation in respect of choosing to remain silent.

Having said, the Islamic principles of freedom of expression and its corollaries are applicable on all citizens, which would mean to include judges also, therefore a separate distinct set of rules defining the allowances and limitations with specific relation to the judges' freedom of expression may be considered as such unnecessary. Judges' freedom of expression generally means (i) freedom of expression inside the court room while conducting judicial proceedings i.e. how he or she orally conducts the proceedings before him; (ii) freedom of expression while writing orders and judgements etc.; (iii) extra judicial speeches or question and answer sessions at a public gathering; additionally interviews to the public or the media may also fall under this head; and (iv) writings and publications which are not judgements or orders. Of great significance are the content of expression, choice of words and tone which are pivotal in all these four instances.

PART II

It cannot be claimed that the divine principles and objectives of Islam are isolated from the realities of the society. A judge's freedom of expression faces the same treatment. As pointed out above, Islam not only validates freedom of expression but it also urges Muslims not to remain silent or indifferent when expressing an opinion which is likely to serve the cause of truth and justice or be of benefit to the society.

injurious for his integrity." p.171. "The position of judge is very delicate and crucial in the sense that public always critically checks the conduct of judges. Therefore, a judge has to avoid all that which may cast reasonable distrust upon his integrity. The best way for a judge to sidestep these dilemma is to endeavor his best to desist from attending any entertainments, banquets or other public gatherings as much as possible." p.172.

⁴⁰ Al-Khassaf's *Adab al-Qadi*, I, p.61; also see Tanzil ur Rahman, *Adab al-Qadi*, Islamic Research Institute, International Islamic University, Islamabad, Islamic Studies, Vol.5, No.2 (June 1966), pp. 199-207: "A *qadi* should show no fear or favour in the exercise of his powers or performance of his duties." <http://www.jstor.org/stable/20832838>

PAKISTAN

In Pakistan, for the members of the superior judiciary, the Supreme Judicial Council framed the Code of Conduct for the judges of the Supreme Court and High Courts.⁴¹ Although the Code does not mention the term “freedom of expression” of the judges⁴² nor does it lay down any express limits on such freedom, it does guide us and the judges by stating that “it is the prime duty of a judge as an individual to present before the public an image of justice of the nation.” Further the Code very clearly affirms that the “justice of this nation is of Divine origin”. The Code also states that the oath of a judge implies complete submission to the Constitution.⁴³ To be a living embodiment of the judge’s powers, functions, and obligations, the Code imposes patterns of behavior, which are the hall-mark of distinction of a judge among his fellow-men. The Code goes on to specify this pattern of behavior in several of its articles. More pertinently, Article II mandates that a judge should be, amongst others, “truthful of tongue” and “cautious and forbearing”. Article III demands that a judge should keep his conduct in all things, official and private, free from impropriety. Article V regulates that a judge should not seek publicity and “In particular, he should not engage in any public controversy.....” and lastly Article VII guides that a judge should generally avoid extra-judicial duties or responsibilities, official or private. This may lead us to conclude that Pakistani judges possess, like any other citizen of Pakistan, “the right to freedom of speech and expression”⁴⁴ however the exercise of this freedom is “subject to any reasonable restrictions imposed by law”. In other words, all the reasonable restrictions imposed by law on any ordinary citizen in this respect are equally applicable on the judges as well. In addition to these restrictions, the judges are also bound to speak the truth which is in consonance with the settled Islamic injunctions as discussed above. Further, caution and forbearance is required, impliedly both in their acts and words. Though the Code does not categorically specify whether such caution and forbearance is in relation to the judges’ judicial functions or extra-judicial functions or both, but the language of the first sentence of Article II when compared with the second sentence and the second paragraph indicates that such acts of caution and forbearance are not restricted to judicial functions and have a broader scope and

⁴¹ Available at <https://www.supremecourt.gov.pk/download/code-of-conduct-for-judges/>

⁴² References to judge or judges in under this head shall be taken to mean judge or judges of Pakistan.

⁴³ And the Constitution grants every citizen of Pakistan freedom of expression in Article 19: “Every citizen shall have the right to freedom of speech and expression,.....”

⁴⁴ As guaranteed under Article 19 of the Constitution of Pakistan, 1973. See *Ibid*

therefore cover the judges' extra-judicial activities as well. Article III & V are clear enough in terms of the language used in them to cover both judicial and extra-judicial functions of a judge.

In view of the above, exercising freedom of expression to carry out *hisbah* seems to be not readily allowed to a judge. As regards, adopting silence, the same may be seen in light of the duty to be cautious and forbearing and hence it can be said that the option of remaining silent is if not best than better, as “whoever believes in God and the Last Day, let him utter what is good or remain silent.”⁴⁵

PRINCIPLES OF JUDICIAL CONDUCT – INTERNATIONAL PERSPECTIVE⁴⁶

The right of a judge to his freedom of expression has seen to develop in the western world at a faster pace than the rest of the world. Various codes of conduct for judges in different countries have been adopted and hold field. A brief reference to a few of such codes is mentioned so as to understand that judges all over the world are treated at par with ordinary citizens when it comes to freedom of expression. However, by virtue of their office, judges are subject to extra qualifications in this respect.

A few of such instruments laying out the principles of judicial conduct are as follows:

Basic Principles on the Independence of the Judiciary⁴⁷

The Basic Principles on the Independence of the Judiciary provide that members of the judiciary, like other citizens, are entitled to freedom of expression. The Basic Principles also acknowledge that, in the light of their special duties and responsibilities, judges should show restraint in exercising these rights and always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary (principle 8)⁴⁸.

⁴⁵ *Ibid* 30

⁴⁶ Independence of judges and lawyers Report of the Special Rapporteur on the independence of judges and lawyers; United Nations, General Assembly. A/HRC/41/48, 29th April 2019

⁴⁷ Available at

<https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx#:~:text=The%20judiciary%20shall%20decide%20matters,quarter%20or%20for%20any%20reason>

⁴⁸ “Freedom of expression and association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.”

The Bangalore Principles of Judicial Conduct⁴⁹

The Bangalore Principles of Judicial Conduct provide extensive guidance for judges on the kind of conduct that is to be expected from them in order to maintain their independence, integrity and impartiality and enhance public confidence in the judicial system. Principle 4.6⁵⁰ is an almost verbatim restatement of principle 8 of the Basic Principles, as referred to above. It should be noted that not every breach of the ethical and professional standards set out in the Bangalore Principles will necessarily constitute misconduct of sufficient character or seriousness to justify legal restrictions affecting a judge's rights.⁵¹

Commentary on the Bangalore Principles of Judicial Conduct⁵²

The Commentary on the Bangalore Principles of Judicial Conduct lists a number of activities that are incompatible with judicial office and provides that, as a general principle, judges should not be involved in public controversies. It also identifies a number of situations in which a judge may properly speak out about matters that are politically sensitive (for instance, in order to comment on legislation and policies that directly affect the operation of the courts, the independence of the judiciary, or fundamental aspects of the administration of justice).

The Commentary emphasises that the judge should not be completely isolated from the community in which he or she lives. Furthermore, judges must both in reality and in appearance “be free from inappropriate connections with, and influence by, the executive and legislative branches of government”; this implies that more onerous restrictions may be imposed on judges' personal and professional associations with members of the executive and legislative branches of government than might be required in relation to other individuals.

⁴⁹ Available at https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf

⁵⁰ “4.6 A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.”

⁵¹ Judges' and Prosecutors' Freedoms of Expression, Association and Peaceful Assembly - Submission to the United Nations Special Rapporteur on Independence of Judges and Lawyers for his upcoming report to the Human Rights Council February 2019 available at <https://www.icj.org/wp-content/uploads/2019/02/Universal-SRIJL-Judges-Advocacy-non-legal-submission-2019-ENG.pdf>

⁵² Available at https://www.unodc.org/res/ji/import/international_standards/commentary_on_the_bangalore_principles_of_judicial_conduct/bangalore_principles_english.pdf

The Commentary explains that “Out of court too, a judge should avoid deliberate use of words or conduct that could reasonably give rise to a perception of an absence of impartiality. Everything - from a judge’s..... remarks that he or she may consider to be nothing more than harmless banter - may diminish the judge’s perceived impartiality.” At the same time, the Commentary notes, “There are some exceptions. These include comments by a judge, on an appropriate occasion, in defence of the judicial institution.....”. However, even on such occasions, a judge must be careful to avoid, as far as possible, entanglements in current controversies that may reasonably be seen as politically partisan.”

The Principles further provide that, “A judge, like any other citizen, is entitled to freedom of expression, belief.....but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.” The Commentary suggests that as a general principle, “A judge should not involve himself or herself inappropriately in public controversies,” because “If a judge enters the political arena and participates in public debates - either by expressing opinions on controversial subjects, entering into disputes with public figures in the community, or publicly criticizing the government – he or she will not be seen to be acting judicially when presiding as a judge in court.” At the same time, the Commentary offers a number of situations where the rights of a judge should not be restricted, including particularly: “A judge may speak out on matters that affect the judiciary” or “A judge may participate in a discussion of the law” or “When the judge may feel a moral duty to speak”.

The Commentary emphasizes that, “There are limited circumstances in which a judge may properly speak out about a matter that is politically controversial, namely, when the matter directly affects the operation of the courts, the independence of the judiciary....., fundamental aspects of the administration of justice.....”.

The Commentary notes that a contribution by a judge to a publication, whether related or unrelated to the law, or appearance by a judge on commercial television or radio, can be acceptable, but that care must be taken to ensure it is presented appropriately.

The Universal Charter of the Judge⁵³

The Universal Charter of the Judge contains two provisions concerning the exercise of freedom of expression. Article 3-5⁵⁴ provides that judges have the right to freedom of expression (with the same limitations identified in principle 8 of the Basic Principles). In accordance with article 6-2⁵⁵, judges are required to be impartial – and to be seen as impartial – in the exercise of their duties, to perform their duties with restraint and attention to the dignity of the court and of all persons involved and to refrain from any behaviour, action or expression that may affect confidence in their impartiality and independence.

Council of Europe recommendation of 17 November 2010 - Judges: independence, efficiency and responsibilities.⁵⁶

The Council of Europe does not include a specific provision on the exercise of freedom of expression. The Council recommends, however, that judges' engagements in activities outside their judicial mandate should be compatible with their impartiality and independence (para. 21).⁵⁷

Consultative Council of European Judges

Opinion no. 3 of the Consultative Council of European Judges states that “[t]he judicial system can only function properly if judges are not isolated from the society in which they live (...). As citizens, judges enjoy the fundamental rights and freedoms protected, in particular, by the European Convention on Human Rights (freedom of opinion, religious freedom, etc) (...). However, such activities may jeopardise their impartiality or sometimes even their independence. A reasonable balance therefore needs to be struck between the degree to which

⁵³ Available at

https://www.unodc.org/res/ji/import/international_standards/the_universal_charter_of_the_judge/universal_charter_2017_english.pdf

⁵⁴ “Judges enjoy, as all other citizens, freedom of expression. However, while exercising this right, they must show restraint and always behave in such a way, as to preserve the dignity of their office, as well as impartiality and independence of the judiciary.”

⁵⁵ “In the performance of the judicial duties the judge must be impartial and must so be seen. The judge must perform his or her duties with restraint and attention to the dignity of the court and of all persons involved. The judge must refrain from any behaviour, action or expression of a kind effectively to affect confidence in his/her impartiality and independence.”

⁵⁶ Available at <https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d>

⁵⁷ “Judges may engage in activities outside their official functions. To avoid actual or perceived conflicts of interest, their participation should be restricted to activities compatible with their impartiality and independence.”

judges may be involved in society and the need for them to be and to be seen as independent and impartial in the discharge of their duties”.⁵⁸

The European Charter on the statute for judges⁵⁹

The European Charter on the statute for judges also contains detailed provisions on the exercise of freedom of expression (art. 4.3)⁶⁰ and extrajudicial activities (art. 4.2).⁶¹ The words of the European Charter are simple and self-explanatory; “judges freely carry out activities outside their judicial mandate including those which are the embodiment of their rights as citizens. This freedom may not be limited except in so far as such outside activities are incompatible with confidence in, or the impartiality or the independence of a judge.....”

The Beijing Statement of Principles of the Independence of the Judiciary⁶²

The Beijing Statement of Principles of the Independence of the Judiciary provides that judges have the right to exercise their fundamental freedoms “to the extent consistent with their duties as members of the judiciary” (principle 8)⁶³.

The Statute of the Iberoamerican Judge⁶⁴

The Statute of the Iberoamerican Judge recognizes the “legitimate right to the freedom of expression and information” (art. 3)⁶⁵.

⁵⁸ Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behaviour and impartiality (November 2002) referred to in European Commission for Democracy through Law (Venice Commission) – Report on the Freedom of Expression of Judges Strasbourg, 23 June 2015 CDL-AD(2015)018 - Opinion n°806/2015

⁵⁹ Available at <https://rm.coe.int/16807473ef>

⁶⁰ “Judges must refrain from any behaviour, action or expression of a kind effectively to affect confidence in their impartiality and their independence.”

⁶¹ “Judges freely carry out activities outside their judicial mandate including those which are the embodiment of their rights as citizens. This freedom may not be limited except in so far as such outside activities are incompatible with confidence in, or the impartiality or the independence of a judge, or his or her required availability to deal attentively and within a reasonable period with the matters put before him or her.....”

⁶² Available at <https://www.icj.org/wp-content/uploads/2014/10/Beijing-Statement.pdf>

⁶³ “To the extent consistent with their duties as members of the judiciary, judges, like other citizens, are entitled to freedom of expression, belief, association and assembly.”

⁶⁴ Available at <http://www.icj.org/wp-content/uploads/2014/10/Statute-Iberoamerican-Judge.pdf>

⁶⁵ “The use of means of social communication with the purpose of supplanting jurisdictional functions, imposing or influencing the content of judicial decisions, in conditions exceeding the legitimate right to the freedom of expression and information, is considered as harmful for judicial independence.”

Code of Judicial Ethics International Criminal Court ICC-BD/02-01-05⁶⁶

The Code recognizes that judges of the ICC have freedom of expression as well as that they are “free to participate in public debate on matters pertaining to legal subjects, the judiciary or the administration of justice” and “shall avoid expressing views which may undermine the standing and integrity of the Court” (art 9).⁶⁷

Montreal Declaration – Universal Declaration on the Independence of Justice⁶⁸

The Declaration subject to the preservation of dignity of the office of the judiciary confirms the right of judges’ freedom of expression (art 2.10).⁶⁹

International Project of Judicial Independence of the International Association of Judicial Independence and World Peace⁷⁰

Judges shall enjoy freedom of expression which must be exercised in a manner that is compatible with the judicial function and that may not affect or reasonably appear to affect judicial independence or impartiality.⁷¹

Bologna Milano Global Code of Judicial Ethics 2015⁷²

The Code echoes the universal approach as it confirms, that “a judge, as any other citizen, is entitled to freedom of expression.....but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.”⁷³

⁶⁶ Available at <https://www.icj.org/wp-content/uploads/2014/10/ICC-Code-of-Judicial-Ethics.pdf>

⁶⁷ Article 9: Public expression and association 1. Judges shall exercise their freedom of expression and association in a manner that is compatible with their office and that does not affect or appear to affect judicial independence or impartiality. 2. While judges are free to participate in public debate on matters pertaining to legal subjects, the judiciary or the administration of justice, they shall not comment on pending cases and shall avoid expressing views which may undermine the standing and integrity of the Court

⁶⁸ Available at <https://www.icj.org/wp-content/uploads/2016/02/Montreal-Declaration.pdf>

⁶⁹ “2.10 Judges shall always conduct themselves in such a manner as to Preserve the dignity of their office and the impartiality and independence of the judiciary. Subject to this principle, judges shall be entitled to freedom of belief, expression, association and assembly.”

⁷⁰ Available at <https://www.icj.org/wp-content/uploads/2016/02/Mt-Scopus-Standards.pdf>

⁷¹ “16.1 Judges shall enjoy freedom of expression and association. These freedoms must be exercised in a manner that is compatible with the judicial function and that may not affect or reasonably appear to affect judicial independence or impartiality.”

⁷² Available <https://www.icj.org/wp-content/uploads/2016/02/Bologna-and-Milan-Global-Code-of-Judicial-Ethics.pdf>

⁷³ Article 5.2.6

Universal Declaration of Human Rights⁷⁴

The Universal Declaration of Human Rights (UDHR) recognises the freedoms of expression (article 19)⁷⁵, and also provides that, “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”.⁷⁶ The term “everyone” is exhaustive enough to include every human being, regardless of his rank or office.

International Covenant on Civil and Political Rights⁷⁷

In the International Covenant on Civil and Political Rights (ICCPR), article 19 (freedom of expression and restrictions thereof)⁷⁸ is elaborate enough to imply the potential for certain special restrictions on judges’ exercise of freedom of expression for the purpose and to the extent necessary to guarantee these qualities.

CONSTITUTIONAL PROVISIONS OR STATUTORY OBLIGATIONS

In many European countries⁷⁹, there are no separate and distinct constitutional provisions concerning specifically the freedom of expression of judges. However, none of the constitutions of these countries provide for any specific restrictions on the freedom of expression of judges

⁷⁴ Available at <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

⁷⁵ “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

⁷⁶ Universal Declaration of Human Rights: Article 29(2)

⁷⁷ Available at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

⁷⁸ “1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.”

⁷⁹ Andorra, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, “the former Yugoslav Republic of Macedonia”, Malta, the Republic of Moldova, Monaco, the Netherlands, Norway, Portugal, Russia, San Marino, Slovenia, Spain, Sweden, Switzerland and Turkey.

either. There are however statutory obligations⁸⁰ for judges in many of these countries which impose restrictions of different levels from on the freedom of expression.

By way of elaboration (a few examples); in Croatia, obligations of judges are regulated under Articles 92 to 98 of the Law on Courts which dictates that a judge's behaviour must not be detrimental to the dignity of judicial power, and must not put in question his/her professional impartiality and independence or the independence of judicial power. And according to the Law on High Council of Justice, damaging the reputation of the court or judicial office are considered as disciplinary grounds.

In Germany, the German Judiciary Act, provides special obligations of judges on the "maintenance of independence"⁸¹. In practice, this principle of moderation is mainly relevant with respect to conduct outside office.

In Romania, according to the Law on the Status of Judges (no. 303/2004), judges are obliged to refrain from expressing or manifesting their political beliefs (Article 8).

In Turkey, according to Article 65 of Law no. 2802 on Judges and Public Prosecutors, a disciplinary sanction (reprimand) may be imposed on judges for having undertaken actions that could jeopardize the respect and trust in the judicial function.

⁸⁰ *Andorra*: The Justice Act of 3 September 1993 provides under Chapters III and IV, the regime of incompatibilities and prohibitions as well as the recusal and abstentions of judges. It also provides the duty of confidentiality under Article 71 and professional secrecy under Article 72. *Austria*: The Law on the Service of Judges and Prosecutors. *Croatia*: The Law on Courts. *Czech Republic*: The Act on Courts and Judges (law No. 6/2002 Coll.). *Denmark*: The Danish Administration of Justice Act. *Estonia*: The Status of Judges Act. *France*: The Organic Law no. 58-1270 of 22 December 1958 on the Status of the Judiciary. *Germany*: The German Judiciary Act. *Iceland*: The Act on the Judiciary (law no. 15/1998). *Lichtenstein*: The Civil Servants Act (Beamtengesetz) of 1938, the Court Organisation Act (Gerichtsorganisationsgesetz) of 1922 and the Judges Act (Richterdienstgesetz). *Lithuania*: The Law on Courts (2002). *Malta*: The Code of Organisation and Civil Procedure. *Moldova*: The Status of Judges Act. *Norway*: The Courts of Justice Act and the Civil Service Act. *Netherlands*: The Judiciary Organization Act, the Legal Status of Judicial Officers Act and the General Administrative Law Act. *Poland*: The Statute of 1 October 2001 on the Constitution on Common Courts of Law, the Statute of 21 August 1997 on the Constitution of the Military Courts amended on 1 October 2001, the Statute of 11 May 1995 on the Supreme Administrative Court and the Statute of 20 September 1984 on the Supreme Court. *Portugal*: The Status of Judges Act. *Slovakia*: The Act No. 385/2000 Coll. *Romania*: The Law on the Status of Judges. *Russian Federation*: The Law No. 3132-I of 26 June 1992 on the Status of Judges in the Russian Federation. *Slovenia*: The Judicial Service Act (OG No. 19/94, 8/96 and 24/98). *Turkey*: The Law no. 2802 on Judges and Public Prosecutors. *Ukraine*: The Law on the status of judges.

⁸¹ German Judiciary Act, 1972, Section 39 "Maintenance of independence: In and outside office a judge shall conduct himself, in relation also to political activity, in such a manner that confidence in his independence will not be endangered". http://www.gesetze-im-internet.de/englisch_drig/englisch_drig.html#p0208

In the Russian Federation, the Law No. 3132-I of 1992 on the Status of Judges in the Russian Federation provides that “a judge must refrain from anything that would diminish the authority of the judicial power or the dignity of a judge or cast doubts on his or her objectivity, fairness and impartiality”.

In Austria, the Law on the Service of Judges and Prosecutors (Law No. 305/1961) regulates official duties of judges and includes the commitment to fidelity towards state and law. A breach of this provision means a disciplinary offence.

CASE LAW⁸²

According to settled case law under Article 10 of the European Convention on Human Rights (ECHR)⁸³ a judge is required to show restraint when the authority of the judiciary and impartiality comes into question. A judge is regarded as the representative of the judiciary and the embodiment of certain ideas and principles of justice and the rule of law. As a result the expression of personal opinions and convictions by judges is easily understood as the expression of views with a special meaning: they may be regarded as the ‘official’ view of the judicial authorities or as representing what is just and fair. In light of this it is easy to make a connection between the expression of personal opinions and convictions by the judge and the authority of the judiciary or judicial impartiality.⁸⁴

The following judgments have been selected in consideration of their relevance for the subject issue in this article. As will be noted there is a variance in the approach of the Courts towards the exercise of freedom of expression by judges. Of great significance is the case of *Kudeshkina v. Russia*.

⁸² European Commission for Democracy through Law (Venice Commission) – Report on the Freedom of Expression of Judges Strasbourg, 23 June 2015 CDL-AD(2015)018 - Opinion n°806/2015

⁸³ “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

⁸⁴ Sietske Dijkstra, The Freedom of the Judge to Express his Personal Opinions and Convictions under the ECHR, www.utrechtlawreview.org, Volume 13, Issue 1, 2017, <http://doi.org/10.18352/ulr.371>

Germany:

Federal Constitutional Court, 30. August 1983, 2 BvR 1334/82

A judge was subject to a disciplinary sanction for having taken part in a newspaper advertisement dealing with a teacher who was banned from his profession because of his candidacy for the DKP (German Communist Party). The signees of the advertisement included the judge concerned. The judge had added his official position to his signature on the advertisement. The Court found that the judge in question had infringed his obligation to participate in political controversies by not doing so in a restrained manner, therefore the imposed disciplinary sanction was upheld as the same did not violate his freedom of expression.

Federal Constitutional Court, 6 June 1988, 2 BvR 111/88; Federal Administrative Court, 29 October 1987, 2 C 72/86

In this case also, the judge was subject to a disciplinary sanction for having taken part in a newspaper advertisement dealing with the intended deployment of missiles on German ground aimed for protection against the former Soviet Union. The text of the advertisement expressly stated that the deployment of the missiles was unconstitutional. The advertisement was signed by judges in Northern Germany where they added their official position to their names. The Court observed that the judge made use of his official position to reinforce their political opinion; he implied in his statement an official reference and therefore linked his private political activity to his office, which was incompatible with the rules governing official duties. The Court emphasized that the judge had stressed his official self-conception and that the trust of the public in the independent administration of his office was undermined by this conduct. Consequently, the Court upheld the imposition of the disciplinary sanction was, and concluded that no violation of the right to freedom of expression had occurred.

Disciplinary Court of Lower Saxony, 14. September 1989, DGH 1/89

In this case, although no disciplinary sanction was imposed on the judge, his superior judge notified him that he had committed a breach of duty. The judge in question was one of the signees of a newspaper advertisement, along with other judges. The advertisement dealt with a

blockade of an access road to a depot of missiles on German ground run by the United States of America. The blockade was performed by judges. The Court ruled that the advertisement expressed an unacceptable approval of the unlawful behavior of the protesters. The text of the advertisement suggested that the blockade was a legitimate and lawful act protected by the freedom of expression. The Court also observed that it was incompatible with the official duties of a judge to publicly pay tribute to the unlawful conduct of his peers. The Court concluded that the judge had violated his official duties by taking part in that kind of political activity.

Austria

Supreme Court, 7 October 1921, Ds 24/21

The fact that a judge advocated monarchy as a form of government by singing the emperors anthem constituted a breach of official duties.

Supreme Court, 1 July 1994, Ds 1/94

It was held that it unsettles the trust of the public in the judiciary if a judge implies that the judiciary as a whole or certain judges are bribable by quoting *Charles Maurice de Talleyrand*: “The judiciary is a prostitute of politics”.

EUROPEAN COURT OF HUMAN RIGHTS

Handyside v. the United Kingdom

While referring to a European Commission of Human Rights Report, it was acknowledged that different standards may be applicable to different categories of persons, such as civil servants, soldiers, policemen, journalists, publishers, politicians etc., whose duties and responsibilities must be seen in relation to their function in society. This specific nature of civil service requires that a civil servant is bound by a duty of loyalty and discretion which should be taken into account when assessing the scope of freedom of expression.

Harabin v. Slovakia [62584/00, 29 June 2004] and Harabin v. Slovakia [ECtHR 20 November 2012, 58688/11]⁸⁵

Both these cases were based on complaints by the Slovakian Supreme Court President Harabin. In both cases he claimed that the revocation of his appointment as well as salary cut were a consequence of his opinions on the law and on judicial independence; which he regarded as an interference with his freedom of expression. In both cases the European Court of Human Rights (ECtHR) disagreed. It was observed by the Court that having regard in particular to the growing importance attached to the separation of powers and the importance of safeguarding the independence of the judiciary, any interference with the freedom of expression of a judge calls for close scrutiny. However, in assessing whether an interference in the right to freedom of expression of a judge has happened, concrete circumstances of the case as a whole have to be considered, with particular importance to the office in question, the contents of the impugned statement, the context in which the statement was made and the nature and severity of the penalties imposed.

Baka v. Hungary (Application no. 20261/12) 23 June 2016⁸⁶

Judge Baka in his capacity as the President of Supreme Court and of the National Council of Justice, expressed his views on various legislative and constitutional reforms affecting the judiciary. Later, a bill on the transitional provisions of the Fundamental Law, providing that the mandates of the President of the Supreme Court would be terminated was adopted by the Parliament of Hungary. As a consequence, the applicant's mandate as President of the Supreme Court ended. Turning specifically to the particular situation of the judiciary, the Grand Chamber of ECtHR stated (paras 162 to 167):

“...it can be expected of public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called in question... The dissemination of even accurate information

⁸⁵ Sietske Dijkstra, The Freedom of the Judge to Express his Personal Opinions and Convictions under the ECHR, www.utrechtlawreview.org, Volume 13, Issue 1, 2017, <http://doi.org/10.18352/ulr.371>. The 2012 judgement is available at <https://www.conjur.com.br/dl/decisao-corte-europeia-direitos-humanos76.pdf>

⁸⁶ Available at <https://www.icj.org/wp-content/uploads/2016/06/Hungary-CASE-OF-BAKA-v.-HUNGARY.pdf>

must be carried out with moderation and propriety... The Court has on many occasions emphasised the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a law-governed State, must enjoy public confidence if it is to be successful in carrying out its duties ... It is for this reason that judicial authorities, in so far as concerns the exercise of their adjudicatory function, are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges...”

At the same time, the Court also stressed that questions concerning the functioning of the justice system fall within the public interest, the debate of which generally enjoys a high degree of protection under Article 10 of the ECHR. Even if an issue under debate has political implications, this is not in itself sufficient to prevent a judge from making a statement on the matter. Issues relating to the separation of powers can involve very important matters in a democratic society which the public has a legitimate interest in being informed about and which fall within the scope of political debate.⁸⁷

Finally, the Court reiterated the “chilling effect” that the fear of sanction has on the exercise of freedom of expression, in particular on other judges wishing to participate in the public debate on issues related to the administration of justice. This effect, which works to the detriment of society as a whole, is also a factor that concerns the proportionality of the sanction or punitive measure imposed...”⁸⁸

It was also noted that Judge Baka’s case was distinguishable from other cases in which the issue at stake was public confidence in the judiciary and the need to protect such confidence against destructive attacks. Although the government relied on the need to maintain the authority and

⁸⁷ “171. On the contrary, the applicant expressed his views and criticisms on constitutional and legislative reforms affecting the judiciary, on issues related to the functioning and reform of the judicial system, the independence and irremovability of judges and the lowering of the retirement age for judges, all of which are questions of public interest (see, *mutatis mutandis*, Kudeshkina, §§ 86 and 94). His statements did not go beyond mere criticism from a strictly professional perspective. Accordingly, the Court considers that the applicant’s position and statements, which clearly fell within the context of a debate on matters of great public interest, called for a high degree of protection for his freedom of expression and strict scrutiny of any interference, with a correspondingly narrow margin of appreciation being afforded to the authorities of the respondent State.”

⁸⁸ “173. Furthermore, the premature termination of the applicant’s mandate undoubtedly had a “chilling effect” in that it must have discouraged not only him but also other judges and court presidents in future from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary.”

impartiality of the judiciary, the views and statements publicly expressed by Judge Baka did not contain attacks against other members of the judiciary; nor did they concern criticisms with regard to the conduct of the judiciary dealing with pending proceedings.

It was further observed that Judge Baka expressed his views and criticisms on constitutional and legislative reforms affecting the judiciary, on issues related to the functioning and reform of the judicial system, the independence and irremovability of judges and the lowering of the retirement age for judges, all of which were questions of public interest. His statements did not go beyond mere criticism from a strictly professional perspective. Accordingly, the Court considered that Judge Baka's position and statements, which clearly fell within the context of a debate on matters of great public interest, called for a high degree of protection for his freedom of expression and strict scrutiny of any interference, with a correspondingly narrow margin of appreciation being afforded to the authorities of the respondent State.

Wille v. Liechtenstein [App No 28396/95, ECHR 1999-VII, (2000) 30 EHRR 558, IHRL 2929 (ECHR 1999), 28th October 1999, European Court of Human Rights [ECHR]; Grand Chamber [ECHR]]⁸⁹

In this case, the ECtHR examined whether the refusal of the Prince of Liechtenstein to reappoint Judge Wille as the President of the Supreme Court was a consequence of his views that he expressed during a series of lectures at a research institute on questions of constitutional law and whether this interference corresponded to a "pressing social need". In view of the status of the Judge Wille (a high ranking judge), the ECtHR reiterated the special significance of "duties and responsibilities" referred to in Article 10(2) ECHR and that the public officials serving in the judiciary should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called into question. At the same time, the Court also considered that an interference with the freedom of expression of a judge in a position such as Judge Wille called for close scrutiny. The Court considered that although the lecture given by the judge at a research institute concerned matters of constitutional law which had inevitably political implications, this element alone should not have prevented him from making any statement on this matter. The lecture in question concerned the issue of whether the

⁸⁹ https://www.echr.coe.int/Documents/CP_Liechtenstein_eng.pdf

Prince was subject to the jurisdiction of the Constitutional Court. The Court was also mindful of the appropriateness of the expressions. The ECtHR, by sixteen votes to one, took into account that the lecture did not contain severe criticism of persons or public institutions or insults against high officials or the Prince.⁹⁰

Kudeshkina v. Russia [App no 29492/05, IHRL 3610 (ECHR 2009), 26th February 2009, European Court of Human Rights [ECHR]]⁹¹

In a live broadcast of her interview with the radio station, Judge Kudeshkina stated that ‘years of working in the Moscow City Court have led me to doubt the existence of independent courts in Moscow’; ‘a judge, although defined by law as an embodiment of judicial power and independent in this capacity, in fact often finds himself in a position of an ordinary clerk, a subordinate of a court president’; ‘the courts of law are used as an instrument of commercial, political or personal manipulation’; ‘if all judges keep quiet this country may soon end up in a [state of] judicial lawlessness.’

In another interview with a newspaper, Judge Kudeshkina also stated: ‘looking around, one is just stunned by the lawlessness. The law applies quite strictly to ordinary people, but this is not the case when it comes to persons holding important posts. But they break the law too – although they are not subject to liability’; ‘the court administration tests each judge to see how flexible he is, so that when it comes to [the allocation of cases] they know who can be entrusted with a delicate case and whom to avoid’.

As a result of Judge Kudeshkina’s statements, it was alleged that in so doing knowingly and intentionally she disseminated in civil society false and untruthful fabrications about the arbitrariness allegedly prevailing in the judicial sphere; that, in dealing with specific cases, judges find themselves under constant and undisguised pressure exercised through the court presidents; that the court presidents pre-test to what extent one or other judge may be controlled in order to determine who could be entrusted with delivering a knowingly unjust judgment in a

⁹⁰ Sietske Dijkstra, The Freedom of the Judge to Express his Personal Opinions and Convictions under the ECHR, www.utrechtlawreview.org, Volume 13, Issue 1, 2017, <http://doi.org/10.18352/ulr.371>

⁹¹ Available at <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-91501%22%5D%7D>

case; that no one can be sure that his case is examined by an impartial tribunal; that judges in fact betray the interests of justice by adopting the position of the prosecution in most cases; that a judge in the country is not independent and honest, but [is] a typical subordinate public servant; that in the country there is complete lawlessness, and judicial chaos. It was further alleged that dissemination by a judge of such information posed a great public danger because it signified deliberate slandering of the authority of the judiciary and intentional undermining of the prestige of the judicial profession, and also promoted incorrect ideas about corrupted, dependent and biased judicial authorities in the country, which had resulted in the loss of public trust in the fairness and impartiality of examination of cases brought before the courts of law. As a result, the false information imparted to civil society by Judge Kudeshkina, undermined public confidence that the judiciary in Russia are independent and impartial; consequently, many citizens were led to believe, erroneously, that all judges in the country were unprincipled, biased and venal, that in exercising their functions they only pursue their own mercenary ends or other selfish goals and interests.

In choosing the disciplinary sanction to be imposed on Judge Kudeshkina, the qualification board took into account that in making her statements, she dishonoured the judges and the judicial system of Russia; she disseminated false information about her colleagues; she traded the dignity, responsibility and integrity of a judge for a political career; preferred her own interests to the values of justice; abused her status as a judge in propagating legal nihilism, causing irreparable damage to the foundations of judicial authority.

Judge Kudeshkina claimed, *inter alia*, that her dismissal from judicial office following her statements in the media constituted a violation of the freedom of expression as provided for in Article 10 of the ECHR. She claimed that judges, like other persons, enjoyed the protection of Article 10 and that the interference with her freedom of expression was not “prescribed by law”, did not pursue a legitimate aim and, finally, was not necessary in a democratic society.

Judge Kudeshkina further claimed that, although the authorities had declared that her termination of office was necessary for “maintaining the authority and impartiality of the judiciary”, this was not the true purpose of the disputed measure. She contended that the authorities were determined

to demonstrate to all members of the judiciary that information concerning the irregular functioning of the judicial system must not be disclosed to the general public, in order to preserve the judicial community from any public scrutiny even in matters concerning the implementation of procedural safeguards.

She further submitted that judicial independence and impartiality were issues of great public concern in Russia, where citizens had little trust in courts and the judiciary. She had decided to unveil the facts of pressure exerted on court and ordinary judges because she considered that drawing public attention to the problem would serve the interests of justice and the principles of independence and impartiality better than concealing the disgraceful facts. Judge Kudeshkina also claimed that she should not have been prevented from criticising the domestic system of justice only because she was a judge. Although she was a civil servant, she enjoyed the rights and freedoms protected under the ECHR, including those guaranteed by Article 10, just as other citizens did.

The Court held, *inter alia*, that issues concerning the functioning of the justice system constituted question of public interest, the debate on which enjoyed the protection of Article 10. However, the Court pointed out the special role in society of the judiciary, which, as the guarantor of justice, must enjoy public confidence if it is to be successful in carrying out its duties. The Court also observed that it may therefore prove necessary to protect that confidence against destructive attacks which are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying and what was at stake here was with regards to protection of the judiciary's authority. For this reason the Court found it incumbent on judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called into question.

The Court also observed that Judge Kudeshkina made the public criticism with regard to a highly sensitive matter, notably the conduct of various officials dealing with a large-scale corruption case in which she was sitting as a judge. Indeed, her interviews referred to a disconcerting state of affairs, and alleged that instances of pressure on judges were commonplace and that this

problem had to be treated seriously if the judicial system was to maintain its independence and enjoy public confidence. In so doing, she raised a very important matter of public interest, which should be open to free debate in a democratic society. Her decision to make this information public was based on her personal experience and was taken only after she had been prevented from participating in the trial in her official capacity.

Finally, the Court also assessed the penalty imposed on Judge Kudeshkina. It noted that the disciplinary proceedings entailed the loss of the judicial office she held and of any possibility of exercising the profession of judge. In the Court's opinion it was undoubtedly a severe penalty and it must have been extremely distressing for Judge Kudeshkina to have lost access to the profession she had exercised for 18 years. This was the strictest available penalty that could be imposed in the disciplinary proceedings and, in the light of the Court's findings, did not correspond to the gravity of the offence. Moreover, it could undoubtedly discourage other judges in the future from making statements critical of public institutions or policies, for fear of the loss of judicial office.

The Court recalled the "chilling effect" that the fear of sanction has on the exercise of freedom of expression of other judges wishing to participate in the public debate on the effectiveness of the judicial institutions.

Upon concluding, the Court, by four votes to three, held that there had been a violation of Article 10 of the Convention.

It is interesting to note the dissenting opinions of Judge Kovler joined by Judge Steiner in this case. The opinions refer to the Resolution on Judicial Ethics adopted by the Plenary of the ECtHR Court on 23 June 2008 which stipulates in point VI, on "Freedom of expression": "Judges shall exercise their freedom of expression in a manner compatible with the dignity of their office. They shall refrain from public statements or remarks that may undermine the authority of the Court or give rise to reasonable doubt as to their impartiality" The dissenting note observes that having applied this principle to the judges of ECtHR, the same should be applied to colleagues in other courts, who are also constrained by similar obligations.

On the point of “chilling effect” as held by the majority, the dissenting judges observed that “The Court draws attention to the “chilling effect that the fear of sanction has on the exercise of freedom of expression”. The dissenting note observes that in fact the “chilling effect” of this judgment could be to create an impression that the need to protect the authority of the judiciary is much less important than the need to protect civil servants’ right to freedom of expression, even if the civil servant’s *bona fide* intentions are not proved....”

Kayasu v. Turkey [ECtHR 13 November 2008, 64119/00 and 76292/01]

The case was based on a complaint from the public prosecutor Kayasu, who had been dismissed because he had initiated criminal proceedings against statesmen involved in the coup d’état of 1980 and because he had received the press at his home to explain his action. The ECtHR viewed Kayasu’s dismissal as detrimental to society, since it affected the confidence of the public in the ability of judicial officials to do what is necessary to maintain the rule of law. It was considered that the actions and expressions of the public prosecutor were aimed at displaying a dysfunctional democratic system so that they were more than a personal opinion. It was considered that the public prosecutor’s accusations against the army generals could not be qualified as insults against the generals or the army.⁹²

OTHER UNREPORTED CASES⁹³

Egypt⁹⁴

In Egypt, since 2014, dozens of judges have been forced into retirement following disciplinary proceedings that resulted in arbitrary limitations to the judges’ right to freedom of expression. In the two cases known as the “Judges for Egypt Case” and the “July 2013 Statement Case”, it was

⁹² Sietske Dijkstra, The Freedom of the Judge to Express his Personal Opinions and Convictions under the ECHR, www.utrechtlawreview.org, Volume 13, Issue 1, 2017, <http://doi.org/10.18352/ulr.371>

⁹³ Judges’ and Prosecutors’ Freedoms of Expression, Association and Peaceful Assembly - Submission to the United Nations Special Rapporteur on Independence of Judges and Lawyers for his upcoming report to the Human Rights Council February 2019 available at <https://www.icj.org/wp-content/uploads/2019/02/Universal-SRIJL-Judges-Advocacy-non-legal-submission-2019-ENG.pdf>

⁹⁴ Egypt: authorities must end actions against independent judges <https://www.icj.org/egypt-authorities-must-end-actions-against-independent-judges/> “Instead of subjecting judges to arbitrary proceedings for lawfully exercising their rights, the Egyptian authorities should stop its sustained campaign to muzzle judges who are seen as not friendly to the authorities,” said Said Benarbia, Director of the ICJ MENA programme. “The Egyptian authorities must reinstate all judges who were removed from office solely for exercising their rights to freedom of expression and assembly and drop all charges against those currently subject to disciplinary proceedings for charges stemming from the exercise of these rights.”

found that judges had been removed from office following mass, arbitrary and unfair disciplinary proceedings.

In the cases of Judge Assem Abdel Jabar, former deputy President of the Court of Cassation, and Judge Hicham Raouf, a judge in Cairo's Court of Appeal and former deputy Minister of Justice, were referred to the Supreme Disciplinary Board for "unfitness proceedings" after they participated, together with other leading lawyers and legal experts, in a workshop to discuss and propose new anti-torture legislation. The proceedings against Mr Abdel Jabar and Mr Raouf started in mid-March 2017 and remain pending.

In April 2018, the Cairo Military Court sentenced Hisham Geneina, a former judge and former head of Egypt's Central Auditing Authority, to five years' imprisonment for "publishing false information harmful to national security" after he criticized the Egyptian Authorities' interference with the election process and referred to the existence of documents incriminating military and political leaders in a media interview.

Morocco⁹⁵

Judge Al-Haini, together with his colleague Judge Amal Homani, were referred to the High Judicial Council by the Minister of Justice on unwarranted allegations of "violating the duty of discretion" and "expressing opinions of a political nature" following social media comments and media articles written by the judges in which they criticized the government's Draft Laws on the High Judicial Council and on the Statute for Judges.

South Korea

On a proposal by the National Court Administration (NCA) to create a 'second Supreme Court,' certain judges expressed their reservations and they were allegedly placed by the NCA under surveillance, both in their professional and personal dealings. Moreover, they were prevented from joining international conferences and national professional organizations. Some were also either side-lined for promotions or were not given preference for educational opportunities abroad.

⁹⁵Morocco: Arbitrary dismissal of Judge Al-Haini must be reversed <https://www.icj.org/morocco-arbitrary-dismissal-of-judge-al-haini-must-be-reversed/>

CONCLUSION

The Quranic and Islamic ideal of justice is inextricably intertwined with righteousness and truth. These golden rules are applicable to the freedom of expression exercisable by judges in the backdrop of *hisbah*. What must be balanced is the exercise of the freedom against duty to speak the truth, caution, forbearance, restraint and even silence. “Restrictions on freedom of speech imposed by society and the state and the consequent fear that exposition of facts and ideas may invoke wrath or disfavour, naturally inhibits the discovery of truth. The right to free speech is also an integral part of self-development. Imposing restrictions on the articulation of what an individual may wish to say, write, express or propagate compromises both his dignity and the desire for personal growth. Of these two objectives which are recognised and validated in Islam, it is, perhaps the discovery and vindication of truth on which Islam tends to be more emphatic but this should only be seen as a general characterization of Islam with its commitment to the discovery of truth. Even so it is reasonable to assume that in the event of a direct conflict between the quest for truth and human dignity the former would normally prevail.”⁹⁶

A judge is entitled to the right to exercise his freedom of expression as much as any ordinary citizen of the state. However such exercise must satisfy the following i.e. The expression or speech:

- (i) must contain the absolute truth and as a result truth will be upheld;
- (ii) is a result of the judge’s belief that it is his moral duty to speak;
- (iii) is for the betterment of the judicial system or its administration;
- (iv) will not to cause a greater harm than what the judge believes to rectify through his speech;
- (v) will lead to a useful purpose;
- (vi) will likely lead to a benefit for the public at large; and
- (vii) is expressed in a courteous and polite manner, adopting a suitable tone, language and choice of words.

⁹⁶ Mohammad Hashim Kamali, Freedom of Expression in Islam, Revised Edition 2010 p.8-9

Further the judge will also be subject to the reasonable restrictions imposed by law under article 19 of the Constitution of Pakistan, 1973 and the Code of Conduct. Additionally, he must show restraint in exercising his freedom i.e. caution and forbearance, in all cases where as a result of such exercise the authority and impartiality of the judiciary are likely to be called into question. In doing so, the judge must also assess the alternative of remaining silent against the usefulness of the speech and the likelihood of harm emanating out of it.

“Freedom of expression has often been characterized as a barometer by which to measure the democratic quality of a government and its commitment to rights and liberties of its citizens. It is, perhaps equally true to say that the endeavours of a people in safeguarding this freedom, and the way they balance its use against its possible abuse, is an index of their cultural refinement. The degree of tolerance that a society encourages on the part of its members to enable everyone to say what they have to say, and for the rest to show sensitivity in receiving it, is not just a question of legal finesse but reflects the liberality and latitude of a society’s collective conscience. Only in a secure and tolerant atmosphere where thoughtful contribution and constructive criticism are gracefully received and appreciated by the community and its leaders, can such contributions be positively encouraged and utilized.

A government which grants and protects its citizens’ right to freedom of expression can also ascertain their wishes, views and attitudes in public affairs. It is only to be expected that free speech may bring contentious issues out into the open and stimulate differences of opinion, but this may also be the only way to facilitate meaningful consensus over issues. In this sense, constructive free speech is, to a large extent, a question of attaining the correct balance of values, and the necessary incentives and disincentives at various levels of interaction in society. But public participation in government necessitates that every citizen has the assurance that he can say what he has to say without incurring anger or being oppressed by the ruling authorities. This need for openness is even more pronounced in regard to minority opinions and views that might oppose the majority or the government in power. For a government which only wishes to explore the views of its supporters is a dictatorship. On the other hand one which encourages impartiality inspires confidence and becomes a vehicle by which society may attain its aspirations.

Freedom of speech is also a powerful instrument when used to combat injustice and to explore the misconduct of rulers and leaders who exceed the limits of their authority. In this sense, freedom of expression plays an important role in enabling the public to monitor the conduct of its government. For it is through such freedom that errors and malpractices in public affairs are discovered. Thus, free speech plays a distinctive role in nurturing a well-informed and vigilant society – one that is likely to exercise good judgement in matters which concern it.”⁹⁷

⁹⁷ *Ibid* p.13-14

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