

Published:  
July 6, 2025

## **Comparative Analysis in Terms of Islamic Viewpoint Regarding Appointment of Judges in Superior Courts of Malaysia and Pakistan**

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### **ABSTRACT**

No society can survive without the system of justice. It's a part and parcel of human's life. Justice is dispensed through the particular persons called judges. Judges are the backbone of a judicial system. Judges are appointed in accordance with its respective system. The objective of this research is to analyze the appointment of judges in superior courts of Malaysia and Pakistan. What are the main differences in appointment of judges in Malaysia and Pakistan? How judges are appointed and what qualification is required for appointments in the both judicial systems. How Malaysian judicial system is different from the Pakistani judicial system. Uniqueness and drawbacks of both judicial systems are also explained. This research paper is related to the Malaysian and Pakistani superior courts only. These courts play an active role in the making of the law because these are constitutional courts, although the law is made by the legislature.

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Precedents of superior courts are guide for subordinate judiciary, and the lower courts are bound to give judgments in the light of precedents of superior courts.

**Keywords:** appointment of judges, Malaysia judicial system, Pakistani judicial system, superior courts

## Introduction

In the universe, every creature is livening in a systematic way adopted by nature and it has its own system of justice. Human is the highest of all creatures as the Holy Quran states:

ولقد كرمنا بني آدم وحملناهم في البر والبحر ورزقناهم من الطيبات وفضلناهم على كثير ممن خلقنا تفضيلاً

Indeed, We (Allah Almighty) have graced the sons of Adam (human beings), and We (Allah Almighty) have carried them (by providing them means of transportations) on the land and sea, and We (Allah Almighty) bestowed them sustenance things good and pure, and We (Allah Almighty) have preferred above many of those whom We have created with a marked preferment.

When a person is so honored, how precious will be the system of justice created for him. Allah Almighty created the universe for man and subjugated this universe for mankind. He explained in the Holy Quran:

وسخر لكم ما في السموات وما في الأرض جميعاً منه إن في ذلك لآيات لقوم يتفكرون

And He (Allah Almighty) has made subservient to you as gift from Himself, all that is in the heavens and on earth; in this, behold, there are messages indeed for people who think!

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Man is so great that Allah Almighty subjugated everything in the universe for the sake of mankind and made them subservient for man. All these kind of things were created for him and then He said to the angles:

وَإِذْ قَالَ رَبُّكَ لِلْمَلَائِكَةِ إِنِّي جَاعِلٌ فِي الْأَرْضِ خَلِيفَةً

That now on earth I am going to make my caliph. Then He appointed man as His caliph and vicegerent. A man's greatness can be gauged from his appointment as vicegerent and being the caliph of Almighty Allah. Then He explained the purpose of human life in such a way that:

وَمَا خَلَقْتُ الْجِنَّ وَالْإِنْسَ إِلَّا لِيَعْبُدُونِ

I did not create the Jin and humans except to worship Allah. That means the purpose of Allah's creation of man in his earthly universe is to worship Allah. It is obligatory for man to obey His orders and submit and surrender himself to His commands. The purpose of worship is to attain piety and piousness, which means that justice, is an act that brings a person to the destination of piety and piousness. That is why it was mentioned in the Holy Quran:

اعْدِلُوا هُوَ أَقْرَبُ لِلتَّقْوَى

Be just; that is nearer to righteousness. You keep making decisions based on justice it is the closest to piety and piousness.

### **Pre-Independence Evolution of Malaysian Judicial System**

After promulgation of the First Chapter of justice in 1807, the Supreme

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Court was established in Malaysia during the British rule. The Second Charter of Justice was issued in 1826. The purpose of this Charter was to centralize the judicial system. The Third Charter was released to separate the judicial system of two territories in 1855. Before 1868, the judiciary and the administration were working under the same system but in 1868 the judiciary was separated from the administration. Inferior Courts i.e. Magistrates' Courts and Coroner's Courts were established in 1878. In 1946, a new Judicial Ordinance was promulgated, according to which the Inferior Courts were converted into lower courts.

### **Post-Independence Judicial System of Malaysia**

Malaysia came into being on 31 August, 1957 and got independence from the British rule. The Federation of Malaysia was took place on 16 September, 1963, resultantly; a Federal constitution was promulgated in 1963 to run the affairs the newly established state. According to this constitution, judges were granted new powers. In 1994, the judiciary was reformed and the courts were classified into a 3-tier system. A two-tier appeal process was introduced. The title of Lord President was replaced by Chief Justice. **Moreover, the names of the superior courts were changed from time to time after due process of law and amendment in the constitution as under:**

- 1957 to 1963 Supreme Court of Malaysia
- 1963 to 1980 Federal Court of Malaysia
- 1980 to 1994 Supreme Court of Malaysia
- 1994 till today Federal Courts of Malaysia

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## **Pre-Independence Evolution of Pakistani Judicial System**

Before the independence of Pakistan, the judicial system passed through three periods. The first period was the Hindu period and the Hindu system of justice was established in it. The second period was the Muslim period and it had a judicial system established by Muslim kings. Then the third period took place from the beginning of the establishment of the East India Company, this was the British period which continued until the emergence of Pakistan. According to the Charter of 1623, the East India Company only made decisions regarding its employees and their affairs. Later on, the Charter of 1661 empowered the Governor and Council to decide not only the cases of Company's servants and employees, but also the cases of all the people living in the settlements. As a result, new courts were established and English law was applied in them.

## **Post-Independence Judicial System of Pakistan**

After the independence of Pakistan, the Government of India Act 1935 was adopted as the interim constitution. Pakistan was a nascent state and had not framed its own constitution, so, the Government of India Act 1935 was adopted as an interim constitution with some modifications and amendments. For this reason, the judicial system of the new state remained the same as it was during the British rule. It continuous to be the same till today with some differences and improvements. The only point that has been added is that the Federal Shariat Court was established in 1980 after amendment in the Constitution of Islamic Republic of Pakistan. The Federal Shariat Court was empowered to examine the issue or question and give a decision which is contrary to the principles of Islam. If the court considers any law or provision of law to be un-Islamic or contrary to

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Islam, it will direct the concerned government to make it Islamic by amending it. Similarly, in cases related to Hudood which have been decided by the subordinate courts and they are not in accordance with the Islamic Shari'ah, then this court has the power of appeal to correct these decisions.

### **Overall View of Judicial Hierarchy in Malaysia**

Malaysian judicial system has been categorized into two categories. On one hand there are Subordinates Courts and on the other hand there are Superior Courts. The Subordinates Courts consist of Sessions Court, Magistrates Courts and Court for Children. The Superior Courts comprise High Courts, Court of Appeal, Federal Court and Special Court. Along with these courts, there is also Syariah Courts which are categorized as Syariah Subordinate Court, Syariah High Court and the Syariah Appeal Court.

### **Overall View of Judicial Hierarchy in Pakistan**

In the Pakistani judicial system, the hierarchy of the judiciary is divided into three divisions.

- i. District Judiciary / Subordinate Judiciary
- ii. High Courts
- iii. Supreme Court

District Judiciary / Subordinate Judiciary are divided into two levels: a. Civil Judges / Magistrates and b. District Judges / Session Judges. It works at district level.

The next step is the High Court. Each province has a High Court and similarly Islamabad Capital Territory also has a High Court. Although Islamabad

is not providence, still a High Court has been established for Federal Capital area and the Federation. There are five High Courts in the country.

1. Lahore High Court
2. Peshawar High Court
3. Sindh High Court
4. Baluchistan High Court
5. Islamabad High Court

The next stage is the Supreme Court. The Pakistan's highest court is known as Supreme Court.

### **Malaysian Superior Courts**

Malaysian Superior Courts consist of i) the Federal Court that is the highest forum to dispense the justice in the country, ii) Court of Appeal iii) the High Courts of Malaya and Sabah & Sarawak. The both High Courts of Malaya and Sabah & Sarawak have the jurisdiction to entertain the appeals and cases which are turn down or accepted in the civil and criminal matters.

### **Pakistani Superior Courts**

The High Courts, Federal Shariat Court and the Supreme Court are called the superior courts. The Supreme Court has it original jurisdiction and as well appellate jurisdiction. The cases decided by the Provincial High Courts are appealed to the Supreme Court, thus it is called the appellate court. Similarly, appeals against decisions made by the District Judiciary are filed in the High Court. Federal Shariat Court has Original jurisdiction as well appellate jurisdiction under article 203-D of the Constitution.

### **Appointment of Judges in Malaysian Superior Courts**

- i) Chief Justice of the Federal Court
- ii) President of the Court of Appeal
- iii) Chief Judge of a High Court
- iv) Other Federal Court Judges
- v) Other Court of Appeal Judges
- vi) Other High Court Judges, these judges are appointed in the manner prescribed in the Federal Constitution of Malaysia. The Prime Minister consults with the Chief Justice about the persons mentioned in the Article 122B for appointment of judges in the Superior Courts i.e. Federal Court, Court of Appeal and High Courts. The Prime Minister then appoints the persons as judges who have been selected under the due process. The YDPA / King / Monarchy appoint the judges after consulting the Conference of Rulers.

### **Appointment of Judges in Pakistani Superior Courts**

A Judicial Commission shall be constituted for the appointment of judges in the High Courts, Federal Shariat Court and Supreme Court. On the recommendation of judicial Commission, the president of Pakistan shall sign the summary for the appointments as sent by the Judicial Commission. An ad-hoc judge can also be appointed under the article 182 of the Constitution in the Supreme Court if necessary in consultation with the judicial Commission. For the appointment of Judges, separate commissions will be formed for the Supreme Court, for the High Courts, and for the Federal Shariat Court, the composition also will be different.

### **Comparison between both Judicial Systems**

Both systems of justice are influenced by the British judicial system due to British rule. The pre-independence British justice system of these two countries is



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being operated with some changes. Wherever, there is a need for change, this system is being operated by making some changes according to the need of time. Along with this conventional system, there are Shariah Courts which make decisions according to the Islamic principles and its teachings. In both countries, on the one hand, there is a conventional system, in which the appointment of judges requires citizenship of respective country and 10 years of practice. On the other hand, the Islamic justice system is a branch in which the procedure for appointing judges is the same but the qualifications are different. For appointment in these courts, it is necessary to know Islamic jurisprudence, to know Islamic principles and to be a religious scholar so that decisions are made keeping in mind the Islamic laws. Islamic Courts be it in Malaysia or Pakistan is getting desired results to some extent. In fact, there is a need to reconstruct the entire judicial system in the light of Islamic jurisprudence and Islam. So that people who are divided into two systems, conventional and Islamic, can breathe a sigh of relief under the shadow of a real and workable system.

### **Conclusion:**

The both countries got independence from the British Empire. Due to which the judicial systems are almost same as regards the hierarchy in superior courts. Both judicial systems of Malaysia and Pakistan have a strong influence of the British judicial system. There are appointments in Syariah Courts in Malaysia and Federal Shariat Court in Pakistan according to Islamic point of view and the judges are being appointed as per qualification set by Islamic law. As for as customary judicial system is concerned, that has been taken from British judicial system, there is no appointments as per conditions set by Islamic law. Moreover,

Published:  
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according to Islamic jurisprudence (الفقه الاسلامي), not all conditions are taken into consideration in both judicial systems of Malaysia and Pakistan at the time of appointment in Syariah Courts in Malaysia and Federal Shariat Court of Pakistan.

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