

# **The Final Frontier**

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By way of an opening statement I would like to observe that independence of judiciary is not an end in itself but it is only a means to the end and the end, for sure, is impartiality of judiciary. For diverse reasons that all of us can conceive an otherwise independent judiciary may still not be impartial and that is why mere achievement of independence of judiciary may not be good enough if the real objective of impartiality still remains an illusion. I may, therefore, emphasise at the outset that for any meaningful understanding of the issue it is imperative to realize and appreciate on a philosophical level that independence of judiciary is not the ultimate milestone to be crossed or the final target to be achieved but it is an ongoing effort in which different targets are to be set and achieved, different stages are to be crossed and different levels are to be attained till we achieve the ultimate objective of impartiality of judiciary. Stage one in this context is identifying the bottlenecks and removing them by suitably interpreting various constitutional and statutory instruments in order to pave the way for achieving independence of judiciary; stage two is consolidation and strengthening of independence of judiciary through bringing about and reinforcing the necessary milieu for the same; stage three is ensuring such a perception of the judiciary that the general public and the society at large feel persuaded to support its independence for their own benefit; and the fourth and the final stage of independence is that which I call the final frontier. I can understand your curiosity about this fourth stage but kindly wait for a few minutes till I come to the final frontier in the later part of this paper after some brief comments about the earlier three stages. Before framing of a Constitution for our homeland the founding fathers had resolved in the Objectives Resolution of 1949 to frame a Constitution which establishes an order wherein, amongst other ideals, “the independence of the judiciary shall be fully secured”. The said aspiration of the founding fathers now stands translated into the main body of the Constitution of Pakistan and forms a substantive part of the same. On the basis of that one sentence of the Constitution I, as a practising lawyer, had built up a whole thesis in the year 1994 and had written a detailed article titled ‘Independence of Judiciary: A Constitutional Challenge’ highlighting therein the loopholes in different provisions of the Constitution and how such loopholes were exploited by their misuse by those interested in thwarting independence of judiciary. I had humbly suggested in some detail the ways through which those loopholes could be plugged through the means of interpretation of the Constitution. That article was published in PLD 1994 Journal 101 and the same was also read by me as a paper at a seminar organized by the Supreme Court Bar Association of Pakistan at Lahore some time during the year 1994. Copies of that article had been made available by me to all the then Hon’ble Judges of the Supreme Court of Pakistan. Within a matter of less than two years of writing that article by me the Supreme Court of Pakistan decided the famous case of Al-Jehad Trust (PLD 1996 SC 324), popularly known as the Judges Case, and in that landmark judgment almost every avenue of interference with independence of judiciary was not only attended to but also a brilliant effort was made to interpret the relevant provisions of the Constitution in such a manner that threats to independence of judiciary posed by their misuse were minimised. If the above mentioned article of mine and the judgment rendered by the Supreme Court in Al-Jehad Trust case are placed side by side the similarities between the two

can strikingly be noticed. I, in all humility, would like to understand that the above mentioned effort made by me through my article on the subject had a small but a pioneering role in the end result. I would like to believe that I had been successful in sensitising their lordships of the Supreme Court about the issue and my little effort had at least triggered a thought process which later on led to a wonderful result. That was the first stage, i.e., the cognitive stage wherein the issue was identified and understood and an intellectual effort was made to tackle the same. That stage has already been successfully crossed by us way back in the year 1996 although some quarters have some reservations about proper implementation and follow up of the Supreme Court’s decision in the case of Al-Jehad Trust. In a civilized society and particularly in a democratic society the significance and importance of independence of judiciary is generally understood and universally cherished. Stage two in the journey towards independence of judiciary is consolidation and strengthening of independence of judiciary through bringing about and reinforcing the necessary milieu for the same. It is commonly known that in order to secure and then safeguard the independence of judiciary the following factors play an important role: constitutionally entrenched courts, security of tenure for judges, impartial

appointment process, articulated judicial ethical standards, impartial discipline process, adequate and constitutionally protected salary, physical security, civil immunity for judicial functions, freedom from interference in decision making from superior judicial officers outside of the appellate process, integration of subordinate courts

as full members of the judiciary, separation of the judiciary from the executive, judicial control of its own budget, judicial control of its own administration, judicial control of the curriculum and faculty of judicial education, freedom from arbitrary geographic transfers, avoidance of retrospective legislation about anything to do with the judiciary, executive support to enforce judgments even against itself, executive support to prosecute and punish attempted or actual judicial corruption, executive restraint from interference in judicial decision making process, an independent Bar, a government sensitive to public opinion, an educated public demanding an impartial judiciary and a free and informed press. In our quest for securing independence of judiciary we in Pakistan are presently passing through this second stage. We are in the process of consolidating the gains achieved by us through the cognitive stage. We already score highly on many of the above mentioned prerequisites of this stage of consolidation of independence of judiciary but unfortunately security of tenure and a government sensitive to public opinion happen to be two critical areas where everything achieved through the other factors stands undermined from time to time. Repeated interruptions in constitutional governance of the country with resultant foisting of unrepresentative governments which are not sensitive to public opinion and unconstitutional and unceremonious exit of members of the superior judiciary on most of such occasions go a long way in destroying or neutralizing every other success achieved towards independence of judiciary. We are, however, keeping our fingers crossed and are hopeful of a better future as the present military ruler assures us that there shall be no future military intervention in the constitutional governance of the country. We only hope that his words prove to be prophetic although we know that his wish may not be treated as a command by any future adventurer. Any intellectual breakthrough at the cognitive stage or any amount of consolidation of independence of judiciary through the factors relevant to the second stage is likely to be meaningless if an otherwise independent judiciary does not command confidence and respect of the people it is meant to serve. The independence of judiciary must enure to the benefit of the people at large so that the people at large take it upon themselves to defend such independence of judiciary whenever it comes under an assault from its predators. The third stage, thus, pertains to developing proper perceptions about the judiciary by making the fruits of its independence available to the members of the society and none except the judiciary itself is to reflect upon this aspect and to deliver. The people of a country may not be interested in planting and growing a tree and in making it strong if the tree bears no fruit for them and does not even provide them shade or shelter when needed. Now I come to the fourth stage which I call the final frontier. In my capacity as a lawyer I had written and spoken about independence of judiciary on several occasions but when I speak now my perspective and angle are slightly different. On the previous occasions I had looked at the issue from the point of view of a lawyer but this time I speak as a Judge who has already spent a good number of years on the Bench. I have seen the system from within and, thus, I know and understand a few things which an outsider may not be in a position to appreciate. In this backdrop I now intend to share with you some aspects of independence of judiciary which are generally overlooked but the said aspects are so important that without attending to them the whole superstructure of independence of judiciary remains incomplete and, if I may say so, shallow and superficial. In order to understand what I am about to say you must appreciate that, as already alluded to earlier, independence of judiciary is not an end in itself but it is only a means to the end. The end is impartiality and independence only helps in securing and maintaining judicial impartiality. It is possible that a judge may be absolutely independent but he still may be partial in many ways and, thus, his independence may not be of any avail because the end result may not be just, fair and correct. It is some of these areas and aspects, often ignored and overlooked, which I intend to talk about and highlight today. The earlier stages that I have talked about are essentially relevant to threats to independence of judiciary from outside the judiciary but the final frontier envisioned by me is the stage where independence of judiciary achieved through a successful passage of the earlier stages is to be protected from the threats originating from within the judiciary itself. Three areas appear to me to be of particular importance in this context: independence from yourself, independence from judiciary and independence from justice. Please don't be alarmed. I would explain these aspects straightaway. It is generally appreciated that threats to independence of judiciary are from without but I believe that the real threats to independence of judiciary are from within, from within the personality of the judge himself. There are cases wherein the metal of an individual judge is tested, and tested hard, and no outside factor is available to provide him strength and fortitude. In such cases a weak judge is likely to buckle down unless he possesses an inner strength of character so as to overcome his personal fears and to demonstrate independence from his personal qualms and worries. There are also cases like those of terrorism, etc. wherein the judge's personal safety and safety of his immediate family is an issue and a judge who is weak from within may find it hard to withstand the pressure. There may also be cases where a judge disagrees with the majority of his colleagues on a matter of principle and in such matters only a judge possessing strength of character can take a stand according to his convictions. A desire to seek further elevation in his status or even a fear of a geographic transfer to a Bench of the court may also weaken a judge's resolve to take a principled stand on issues. All such desires, fears and apprehensions detract from a judge's

independence and, notwithstanding availability of the wherewithal talked about above, the judiciary cannot become truly independent unless the individual judges are able to shun and rise above such desires, fears or apprehensions. History is full of examples where judges with no security of tenure and lacking proper protections, amenities or salaries had been taking bold and independent decisions. It was surely their personal metal and commitment to their vocation rather than anything else that had made them truly independent. Let me add another dimension to this aspect by reiterating that independence of judiciary is all about perception of its impartiality. A judge known to be afflicted with his own personal prejudices may be independent from extraneous influences but he cannot be perceived by the public at large as an independent judge if he does not decide his cases with an independent mind. It is universally true that every man is an island and his approach towards others is conditioned by the circumstances of his own upbringing, his social and financial status before becoming a judge and the cultural traditions of his own milieu. It is, thus, but natural that every judge tends to look at the facts of a case from his own individual perceptions and this is why many a time different judges handling the same case and the same set of facts arrive at different conclusions on the facts. I, therefore, feel convinced that if the ideal of independence of judiciary is to be achieved in any meaningful manner then a system has to be devised whereby the individual judges are trained to look at and examine the facts of a case from a standpoint which is completely divorced from the judge's own personality. I understand that in some parts of the civilized world despite a great fanfare about independence of judiciary judges are selected and appointed to the hierarchy of courts including the apex court with particular reference to their known conservative or liberal approach towards the national or moral issues. With great respect I consider such a practice to be nugatory to impartiality of judiciary and I can only sympathise with the litigant taking his case to such a judge when he knows in advance that the judge openly holds and is expected to express a view other than that which the litigant is about to canvass before him. A judge, howsoever independent he may otherwise be, is not independent enough if his impartiality is clouded by his personal views and perceptions. This is what I mean when I include independence from yourself as a part of the final frontier. The second aspect of the final frontier that I want to talk about is independence of an individual judge from the undue pressures of his peers and from some unnecessary or unwarranted controls of his institution. There is no doubt that in his capacity as a judge a person performing judicial functions is necessarily a part of his institution, i.e. the judiciary and ordinarily his functioning is to be in line with the over all policy and scheme of the institution. However, the problem comes when the institution's independence is itself under cloud because of extraneous factors and an individual judge starts abdicating his decision making before the dictates of the institution or conversely when the institution starts excluding an individual judge from decision making in sensitive matters because that judge is not likely to tow the line of the institution. Both such factors, which may be unthinkable in the civilized world but may unfortunately be real possibilities in some other parts of the world, completely undermine the notions of independence of judiciary. Apart from that concentration of powers in the hands of the head of a judicial institution regarding constitution of Benches, allocation and distribution of cases amongst Benches, attaching of priority to different kinds of cases and geographic transfer of judges is an issue which has raised eyebrows in the past and can also resurface in the future. A possible misuse of such powers by the head of a judicial institution can effectively render the independence of an individual judge to be of no practical utility or benefit to the citizens at large. Such a threat to independence of judiciary has its origins within the judiciary itself and any degree of independence of judiciary painstakingly achieved through all the other stages mentioned above can effectively be neutralized through some machinations from within the judiciary itself. In this context I feel that independence from judiciary in the above mentioned areas may be a sine qua non for reaching the final frontier of independence of judiciary.

Sir Francis Bacon, the British Lord Chancellor of his time, started his essay *Of Truth* with the following words: "What is truth said the jesting Pilate and did not wait for an answer." The same can be said about justice as well. Justice is an abstract notion and true justice can be done only if totality of the facts are known. According to the Holy Qur'an when Khizar (PBUH) killed a minor boy for no ostensible reason Moses (PBUH) found that to be unjust and he protested against such an unjust murder but subsequently Moses (PBUH) was satisfied when Khizar (PBUH) explained the will and wisdom of Almighty Allah in that regard on the basis of facts which were not known to human beings till then. Thus, even a Prophet of Almighty Allah apparently faltered in the matter of justice on account of lack of knowledge of the totality of facts. Unfortunately all that we fallible and mortal judges in this world have before us is a few papers containing half-truths and some self-serving statements of the parties and their partisan witnesses. Almighty Allah, the Maker of us all, knows our limitations and that is why at many places in the Holy Qur'an we have been ordained to decide according to the onus, quantum and standard of proof prescribed for various offences. In some cases where an allegation is leveled in the absence of the prescribed quantum and standard of proof the person leveling the allegation is required to be punished even if his allegation may in fact be true. The essence of this is that the emphasis is not upon making sure that the culprit does not go unpunished but the focus is

on punishing him only if he is proved guilty in accordance with the legal requirements. It is, thus, evident that we have been ordained to administer justice only in accordance with the law and not in accordance with our own subjective appreciation or understanding of what might have happened and on the basis of our own subjective sense of justice. Even the Star Chambers and the Court of Equity in England had to be wound up because it was soon felt that equity had started varying with the size of the Chancellor's foot and justice being administered was becoming more and more whimsical and subjective. It is in the background of such accumulated wisdom that the oath of office of a judge in our country requires him to dispense justice only in accordance with the law. Let me explain this issue through an example. We all know what a fake police encounter is. A fake police encounter is where a notorious criminal, a menace to the society, is apprehended by the police and knowing that no sufficient evidence is available against him to prove his misdeeds before a court of law the police officer decides to rid the society of that menace and kills that person by fabricating and faking a police encounter. The motives of such a police officer appear to be just to him and he feels convinced that by ridding the society of that menace he is doing a service to the society but the law considers such a killing to be nothing but a cold-blooded murder. Please allow me to say that if a judge passes a sentence of death against a notorious person or upholds such a sentence only on the basis of his own subjective sense of justice in the name of good of the society with scant regard for the law or the standard of proof then I see no difference between the above mentioned police officer and the judge. A fake judicial encounter is as bad and condemnable as a fake police encounter. I strongly believe that jurisdiction conferred by law can in no circumstances be exceeded by a judge in the name of justice because such an approach completely negates the concept of rule of law. How can a judge violating the law in the name of justice be treated more charitably than any other criminal who violates the law deliberately? Let me broach this subject from another angle. A judge is like an umpire in a game of cricket. In a tense and emotionally charged cricket match being played between India and Pakistan at Lahore Sachin Tendulkar hits the ball for a six and the ball is caught by a Pakistani fielder outside the boundary rope and the entire Pakistani team rises to its feet with an appeal to the Pakistani umpire with a question 'How is that?'. According to the rules of the game Sachin is not out and the Pakistani umpire cannot say that although according to the rules of the game the batsman is not out but I would give him out because it is in the interest of my country. Such a decision of the umpire based upon a perverted and subjective sense of justice would surely be the last decision in that gentleman's umpiring career. Like an umpire in a game of cricket a judge's function in the justice system is to decide only and only in accordance with the law and not according to his own subjective sense of justice or fairness. It is the law which is to take care of justice and a judge should never try to be wiser than the law. People come to a court of law after exhausting the other avenues of justice. They want to get the legal position declared by the court and the court should not shy away from it. In a misdirected and abstract pursuit of justice the law is not to be relegated to the status of or condemned as mere technicalities. Such an attitude amounts to destroying the very basis and the very fabric of the entire legal and judicial system. The very purpose of having such so-called technicalities, i.e. the law is to establish an order in the society through known and codified standards. A judge ignoring the said code or the standards may be trying to do justice to one party according to his own subjective standards which may not necessarily be correct and sure but by doing that he is throwing the entire society into chaos by violating the agreed and settled code and standards. It must never be lost sight of by a judge that he has no mandate from the society to be an apostle, a cavalier, a reformer or a missionary and the only mandate given to him by the society is to administer justice according to the law of the land. A judge must understand that the warrant of his appointment is not a proclamation of his coronation as a king who is above the law. Even for a king it now stands settled that "howsoever high you may be the law is above you". It is but obvious that a judge, on account of the nature of his job, is more bound to obey and follow the law than any other citizen. A judge trying to do justice by ignoring or disregarding the law does so at the peril of shaking the very foundation of the judicial system itself as such an approach destroys certainty and predictability of judicial response. This in turn gradually cuts across and erodes public confidence in the judiciary which is so important for maintaining and safeguarding its independence. The final frontier for independence of judiciary, therefore, is that the judges should shake off every other consideration from their minds and should decide the matters placed before them in accordance with the law and nothing but the law. This I believe is what would be the ultimate cutting edge in our quest for independence of judiciary.