

SEPARATE AND INDEPENDENT JUDICIARY

CHAUDHRY HASAN NAWAZ

Quite a few things deserve our attention in the context of talk about going into the next century as a civilized and progressive society, to be able to play our part effectively in the comity of nations. Our foremost requirement is the proper fixation of our priorities which are now in shambles. Apart from education, which word is meant to be understood in its wider sense as to include elementary, adult and all kinds of education, our next priority should be fair and speedy administration of justice, without which it would not be possible to infuse the kind of health into an otherwise ailing body politic, necessary for a claim to the status of a fully developed nation.

2. This goal of fair and speedy administration of justice cannot possibly be achieved without an independent and separate judiciary. The essence of independence is that in the discharge of his functions, a judge should reach conclusions on the basis of analytical examination of the record before him, which he will accomplish by virtue of his understanding, knowledge of law, training and appreciation of values, and that he is not led to his decisions by any ulterior consideration. This independence is demonstrated in his refusal to yield to any external pressure for conclusions, different from those justified by the material before him and evaluation of the law.

3. Our system of administration of criminal justice is mainly provided by the Code of Criminal Procedure, under which we have two kinds of Courts to deal with criminal cases. In the first category are the court of Sessions. Each province of the country consists of various Sessions Divisions and for each such Division a Court of Sessions is established by the Provincial Government with the appointment of a Session Judge for the Court. The Provincial Government is also authorized to appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in one or more of such courts. These courts are subordinate to the High Court of a province and they deal with all such cases of heinous nature where the punishment is either death or imprisonment of life. This will suggest that the courts of sessions is the highest court of criminal jurisdiction in a district. In exercise of their original jurisdiction, the judges of these courts deal primarily with cases of culpable homicide.

4. I should say that the judges of these courts are independent in every respect, because of their subordination to the High Court, which is the highest judicial authority in a province. As the scheme goes, they derive the authority to deal with the cases from the Code and they are not amenable to pressure of any kind from the executive authority.

5. But even here, there are a few things which can have a tendency to impair the independence of these judges. One of those is the inadequacy of salaries paid to them. The take home pay of a judge is seldom commensurate with his status, as would enable him to ensure comfortable maintenance of his family. Vast majority of these judges are without essential facility of a private library. They are compelled to live and work under the constant pressure of their overdrafts and spiral inflation, Mr. Warren Burger, the Chief Justice of United States of America once observed that unless the salaries of judges are made inflation proof, the constraints against alteration to their disadvantage may well be without meaning. The stock answer of the executive as to non-availability of funds is manifestly untenable and ignores the realities of situation. Another answer is the tendency to compare judicial salaries with those attached to the senior posts of the Government. The danger here lies in a purported comparison between incomparable. A Judiciary Act is required to be passed, which may ask the judges to fix their own salaries and allowances. The preliminary objective of trying to arrive at proper level of remuneration is to remove any ground for suspicion that the guardians of our liberties are dependent upon the government.

6. Another area in which the independence of judiciary has been threatened is where the judges are called upon to resolve problems, dealing with the fundamental rights and freedoms provided in the Constitution, which gives rise to a conflict between the judiciary and the executive. The matter can be settled if the judiciary are vested under the Constitution with the final responsibility of determining the propriety of executive and legislative actions.

7. Yet another area for damage to judicial independence is where the judges, at the government request, conduct inquiries into matters highly charged with political issues and considerations. This practice is justified on the ground of necessity to impart an air of impartiality and objectivity to the enquiry. But its consequences are not sometimes conducive to the functioning of an independent judicial system. Apart from wastage of time, the judges are made to involve themselves in issues having no rapport with the administration of justice and mostly such as are so controversial as to invite public criticism.

8. Another important aspect is provided by over-emphasis in the selection of judges from the bar. On paper, the requirement is that lawyers of exceptional capability should decorate the chair. It is usually maintained in support of this practice, that it is required to attract talent to the higher judicial forums. I feel that the Executive's prerogative to recruit judges at all levels can have its contribution in impairing the independence of judiciary. There is no reason why people should not be brought to the Bench by means of a competitive examination held by independent Public Services Commissions. In addition, it goes without saying that selection of judges from the bar deprives the aspiring young graduates from seeking recruitment to responsible judicial posts by competitive examination. The argument with regard to attraction of talent is evidently fallacious and unsound, for talented law graduates can also be available by means of competitive examination, especially if it be made known that there will be no selection from the bar. This apart, the prevalent practice of direct recruitment from the Bar, is likely to be abused in encouragement of favouritism, which is in addition to the fact that it negates the principle of equal opportunity for selection.

9. In the second category we have the courts of Magistrates in the Districts which, under the scheme of things, perform executive as well as judicial functions and are under the control of the Provincial Governments through Districts Magistrates. This amalgamation of executive as also judicial functions in one person is the root cause of many ills in our system of administration of criminal justice. Apart from the fact that their engagement with executive duties leaves very little time to them for performance of judicial functions, their independence in dealing with the judicial cases is also adversely affected on account of their subordination to the executive authorities. Further, I would say that the nature of both the duties is so self-contradictory that they cannot go in one person. The performance of judicial functions requires a mental aptitude, which can by no means be possible in the case of a person at the same time entrusted with the performance of executive duties. The consciousness that they are subordinate to the executive authority creates a state of mind which cannot be viable for a judicial aptitude. It hardly requires an emphasis that the priorities of an executive magistrate are basically different from those of a person wedded with judicial functions. Therefore, fair dispensation of criminal justice can never be possible unless the judiciary is separated from the executive, which may hopefully come about in the very near future in view of the Supreme Court's judgment, directing the Government to fulfill its constitutional obligation in that regard.