INDEPENDENCE OF JUDICIARY

MR. JUSTICE CH. IJAZ AHMED,
JUDGE, SUPREME COURT OF PAKISTAN.

The judge occupies a pre-eminent position in the modern state. He is the guardian of the rights, and privileges of the people against the encroachment of private persons, and the aggression of executive officers. His function consists in interpreting the laws of the country and applying them to individual cases. He has got to settle not only private disputes but to bring under review executive action. The way he discharges his duty is of vital importance to the people. The legislature may lay down good and wholesome laws. But they would not be of any avail if they are not ably, promptly and impartially applied. Without right administration of justice, good government is out of the question.(1) “There is,” says Lord Bryce, “no better test of the excellence of a government than the efficiency of its judicial system, for nothing more nearly touches the welfare and security of the average citizen.”(2)

Now if judicial administration has to be run properly and efficiently, some qualities are indispensable in the judges. Legal knowledge and skill, are of course their essential attributes. In interpreting and applying the law, they must have a thorough grounding in the legal principles and practices. But this intellectual equipment is not enough per se, for the right discharge of their duties they must be at the same time adorned with the moral virtue of impartiality, which has in fact to be the breath of their judicial life. Without looking to the interest of any one, without consulting personal profit or party gain, without grinding national or communal axe, the judge has got to decide a case on its own merits. He is no respecter of person. Neither the smile nor the frown of any authority however high, may influence his verdict. To exercise such impartiality is certainly no easy job. It is indeed a tough business to overcome all internal and external influences and deliver the judgment only with an eye to the law of the country and the facts of the cases. As regards the internal influences – the personal prejudices and ideals – they must be left to the judge to be repressed by him as best he can. By no rules and regulations, they can be checked. But as regards the external influences and control, the judge should be made independent of them, by every necessary precaution. Especially, he should be made immune from all control which the executive is so prone to exercise over him. This independence is the prime virtue that must always pervade a court of law. Without it, all other virtues which a judge may possess come to nothing. Of what use, will be his legal learning, his wide experience and all his insight into human nature if he has not, the independence to put them into operation? On the contrary if he is under the thumb of the executive, these qualities of his will be requisitioned for curbing popular liberty, and trampling upon individual rights and not for maintaining them against executive onslaughts. Independence of all external control is hence the basic quality of the judicial bench.

At this juncture, it would be advantageous to refer to the following passages from the book titled “The Federalist Papers” by Alexander Hamilton-James Madison-Jhon Jay:-

“The complete independence of the Courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative
authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws and the like. Limitations of this kind can be preserved in practice no other way than through the medium of Courts of justice, whose duty must be to declare all acts contrary to the manifesto tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."

“This independence of the Judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have tendency in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed Constitution will never concur with its enemies in questioning that fundamental principle of republican government, which admits the right of the people to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness; yet it is not be inferred from this principle that the representatives of the people; whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing Constitution would, on that account, be justifiable in a violation of those provisions; or that the Courts would be under a greater obligation to connive at infractions in this shape than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act. But it is easy to see that it would require an uncommon portion of fortitude in the Judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community".

The 6th Conference of Chief Justices of Asia and the PACIFIC held at Beijing on 19th August 1995 adopted the Beijing Statement of Principles of the Independence of the Judiciary in the LAW ASIA Region as follows:

1. The Judiciary is an institution of the highest value in every society.

2. The Universal Declaration of Human Rights (Art. 10) and the International Covenant on Civil and Political Rights (Art. 14(1)) proclaim that everyone should be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. An independent judiciary is indispensable to the implementation of this right.

3. Independence of the Judiciary requires that:
   
   (a) the judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source; and
   
   (b) the judiciary has jurisdiction, directly or by way of review, over all issues of a justicable nature.

4. The maintenance of the independence of the judiciary is essential to the attainment of its objectives, and the proper performance of its functions, in a free society observing the Rule of Law. It is essential that such independence be guaranteed by the State and enshrined in the Constitution or the law.

5. It is the duty of the Judiciary to respect and observe the proper objectives and functions of the other institutions of government. It is the duty of
those institutions to respect and observe the proper objectives and functions of the Judiciary.

6. In the decision-making process, any hierarchical organization of the Judiciary and any difference in grade or rank shall in no way interfere with the duty of the judge exercising jurisdiction, individually or judges acting collectively to pronounce judgment in accordance with article 3(a). The Judiciary, on its part, individually and collectively, shall exercise its functions in accordance with the Constitution and the law.

7. Judges shall uphold the integrity and independence of the Judiciary by avoiding impropriety and the appearance of impropriety in all their activities.

8. 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.

9. Judges shall be free, subject to any applicable law to form and join an association of judges to represent their interests and promote their professional training, and to take such other action to protect their independence as may be appropriate.

Independence of judiciary truly means that the judges are, in a position to render justice in accordance with their oath of office and only in accordance with their own sense of justice without submitting to any kind of pressure or influence be it from executive or legislative or from the parties themselves or from the superiors and colleagues (3). The concept of judicial independence as recent international efforts to this field suggests, comprises following four meaning of judicial independence (4).

(i) Substantive Independence of the Judges: It referred to as functional or decisional independence meaning the independence of Judges to arrive at their decisions without submitting to any inside or outside pressure;

(ii) Personal independence: That means the judges are not dependent on Government in any way in which might influence them in reaching at decision in particular cases;

(iii) Collective Independence: That means institutional administrative and financial independence of the judiciary as a whole vis-a-vis other branches of the Government, namely the executive and the legislative; and

(iv) Internal Independence: That means independence of judges from their judicial superiors and colleagues. It refers to, in other words, independence of a judges or a judicial officer from any kind of order, indication or pressure from his judicial superiors and colleagues in deciding cases.

The independence of judiciary is a basic principle of our constitutional system of governance. The Constitution of Pakistan contains specific and categorical provisions for the independence of judiciary. The Preamble and Article 2-A state that “the independence of judiciary shall be fully secured” and with a view to achieve this objective, Article 175 provides that “the judiciary shall be separated progressively from the executive”. The rulings of the Supreme Court in the cases of Government of Sindh v. Sharaf Faridi (5), Al-Jehad Trust v. Federation of Pakistan (6) and Malik Asad Ali v. Federation of Pakistan (7) indeed, clarified the constitutional provisions and, thereby further strengthened the principle of the independence of judiciary, by providing for the separation of judiciary from the executive, clarifying the qualifications for appointment of judges of the High Courts prescribing the procedure and time frame for appointment of judges, appointment of Chief Justices and the transfer of a judge from a high court to the Federal Shariat Court. Furthermore, the Supreme Court judgments in the
cases of Mehram Ali v. Federation of Pakistan (8) and Liaquat Hussain v. Federation of Pakistan (9) are also in line with the above rulings, in as much as they elaborated and reiterated the principle of judicial independence and the separation of judiciary from the executive (10).

The Supreme Court of Pakistan in Zafar Ali Shah Vs. Pervez Musharaf (11) on the subject of independence of judiciary held:

"Stability in the system, success of the Government, democracy, good governance, economic stability, prosperity of the people, tranquility, peace and maintenance of law and order depend to a considerable degree on the interpretation of Constitution and legislative instruments by the Superior Courts. It is, therefore of utmost importance that the judiciary is independent and no restraints are placed on its performance and operation. It claims and has always claimed that it has the right to interpret the Constitution or any legislative instrument, and to say as to what a particular provisions of the Constitution or a legislative instrument means or does not mean, even if that particular provisions is a provisions seeking to oust the jurisdiction of this Court. Under the mandate of the Constitution, the Courts exercise their jurisdiction as conferred upon them by the Constitution or the law. Therefore, so long as the Superior Courts exist, they shall continue to exercise powers and functions within the domain of their jurisdiction, and shall also continue to exercise power of judicial review in respect of any law or provision of law, which comes for examination before the superior Courts to ensure that all persons are able to live securely under the rule of law; to promote, within the proper limits of judicial functions, the observance and the attainment of human and Fundamental Rights; and to administer justice impartially among persons and between the persons and the State, which is a sine qua non for the maintenance of independence of judiciary and encouragement of public confidence in the judicial system.

The Code of Conduct to be observed by the Judges of the Supreme Court and all the High Courts in Pakistan inter alia enjoins:

"The prime duty of a Judge as an individual is to present before the public an image of the justice of the nation. As a member of his Court, that duty is brought within the disciplines appropriate to a corporate body.

The Constitution, by declaring that all authority exercisable by the people is a sacred trust from Almighty Allah, makes it plain that the justice of this nation is of Divine origin. It connotes full implementation of the high principles which are woven into the Constitution, as well as the universal requirements of natural justice. The oath of a Judge implies complete submission to the constitution, and under the Constitution to the law. Subject to these governing obligations, his function of interpretation and application of the Constitution and the law is to be discharged for the maintenance of the Rule of Law over the whole range of human activities within the nation.

To be a living embodiment of these powers, functions and obligations call for possession of the highest qualities of intellect and character. Equally, it imposes patterns of behavior which are the hall-mark of distinction of a Judge among his fellow-men"
impartiality was strictly adhered to in the initial days of Islam. There are number of verses in the Holy Quran about the impartiality of judges and some of them are as follows:

“O, you who believe, be maintainers of justice, bearers of witness for Allah even though it be against your own selves or (your) parents or near relatives-whether he be rich or poor. Allah has a better right over them both. So follow not (your) low desires, lest you deviate. And if you distort or turn away from (truth), surely Allah is ever Aware of what you do” (Al-Quran) (15)

“O, ye who believe—stand out firmly for Allah, as witnesses to fair dealing and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just, that is next to Piety: and fear Allah, for Allah is well-acquainted with all that ye do.” (Al-Quran) (16)

“Judges are not to be led away be personal likes or dislikes, love or hate.” (Al-Quran (17)

Hazrat Umar Bin Khittab (R.A), the Second Caliph explained the principle that law was supreme and the judges must not be subordinate to the ruler. It is recorded that once a personal law suit was filed by a Jew against Caliph and when he as defendant appeared before the Qazi, the latter rose in his seat out of respect for the Caliph. Hazrat Umar (RA) considered this action to be unforgivable on the part of the Qazi and severely censured him. Another incident in this context took place when Jablah bin Al-Aiham was the ruler of a State in Syria. He embraced Islam. Once he was performing Haj, a part of his gown was trampled over by a poor Arab (Beduin), Jablah gave him a slap. The Beduin retorted with a slap. The infuriated Jablah went to Caliph Umar (RA) to complain about it, but was told that he had already received justice. Thereupon, Jablah said the Beduin would have been hanged if he would have been in his country. The Caliph’s reply was that a pauper and a prince were equal in Islam and that the Beduin did not do anything wrong. (18)

Islam, as a way of life, provides comprehensive legal code for justice, apart from general exhortation of justice. The salient features of Judicial System in Islam are as follows (19):

- The absence of justice results in total disintegration of the social structure.
- Deal justly that is nearest to your duty.
- If you judge between the mankind, judge justly.
- You have been sent as a Viceroy on earth, therefore, judge aright between mankind and do not follow desire.
- God has ordered to establish and execute through justice.
- The doing of justice is an attribute of God Almighty.
- The commandment to do justice and settle disputes between people emanates from and is the necessary incident of the appointment of Prophets.
- Even the slightest deviation from what has been ordained will result in beguiling from the way of God.
- It is the bounden duty of the State to establish and effective system of administration of justice.
Administration of justice for a single moment is better than non-obligatory worship of sixty years.

A Judge must know laws of the land, he must be honest and his integrity must be above board.

The law is supreme and the Judges must not subordinate to the Ruler.

Treat all people equally while doing justice in Court so that the justice should be seen to be done and poor petitioner may not feel any deprivation of justice.

The judiciary should be beyond every kind of executive pressure or influence, above fear or favour, intrigue or corruption.

Islam requires a Judge to be of such a calibre and character that if he himself is guilty of an unjust act he should rise in judgment against himself.

At this juncture, it is germane to quote an extract from an Article titled "the just judge" written by Sir Alfred Denning:

"A Judge should in his own character be beyond reproach, or at any rate should have so disciplined himself that he is not himself a breaker of the law. Time and time again he has to pronounce judgment on those who have offended against the law. He has to rebuke the evil and support the good. He cannot well do this ----he cannot without hypocrisy do it----if he himself has been found guilty of an offence against the law. I refer not to administrative offences like exceeding the speed limit but to grave offences which carry reproach in the eyes of the people. If a judge should be found guilty of an offence, whilst holding office, most people would say he should resign; but a very difficult question may arise if a man should have been found guilty some years ago and then afterwards be considered for appointment as a judge. Should the previous offence be a bar to his appointment? If he is appointed, will he not himself take a lenient view of those guilty of the like offence? Or else take a harsh view, so as to show that he is not affected by his past guilty? This raises a serious moral issue, it may be said that, if the offence is not known to the public generally, then the man can properly be made a judge. But is this a proper attitude to take? Even if it is not known to the many, it is known to the few: and it can at any time be made known to all the country through the medium of the newspapers. It could hardly be a contempt of court to make a true statement about it. The moral question seems to be the same whether the offence is publicly known or not. And upon the moral issue I would go back to Plato: for he discussed this very matter over two thousand years ago in the third book of the Republic. He recognizes that it is a good thing for a physician to have some personal experience of illness so that he can know better the feelings of his patients. Likewise it is good for an army officer to know what it is to carry a pack so that he can know what the men have to go through. But Plato says that it is not right for a judge to have personal experience of evil-doing. If you are appointing men to a police force you will not act on the motto “set a thief to catch a thief.” So also if you are appointing a judge you will not, says Plato, appoint a man who has committed the whole catalogue of crimes on the theory that he knows best what crime is. You will appoint a good man whose knowledge should be his guide, not his personal experience. The reason he gives is because vice cannot know virtue: but a virtuous nature, educated by time, will acquire knowledge of both virtue and vice. The answer would seem to be therefore that a man should not be appointed a judge if he has been found guilty of a grave offence against the law: even though it is not generally known. And when it is publicly known it is worse because the people will then point a finger of scorn".
In his famous letter to Malik-e-Asther, Hazrat Ali (R.A.) issued the following directions:

“So far as dispensing of justice is concerned, you have to be very careful in selecting officers for the same. You must select people of excellent character, superior calibre and meritorious record. They must possess following qualifications: Abundance of litigation and complexity of cases should not make them lose their temper. When they realize that they have committed a mistake in judgment they should not persist upon it and should not try to justify it. When truth is made clear to them or when right path opens up before them, they should not consider it below their dignity to correct the mistake made or to undo the wrong done. They should not be corrupt, covetous or greedy. They should not be satisfied with ordinary enquiry or scrutiny of a case but scrupulously go through all the pros and cons, must examine every aspect of the problem carefully, and whenever and wherever they find doubtful and ambiguous points they must stop go-through further details, clear the points and only then proceed with their decisions. They must attach greatest importance to reasoning, arguments and proofs. They should not get tired with lengthy discussions and arguments. They must exhibit patience as true and in sifting facts from judgments without fear, favour or prejudice. They should not develop vanity and conceit when compliments and praises are showered upon them. They should not be misled by flattery and cajolery. Unfortunately there are few persons having such characteristics. After you have selected such men, to act as your Judges make a point to go through some of their judgments and to check their proceedings. Pay them handsomely, so that their needs are fully satisfied and they are not required to beg or borrow or resort to corruption. Give them such a prestige and position in your State that none of your courtiers or officers can overlord them or bring harm to them. Let judiciary be above every kind of executive pressure or influence, above fear or favour, intrigue or corruption. Take every particular care of this aspect because before your appointment this State was under sway of corrupt, time-serving and wealth-grasping opportunists who were lewd, greedy and vicious and who wanted nothing out of a State but a sinful consent of amassing wealth and pleasures for themselves” (20).

Now, I take this opportunity to express my firm belief that society in the world can exist, without providing justice to the people. The job of a judge is very difficult but at the same time very easy. The attributes of a judge are: honest to his job, willing worker, command over the basic principles of law and a perfect gentleman. In fact according to my understanding concept of independent judiciary is not important. What is more important is independent judges. To have independent judges, the state is duty bound to develop a mechanism of such a nature which should be applied and acted upon at the time of appointment of judges. Appointment of judges should not be in few hands. It must be open. The Chief Justice of the concerned High Court must consult the Administrative Committee in particular and full court in general while recommending the names of a person for the post of judge to the concerned quarter. The same process should also be adopted at the time of recommendation of a name by the Chief Justice of Pakistan. Moreover, the age of the judges of the superior courts must be one and the same so as to eliminate aspiration to become a judge of the apex Court at the verge of retirement. I place emphasis on this suggestion, because a person who desire for the post of a judge renders himself disqualified for the same.

To end this discourse I quote the words of Sydney Smith: “Nations fall when judges are unjust, because there is nothing which the multitude think worth defending; but nations do not fall which are treated as we are treated And why? Because this country is a
country of the law; because a judge is a judge for peasant as well as for the palace; because every man’s happiness is safeguarded by fixed rules from tyranny or caprice....”

NOTES

5. PLD 1994 SC 105
6. PLD 1996 SC 324
7. PLD 1998 SC 161
8. PLD 1998 SC 1445
9. PLD 1999 SC 504
10. PLD 2000 SC 869
11. PLD 2000 SC 869 at P. 1241
12. Islam Ka Nizam-e-Adal (P.31)
13. Ibid – P. 36
14. Ibid – P 37
15. Chapter IV Verse 135
16. Chapter V, Verse 9
17. Chapter V, Verse 8
19. Methods of educating newly appointed judges by Justice Ch. Ijaz Ahmed (PLD 2005 JOU.1)
20. PLJ 1993 Mag 2.