

## ***Article 248 of the Constitution of Pakistan 1973 in perspective of Islamic Law***

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### ***Abstract***

*Of the many problems prevailing in Pakistan is one of the immunity of the head of state/government functionaries in presence of Article 248 of the Constitution of Pakistan 1973 on one hand and Preamble and Articles 2 (Islam to be State Religion); 2A (Objective Resolution); 4 (Right to be dealt with in accordance with law); 25 (Equality before law); 31 (Islamic way of life); and 227 (provisions relating to the Holy Quran and Sunnah) of the Constitution on the other hand.*

It is essential to consider both the Articles. According to Article 248:

- ✓ The President, a Governor, the Prime Minister, a Federal Minister, a Minister of State, the Chief Minister and a Provincial Minister shall not be answerable to any court for the exercise of powers and performance of functions of their respective offices or for any act done or purported to be done in the exercise of those powers and performance of those functions:
- ✓ No criminal proceedings whatsoever shall be instituted or continued against the President or a Governor in any court during his term of office.
- ✓ No process for the arrest or imprisonment of the President or a Governor shall issue from any court during his term of office.
- ✓ No civil proceedings in which relief is claimed against the President or a Governor shall be instituted during his term of office in respect of anything done by or not done by him in his personal capacity whether before or after he enters upon his office unless, at least sixty days before the proceedings are instituted, notice in writing has been delivered to him, or sent to him in the manner prescribed by law, stating the nature of the proceedings, the cause of action, the name, description and place of residence of the party by whom the proceedings are to be instituted and the relief which the party claims.”

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Before discussing these Articles, it is important to analyse the requirements for constitution of an Islamic State and qualifications for head of state/government functionary in light of the theories presented by different Muslim political philosophers.

M.M Sharif<sup>1</sup> has defined following qualities to be present in persons before being chosen as representatives in an Islamic State:

1. *“They must have faith in the principles according to which they have to manage the affairs of the Caliphate”.*
2. *“They should not be unjust, licentious, forgetful of God, or transgressors of divine limits. They should be, on the other hand, honest, trustworthy, God-fearing and virtuous”.*
3. *“They should not be unwise and ignorant. They must be rather educated, wise, intelligent, and both bodily and intellectually fit to pilot the state”.*
4. *“They should be men of integrity so that they may be safely entrusted with public responsibilities”.*

The constitution of such a state shall be based on the following principles:

*“O ye who believe! Obey Allah, and obey the Apostle and those of you who are in the authority; and if you have a dispute concerning any matter, refer it to Allah and the Apostle if ye are (in truth) believers in Allah and the last Day. That is better and more seemly in the end” (Al Quran, IV, 59).*

Imam Abu Hanifa<sup>2</sup> was of the view that a caliph should be a Muslim, a male, free, just, and well versed in religion, and sound in body and mind. He has also provided for revolt against tyrannical rule of the caliph.

Imam Abu Yusuf<sup>3</sup> in his *Kitab al Kharaj*:

*“conceives the Caliph to be answerable not only to God but also to the public, and has quoted at several places from the sayings of the Prophet and the Companions to prove that the Muslims have an unquestionable right to criticize their rulers, and that such criticism contributes to the good of the people and the state”.*

Al Farabi<sup>4</sup> has classified chiefs into two classes. According to him,

*“It is evident that every man cannot be a chief. People differ in their intellectual capacity, in physical strength, in the exercise of virtuous deed, and in the acquisition of excellent habits of thinking, feeling, willing and doing. In every department of life and arts the strongest person, of excellent manners, who also knows, acts, and directs, is the chief of that department, the rest being the subjects. The chief is*

*either one of the first rank who is not subservient to anyone; or he is of the second rank, dominating some, and being dominated by some others”.*

He has mentioned strict criteria (12 characteristics) for the chiefs of first rank and for those of second rank (6 characteristics).

Al-Mawardi<sup>5</sup> presented his political thoughts in his *al-Ahkam al Sultaniyyah*. He has mentioned conditions for Imam to be elected. He has also provided for the grounds of deposition on grounds of adala (sense of justice); and change occurs in person of imam.

Nizam ul Mulq Tusi<sup>6</sup> in First Chapter of Siyasat namah says:

*“In every age God the Almighty selects someone from men and gives over to him the charge of the well-being of the world and the comfort and tranquillity of the human race after duly furnishing him with the art of government. He also makes him responsible for the peace and security of the land and endows him with all the necessary prestige in order that God’s creatures may live in peace and plenty and that justice and security may be the order of the day. He should be just, benevolent and must rule for the well-being of the people. He is accountable to God for all his deeds”.*

Al Ghazali in his famous book *Tibrul-Masbuk* portrays the functions of Amir. He says that:

*“The necessary qualities of an ideal ruler and reverently expresses that he should have intellect, knowledge, perception, right proportion of things, chivalry, love for the subjects, diplomatic bend, foresight, strong will-power, and must be well informed of the news of the day and the past history of the kings. The Amir must also vigilantly watch that his judges, secretaries, viceroys and other officers did their work well”.*<sup>7</sup>

According to Abu Ala Maududi<sup>8</sup>,

*“As regards the eligibility for membership of the consultative assembly or for the head of the state, there is one aspect which must be termed as legal eligibility, on the basis of which an election tribunal or a judge, after a due consideration and verification may declare a person eligible or non-eligible for election. There is yet another aspect of eligibility on which the selectors, the proposers and the voters base their judgment. The first aspect of eligibility may be possessed by every one of the millions of citizens of state, but it is the second which actually elevates very select few to the top. The success or otherwise of any constitution would depend on the fact that the minds of the masses have or have not been trained properly to elect only those who are eligible for those august positions in accordance with the spirit of the constitution rather than its form only”.*

Both the Quran and the Hadith give clear guidance about these two aspects of eligibility. As regards the first, the following four conditions have been prescribed: should be Muslim; should be male; should be sane and adult; and should be citizen of the Islamic State.

In light of the above mentioned criteria, a person can be chosen as an elected representative of Shura or head of Islamic State. The question which follows thereafter is that who is to be chosen among all the eligible members of an Islamic State? Simple answer is that a trustworthy, God fearing and aalim should be elected/chosen.

So these are the some of the features of different eminent Muslim philosophers. They have presented qualifications for the head of the State as are given in Article 62 of the Constitution and provided grounds for the removal of the head on different grounds as are embodied in Articles 63 and 63A of the Constitution. Now I will come to the immunity of the head of the state.

As the present era is the era of welfare states, so the state has to work in almost all the fields of the life for the welfare of people. If the head of state is to answer all the acts he has done in official capacity it will be impossible to carry on functions of the state smoothly. This immunity in one way or the other is provided in the constitution of the world with certain limitations.

As an Islamic State, the question of immunity is controversial. There are two schools of thought over this issue. One school of thought is favouring immunity on the touchstone of concept of welfare state while the other is opposing as against Islamic principles and certain articles of the Constitution. In the lines below are the arguments of both the schools of thought.

First school of thought considers protection in a positive sense. According to them Article 248 offers dual protection. Clause 1 of the Article is limited in scope which provides protection for official acts whereas Clause 2 & 3 are wider and offers unlimited protection for president, governor etc. against the criminal liability.

*“Articles 248(2) and (3) on the other hand unequivocally prohibit initiation or continuation of any criminal proceedings against the president during his term in office. The language barring continuation of pending proceedings makes it obvious that the intent here is not just to protect acts of the president while in office, but also his personal acts from before. Further, given that these provisions prohibit the state and its authorities from instituting or continuing proceedings rather than affording the president with a defence in case criminal proceedings are brought against him, the legal argument being made by some analysts that the president needs to proactively claim immunity seems misplaced”.*<sup>9</sup>

On other hand, constitutional immunity is provided in few of the constitutions and Pakistan is one of them. While majority of the Constitutions of the world believe in rule of law and equality before law. In US history, three of the incumbents Presidents were tried for impeachment over different charges levelled against them. But in Pakistan President etc. are strangely exempted.

Legal fraternity is divided over the interpretation of this Article. However, some of the eminent lawyers have opined that this immunity is not exclusive in nature because its wording is vague and needs proper interpretation. Also, if an elected person (eg President) is alleged to have committed a wrong or is liable for criminal offense, he should resign and it is moral obligation upon him to keep retain the trust of the ruled.

It is evident from teaching of Islam that no one is above law. Everyone should be treated with same law. While keeping this in view, it can be deduced that if any clause in the Constitution provides for such violation of Islamic teachings, other organs of the State must come forward, even the elected/chosen. In this regard various provisions of the Constitution of Pakistan 1973 are crystal clear particularly Preamble.<sup>10</sup>

There is a huge burden on the judiciary of Pakistan to interpret the controversial Article 248 and the concept of immunity in light of the other Articles embodied in the Constitution.

It is clear from above discussion no one is above law. Even Article 25 of the Constitution of Pakistan provides for equality before law. As all are equal before law, therefore no one should be given/extended any kind of exemption from due process of law.

### References

- 1 M.M Sharif, *A History of Muslim Philosophy*, the University of Michigan Publication, Vol I, p 194
- 2 *Ibid*, p 683 & 688
- 3 *Ibid*, p 698
- 4 *Ibid*, p 710
- 5 *Ibid*, p 719, 720, 726 & 728
- 6 Muhammad Aslam chaudhry, *Sages of the Ages*, Lahore: Noor sons, 1970, p 364
- 7 *Ibid*, 396
- 8 Khurshid ahmad (Ed.), *Abul A'la Maududi, The Islamic Law and Constitution*, Lahore: Islamic Publications (Pvt.) Ltd, 1960, 242-244.
- 9 Babar Sattar , *A legal analysis of Article 248 and the presidential immunity in THE NEWS* 3-4-2012.
- 10 Najam Mahmud, retrieved from <http://www.studying-islam.org/articletext.aspx?id=1270> on 10-6-2012