



The Rule of Law in Pakistan: A Myth or Reality?

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Abstract

The rule of law is one of the most important, if not the most important, constitutional principles. It has been a philosophical concept since the time of the Greek philosophers or even before. For the English jurists, the rule of law encompasses two central principles, which are the supremacy of law and equality before law. However, the British showed no concern for upholding it during the era of colonization. In Pakistan, the principles of supremacy of law and equality before law were incorporated into the Constitution. The Pakistani Superior Courts have widened the scope of these two principles in their decisions. However, in reality, such principles as enunciated by the Judiciary are not actually implemented in true letter and spirit.

Keywords: Law, Constitution, Constitutional Law, Rule of Law, Supremacy of Law, Equality before Law.

Introduction

“He that runs away from his master is a fugitive. But the law is every man’s master. He therefore that forsakes the law, is a fugitive.”

~Marcus Aurelius*

Constitutional law is the law of structure. It is the structural law of governance. Without it, there can be no structure, no foundation, and no framework upon which a state could function. One of the most important, if not the most important, constitutional principles is the rule of law. Without the rule of law, a state could not be considered a state, and a constitution

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* “Meditations” in Meric Casaubon (tr), *“The Meditations of Marcus Aurelius”* (London: J. M. Dent & Sons Ltd, 1906), 128.



could not be considered a constitution. Without it, there can be nothing called law, as there would be no obedience to the law. And if there is no obedience to the law and no acknowledgement of its superiority, then there will only be chaos and anarchy. Therefore, the main proposition this paper shall focus on is whether the rule of law is incorporated within the Pakistani legal system or, to be more specific, within Pakistani jurisprudence.

This paper thus briefly discusses the origin of the rule of law; what is the rule of law; what is the jurisprudence surrounding the rule of law from the time of pre-classical Greece till the 21st century; it briefly discusses the constitutional framework of the rule of law under the Pakistani legal system and then discusses in detail the jurisprudence of the rule of law as expounded by the Pakistani Superior Courts;

Rule of Law under Anglo Jurisprudence

The rule of law has been a subject of legal and political discourse since the time of Aristotle or even before. Naturally, this precept itself has a philosophical foundation.¹ The rule of law was also naturally a subject of jurisprudential discourse here as well. Like all other Anglo-Saxon constitutional principles, the foundation of the rule of law can be traced back to the Magna Carta in 1215. It was in this charter that the then English King, King John, agreed to follow the law of the land rather than his own whims. It was due to this historical document that the famous phrase “the king can do no wrong” was abrogated. Previously, the King was able to act arbitrarily without reason, heavily taxing people, taking their possessions, and throwing them to prison for the slightest reason.² However, after agreeing to the charter, his powers were restricted. Hence, the Magna Carta established the rule of law and the idea that all citizens, including those in power, should be fairly and equally ruled by the law.³ It began the tradition of respecting the law, limiting government power, providing access to justice, and protecting human rights.⁴

However, the Magna Carta itself was just the starting point, and it catered more to the ruling aristocratic class than it did to the rest of the common folk.⁵ It was only due to the efforts of great jurists such as Sir

Edward Coke and Sir William Blackstone, among others, that the law of the land did not just mean the law of the aristocratic ruling class but also the law of the common folk. Coke, one of the greatest judges and jurists, made the following remarks after being confronted with disagreeing with the King's power to adjudicate cases whenever he wanted, as he as the monarch was the 'embodiment of the law': "Word of God' actually requires that 'the laws even in heathen countries [must] be obeyed."⁶ He further asserted that "the King shall not be under man, but under God and the Law."⁷ Hence, Coke was possibly the first to destroy the nefarious principle, which was that "the King can do no wrong". He boldly asserted the principle of the supremacy of law over the ruling monarch and even the principle of "all persons are equal before law" to the king, thus making sure that the rule of law is upheld. Another famous judge and jurist, Blackstone, when discussing the nature of law, made the following comment:

"This, then, is the general signification of law, a rule of action dictated by some superior being; and in those creatures that have neither the power to think nor to will, such laws must be, invariably obeyed, so long as the creature itself subsists, for its existence depends on that obedience..."⁸

While Blackstone does discuss the supremacy of law as a code that men are to be subservient to, the law he is talking about is not the law of the land but rather the law of God, that is to say, divine law,⁹ which is in contrast to Coke, who was speaking of both the law of God and the land.

In the 19th century, A.V. Dicey, another jurist also discussed his formulation of the rule of law. For him, the rule of law incorporated three distinct principles. First, each and every man should only be punished in accordance with law, with proper due process.¹⁰ Secondly, that each and every man was equal before the law, no one is above it¹¹ and lastly, the rights of an individual are determined and established by judicial decisions.¹² Hence, Dicey was firmly against the notion of unbridled and arbitrary government power and was an advocate for the principle of equality before law. The principle of rights being determined in judicial decisions, he himself admitted was entirely unique to the English

constitution as in other nations, the rights of an individual are incorporated within the general principles of the constitution itself.¹³

The famous judge and jurist, Lord Denning, who was also a notable author himself, also quoted the following quote by Dr. Thomas Fuller in a case: "Be you ever so high, the Law is above you."¹⁴ The endeavours of Sir Thomas Bingham in this regard are also noteworthy. In his book, the "Rule of Law"¹⁵, he incorporated eight principles in the rule of law which were namely: certainty and public accessibility of law, discretion should be used as least as possible, legal equality, no abuse of power by the authorities, protection of human rights, access to fast and inexpensive justice, due process of law and lastly, compliance and adjustment of national laws with international law.¹⁶

Ronald Dworkin encompassed the following principles in his exposition of the rule of law, which were first, the protection of fundamental rights and secondly, equality of all persons before law.¹⁷ Joseph Raz observed that the rule of law is "a virtue possessed by a legal system that conforms to the doctrine of the rule of law, and whose public culture resists deviations from it."¹⁸ He further discusses some principles that the rule of law should adhere to. These principles are: Government is by law; law should be reasonably stable and publicly available and lastly there should be general rules and standards which should be applied prospectively rather than retrospectively.¹⁹

Hence, from this very brief discussion, we can garner that the rule of law has two central principles which are supremacy of law and equality before law. All other principles that are discussed by the jurists hereinabove are one way or another derived from these two central principles.

The Rule of Law in Colonial British India

Before independence, the Indian sub-continent was a British Colony in which the principles of common law were being promulgated into different pieces of legislation and in some cases, an Anglo interpretation of Islamic Law and Hindu Law were also legislated and applied by the Anglo-Indian judges.²⁰ The British also promulgated different governing Acts such as the

Government of India Act 1909 and the Government of India Act, 1919, each time making some sort of addition in which the needs of the local Indians were catered to by popular demand. These Acts allowed the Indians who had performed political parties to run as representatives in the legislative assemblies. However, these were very small governing Acts. The major and last governing Act promulgated by the British was the Government of India Act, 1935. Interestingly enough, there was no provision that incorporated the rule of law therein. The Act also did not incorporate any sort of individual right or liberty. It would seem that the British still had no regard for its British citizens. It is also no secret that the British themselves thought themselves as some sort of godsend to the indigenous Indian population as a means to 'enlighten them'²¹ Hence, the British adopted a supremacist attitude towards the Indians which was also undoubtedly reflected both legislatively and politically as well.²² There were numerous pieces of legislations that reflected this. Consider for example, the Murderous Outrages Act which provided the British government to sanction their extra-judicial killings of Indians as a response to the brutal harming and killing of Europeans by local Indians by 1846.²³ This Act created a new category of persons in India called the 'fanatic' and also deprived them of their due process rights, particularly their right to fair trial.²⁴ In fact, this Act even allowed the British government to hang people and also desecrate their corpses.²⁵ This particular law itself was based on another law that provided for extra-judicial procedures and punishments called the Moplah Act 1854, which provided for colonial authorities to act against 'murderous outrages' committed by Muslims against Non-Muslims without any regard to laws or regulations in the Malabar District of the Madras Presidency.²⁶ In addition to this, there were other laws that were increasingly repressive against the Indians, such as the Press Act, 1910, the Seditious Meetings Act, 1907 and the Defense of India Act.²⁷ Hence, during the era of British India, the rule of law was not really a concern for the British especially when it particularly came to the Indians.²⁸

Rule of Law in the Pakistani Legal System

The jurisprudence of the rule of law in the Pakistani legal system can only be garnered by critically evaluating the decisions of the Pakistani Superior Courts related to it. We shall discuss in detail how the rule of law has been discussed by the Superior Judiciary and how they have set principles related to it.

Separation of Powers

One of the principles that the judiciary discuss in relation to the rule of law is the doctrine of separation of powers. The separation of powers is a necessary prerequisite for the maintenance of the rule of law as it incorporates the principle of the supremacy of law. One organ of state having arbitrary power would mean that the law is not supreme. In order to combat this, power must be divided in a check and balance framework where each organ does not breach their respective mandates.

In the case of “Brig. (Retd.) Imtiaz Ahmad v. Government of Pakistan”,²⁹ where criminal proceedings of misuse of secret funds and abuse of power were initiated by the then government against the then director of the Intelligence Bureau. The petitioner, the director who felt aggrieved challenged the order of the then Prime Minister who was not the competent authority to issue such an order. The competent authority, namely the Anti-Corruption Council who had the authority to issue such an order did not in fact issue it. He also pleaded that he was placed on the Exit-Control List and was thus under strict surveillance and as a result, his right to liberty had also been violated. He also pleaded that he had also been denied the opportunity to show cause against the registration of criminal cases. The Court while relying on Anglo-Jurisprudence observed that the doctrine of judicial review under Article 199 of the Constitution is a great weapon in the hands of Judges, but the Judges must observe the Constitutional limits set by our parliamentary system on their exercise of this beneficial power, namely, the separation of powers between the Parliament, the Executive and the Courts.³⁰ The Court further observed that judicial review must, therefore, remain strictly judicial and in its exercise, Judges must take care not to intrude upon the domain of the other branches of Government.³¹ And that the observations of the High Court in both instances were examples of

judicial restraint which is essential to the continuance of rule of law, the continued public confidence in the political impartiality of the judiciary and the voluntary respect for the law.³²

Hence, we can see that the Court discusses the doctrine of judicial review to be used in accordance with its constitutional mandate and to make sure that the separation of powers between the three organs, namely, the Executive, the Legislature and the Judiciary should be maintained so as to make sure that the rule of law is upheld. This is in line with Montesquieu's exposition of the rule of law, where he discusses that there should be separation of powers between all three organs so as to make sure that one organ does not gain any arbitrary power over the other.³³ Hence, this judgement discusses the rule of law on the basis of the precept of legal supremacy discussed hereinabove, which also includes the separation of powers, that is to say, that no authority should have any arbitrary power, especially the three organs of state. For example, the judiciary cannot order the local police to file a Challan against a particular person as the investigation of a criminal case is the exclusive domain of the police,³⁴ which thus comes under the executive and any interference from the courts with that could violate the doctrine of separation of powers and in turn violates the rule of law. Hence, the courts must always practice judicial restraint. This was highlighted well in the case of "Jurists Foundation v. Federal Government",³⁵ where the Court observed that judicial restraint is essential to the rule of law and public confidence in the judiciary as it imposes the principle of the Judges staying within their Constitutional parameters and not abuse their powers so as to make sure that the separation of powers is maintained.

In the case of "Syed Yousaf Raza Gillani, Prime Minister of Pakistan v. Assistant Registrar, Supreme Court of Pakistan",³⁶ where the Court was considering the contempt of court against the then Prime Minister, Yousaf Raza Gillani. The Court observed that the functionaries/authorities of the land have gotten their power on a sacred trust given to them by the people of the land,³⁷ that there is a fiduciary relationship between the people and the authorities³⁸ and that they must strictly work with adherence to the law

and constitution.³⁹ The Court also observed that that this is the very essence of the Constitution and democratic dispensation which is based on the rule of law⁴⁰ and that the government is expected to play the role of an exemplar for promoting the rule of law.⁴¹ Lastly, the Court held that it can only strengthen the rule of law by upholding the Constitution, which is in fact the supreme law.⁴² This is correct as the authorities working within the confines of law is part of the supremacy of law, which in turn is a fundamental principle of the rule of law.

Public Confidence and Acceptance of the Judiciary

In the case of “Muhammad Mansha v. The State”⁴³, where the order of the judge which cancelled the petitioner’s bail was challenged in the Supreme Court. The Court observed that the rule of law depends upon public confidence and public acceptance of the judicial system and therefore, anything which could undermine that confidence must be strongly discountenanced.⁴⁴ This observation is laudable as acceptance and confidence in the judicial system would ensure the supremacy of law and thus uphold the rule of law.

Judicial Review

One of the greatest powers of the judiciary have been its power of reviewing and rectifying administrative decisions of the executive and judicial decisions of lower courts. In the case of “Syed Zafar Shah v. General Pervez Musharraf”⁴⁵, where the imposition of martial law by Pervez Musharraf was challenged, the Court gave it validity by applying the doctrine of state necessity, the Court further discussed the scope of the doctrine of judicial review being necessary in order to ensure that all persons live securely under the rule of law.⁴⁶ It is quite interesting how they still gave validity to the blatant extra-constitutional measure taken up by the Armed Forces for the imposition of martial law. Was it not a violation of the rule of law when the Armed Forces, an authority that is subservient to the law, or in this case, the supreme law, the Constitution did not obey it and transgressed their constitutional mandates? This was a blatant violation of the precept of supremacy of law which is one of the fundamental principles of the rule of law.

Thus, wherever public authorities violate the rule of law by abusing their discretionary power, the same cannot be condoned by the judiciary, instead the judiciary shall rectify it.⁴⁷ Although, this does not mean that the judiciary can overextend their power into the domain of other branches of state.⁴⁸

Independence of the Judiciary

In the case of “Khan Asfandyar Wali v. Federation of Pakistan”⁴⁹, where certain provisions of the National Accountability Ordinance, 1999 (NAB) were challenged to be violative of the constitution, the principle of separation of powers, independence of judiciary and the fundamental rights enshrined in the Constitution. Its validity was also challenged on the touchstone that it would set up an arbitrary executive body that would in turn negate the rule of law. The Court while relying on Henc van Maarseveen’s and Ger van der Tang’s book, *Written Constitutions, A Computerized Comparative Study*⁵⁰ observed that “an independent judiciary is an indispensable requisite of a free society under the rule of law”⁵¹, that “independence of the judiciary must be protected if we want to maintain the essentials of a decent society governed by the rule of law”⁵² and lastly that agencies like the police and magistrates must perform their duties with strict compliance of the law otherwise, not only will the people of the country lose faith in them but it will also adversely affect the establishment of rule of law in the country.⁵³ All three of the Court’s observations are laudable.

Supremacy of Law

Article 5 of the Constitution provides that each and every citizen has an inviolable duty to be obedient to the Constitution and the law no matter he may be in Pakistan or outside it. Naturally, this applies also to all public authorities and even private entities. In “Government of N.W.F.P. v. Muhammad Tufail Khan”⁵⁴, the Court held that “the Courts are duty bound to uphold the Constitutional mandate and to keep up the salutary principle of rule of law.”⁵⁵ This observation is correct.

In the case of “Federation of Pakistan v. Mian Muhammad Nawaz Sharif”⁵⁶, where the respondent’s qualification to be a candidate for election

was challenged by the other contestants. The Court discussed the rule of law within the ambit of political science, citing that a democratic system of governance without the rule of law would mean that those in powers would be akin to a mob, they would have too much arbitrary power and thus cause the rights of minorities and more to be infringed.⁵⁷ This is correct as the protection of human rights and no arbitrary power of the government comes within the ambit of the rule of law as well. The former comes within the principle of equality before law while the latter comes within the ambit of the principle of supremacy of law. Hence, the rule of law is without a doubt a fundamental principle of any democratic society and in our legal system, it is in fact the bedrock of the Constitution, the judiciary is entrusted with the constitutional duty to enforce the rule of law and to safeguard the Constitution.⁵⁸

Hence, it is the duty of the Judges to only strictly implement the law and Constitution.⁵⁹ Also, the public authorities are also bound to work in transparency and only comply with orders that have legal validity so as to make sure the rule of law is upheld.⁶⁰ This does not apply to illegal orders from higher authorities. In this regard, the Courts have also ruled that the comity of judges, that is to say mutual respect between judges aids in the upholding of the rule of law and public confidence in the judiciary as its purpose is to stimulate a national interest in the finality of judicial decisions through a concerted effort by the judiciary of maintaining their hierarchy despite it also being an informal and discretionary principle.⁶² While it is true that it is discretionary, such discretion must be used with strict compliance to the law and also to the doctrine of stare decisis especially in a common law legal system.

Powers of Public Authorities

While public authorities have discretion, such discretion is not absolute and must be used with strict adherence to the law, that is to say, discretion has to be understood within the four corners of the concept of rule of law upon which our system of governance is founded.⁶³ This is very similar to Joseph Raz's exposition of the rule of law, in which he discusses how authorities are bound to discretion, so the main concern should be of how much

discretion should the authorities have? How much of their discretion will be within the ambit and compliance of the law and how much is not?⁶⁴ Thus, the authorities are to exercise their discretion within the legal mandate bestowed upon them. Where they have such discretion as per the law, they may exercise it according to law and where they do not have such discretion, they may not exercise it. For example, the executive is to exercise their authority and discretion to ensure that any person involved in a criminal case should be brought to this country to face the law under the principal of rule of law.⁶⁵

Hence, the object of good governance cannot be achieved by exercising discretionary powers unreasonably or arbitrarily and without application of mind but objective can be achieved by following the rules of justness, fairness, and openness in consonance with the command of the Constitution enshrined in different constitutional provisions as this obligation to act fairly on the part of the administrative authority has been evolved to ensure the rule of law and to prevent failure of justice.⁶⁶

In the case of “National Commission of Status of Women v. Government of Pakistan”⁶⁷, where the legality of the jirgas/panchayats to decide criminal, family and civil cases were challenged under Article 184(3) of the Constitution. The proposition before the Court was whether these council of elders of the village are acting as courts in the form of jirgas/panchayat and whether they are illegal under the law in place read with the international commitments made by Pakistan under various treaties/conventions? The Court while relying on an Indian judgement observed that the doctrine of the rule of law only accepts the deliverance of justice from formal institutions set under the law rather than informal institutions set under tribal and village customs.⁶⁸ That it is a blatant violation of the rule of law when such informal institutions assume the powers of a pillar of the state.⁶⁹ The Court observed that the institution of jirgas/panchayats themselves are not illegal but the act of them posing as courts and usurping the powers of a court of law which is illegal, rather, they are more like a form of informal alternate dispute resolution for civil disputes where all parties involved are willing participants who seek an

amicable resolution through a settlement within the permissible limits of the law.⁷⁰ The Court also observed that the citizens of FATA and KPK are one and the same especially after the 25th Amendment and thus, there should be no more distinction made between them so as to make sure the principles of the rule of law and natural justice are not violated.⁷¹ The Court also directed that the federal and provincial governments are to take steps to spread a uniform system of courts of ordinary jurisdiction in KPK, mandating the local law enforcement agencies to ensure that the rule of law is observed by reducing jirgas/panchayats etc. to arbitration forums which may be approached voluntarily by local residents to the extent of civil disputes only.⁷² The Court's observation of an informal institute that is assuming the powers of not just one but two organs of state being a violation of the rule of law is indeed correct. Otherwise, there is no problem with the institution of jirga/panchayat in their capacity as an informal alternate dispute resolution mechanism for civil cases, as the purpose of the jirga/panchayat is to mediate the dispute between two parties and resolve it by helping them reach an agreement together.

In "Suo Moto Case No. 7 of 2017"⁷³, where the Supreme Court took a Suo-moto notice of the Faizabad sit in protest that was arranged by the political party, Tehreek-e-Labaik Pakistan (TLP), who were protesting for the removal of the Ministry for Law, Justice and Parliamentary Affairs and for the removal of the then government. When the Court had inquired about the law/rules/regulations of the Inter-Service Intelligence (ISI) agency, the Attorney-General did not answer them as he requested without reason that the ISI's mandate not be disclosed except citing that this was the practice of other countries and that other countries' legal mandates are disclosed publicly.⁷⁴ The Court then observed that other countries' legal mandates are disclosed publicly.⁷⁵ The Court ruled that "to best ensure transparency and the rule of law it would be appropriate to enact laws which clearly stipulate the respective mandates of the intelligence agencies".⁷⁶

This observation is laudable as no authority under the law should have any sort of arbitrary power and thus in order to avoid that, it must be

clearly laid down in the law what a particular authority's mandate is as per the law.

Parliamentary Sovereignty

In the case of "Nadeem Ahmed, Advocate v. Federation of Pakistan"⁷⁷, where certain constitutional provisions of the 18th amendment were challenged on the touchstone that they were violative of the salient features of the constitution, which included parliamentary form of government, democracy blended with Islam, provision of fundamental rights, independence of judiciary and federalism.⁷⁸ Thus, the petitioners presented their challenges on the touchstone of the Basic Structure Doctrine, which is a doctrine that discusses that every constitution has a basic structure and each and every constitutional amendment must conform to this basic structure, otherwise they shall be declared null and void.⁷⁹ The Court observed that the independence of judiciary is linked with the rule of law and that Parliamentary sovereignty and independence of judiciary can complement one another so as to uphold the rule of law.⁸⁰ Of course, parliamentary sovereignty is but a delegated authority which is conferred onto the parliamentarians by the citizens who voted for them on a sacred trust. Hence, there is a fiduciary duty that is given to our parliamentarians and which must not be violated as it will be a breach of the rule of law.⁸¹ Should it be violated, then the citizens will lose their trust and thus no longer remain obedient to the law.⁸² This is based on the principle that rule by the chosen representatives of the electorate and the rule of law are the two fundamental pillars of a democracy.⁸³

In the case of "Chaudhry Parvez v. Deputy Speaker, Provincial Assembly of Punjab, Lahore"⁸⁴, where the petitioner who was a candidate for the seat of Chief Minister of Punjab challenged the ruling of the Deputy Speaker who had discarded 10 votes that were on his favour. The Court observed that:

"...the ruling therefore allegedly deprived the people of Punjab, of their fundamental right to be governed by a constitutional Parliamentary Government in violation of the rule of law thereby, causing a constitutional violation and turmoil in the Province that affected its electorate...."⁸⁵

The Court's observation on the "right to be governed" is indeed curious. A better observation would have been that this ruling had violated the rule of law as there was no government and thus there were no public functionaries to govern the province and exercise their functions on a sacred trust of the people. Thus, the violation of the people's sacred trust amounts to a violation of the rule of law as the authority who does not function on the people's sacred trust is no authority at all.

Protection of Fundamental Rights

The Courts have also that under Article 184(3), where the matter concerned is one of public interest and fundamental rights of the people are involved, then the rule of locus standi does not apply as to make sure the people are able to have the protection of the rule of law.⁸⁶ The exercise of this particular jurisdiction by the Court is intended to be the need of the hour to ensure and enforce the rule of law; and not to undermine the lawful authority of the departments, institutions, authorities.⁸⁷

In the case of "D.G. Khan Cement Company Ltd. v. Government of Punjab"⁸⁸, where the petitioners were the owner of a cement manufacturing plant based in District Chakwal had challenged the legality of the notification issued by the provincial government that did not allow the establishment of new cement plants and the enlargement and expansion of old cement plants shall not be allowed in the "Negative Area" falling within the Districts of Chakwal and Khushab. The proposition before the Court was whether the provincial government's decision of issuing the notification lacks statutory authority or if factual grounding of the notification compromises its legal validity. The Court adopted the natural law approach and thus included the protection of human rights in its exposition of the rule of law.⁸⁹ Protection of human rights does indeed form part of the rule of law as the protection of human rights would that the principle of equality of law is protected which as discussed hereinabove forms part of the rule of law.

Bar Associations

We have discussed hereinabove how public authorities do not have absolute power. This does not of course apply just to public authorities of

the government but to any authority that has been conferred authority. This applies to each and every individual person and other such authorities that have given power, such as the Bar Associations.⁹⁰ Hence, the members of the Bar constitute one community, they united by the principle to promote the rule of law in the country and to establish and maintain the highest standards of excellence and ethics in the profession of law as lawyers.⁹¹ In fact, upholding and protecting the rule of law is one of the key functions and duties of the Bar.⁹² One of the ways, it can ensure the protection of the rule of law is through improving the quality of education⁹³ as quality legal education also plays a significant role in strengthening the rule of law.⁹⁴ With better legal education, there shall be a significant increase in the talents of future potential lawyers, judges, academics, scholars and jurists that shall than give their utmost effort in upholding the rule of law each in their own unique ways.

Access to Justice

The Courts have also ruled that the principle of “access to justice” is also a part of the rule of law.⁹⁵ It is the equal right to participate in every institution where law is debated, created, found, organized, administered interpreted and applied.⁹⁶ Hence, access to justice comes under the ambit of the equality before law which in turn is a fundamental principle of the rule of law.

The Courts have also ruled that “the maintenance of the rule of law, transparency and fairness in the constitution of Benches and fixation of cases must be established to retain the independence, integrity and prestige of this Court.”⁹⁷

Equality before Law

Article 25 of the current 1973 Constitution provides that all citizens are equal before law and are entitled to equal protection of the law. It also provides that there shall be no discrimination on the basis of sex and that this article shall not prevent the State from making special provisions for the protection of women and children. This last provision is very similar to what Bingham discussed on his exposition of ‘equality before law’ where he discussed how some categories of people are treated differently due to their

different important position.⁹⁸ He gives the example of how children who are not mature are not handed out the same punishments for committing crimes as a mature adult would.⁹⁹ This is also true in Pakistan as well. A child who is under 10 years of age cannot be made criminally liable for offence.¹⁰⁰ The same is the case for children who are above 10 years old but are under 14 years old and do not have sufficient maturity or understanding of the nature and consequences of his actions.¹⁰¹ Equality before law applies to all people irrespective of their, rank or position. This was clearly enunciated by the Supreme Court in "Justice Qazi Faez Isa v. President of Pakistan"¹⁰², where a reference was filed against a judge of the Supreme Court for the institution of an inquiry against him, alleging misconduct by him on the basis of non-disclosure of three foreign properties in the declaration of his assets. While the Court does not explicitly mention the rule of law anywhere, the Court does discuss the equality of law, of how not even a judge is above the law and how judicial accountability is also important and also that just because the one question is a judge of the Apex court, it does not mean that he will be denied his right to due process of law and thus is entitled to equal protection of law.¹⁰³ Thus, the Court discusses the due process clause on the basis of 'equality before law'. The due process clause is incorporated within Articles 4, 9 and 10A of the Constitution of Pakistan.¹⁰⁴ This observation is laudable as the doctrine of due process while being a separate constitutional principle is still a part of the principle of equality before law and is thus a part of the rule of law as discussed hereinabove.

Due Process of Law

We have discussed hereinabove how due process of law is also incorporated under the rule of law by coming under the ambit of equality before law. This was especially discussed by Ayesha J. in her concurring opinion in which she observed that "the right to fair trial and due process are also important requirements of the rule of law".¹⁰⁵ This was part of the recent and famous judgement in which the Supreme Court held the civilian trials in military courts as unconstitutional.¹⁰⁶ She further observed how the particulars of a fair trial as envisioned under Article 10A of the

Constitution and under various international conventions which Pakistan have ratified are necessary to uphold both the due process of law and the rule of law, not only as constitutional safeguards but also as international obligations.¹⁰⁷ Hence, upholding the principle of due process is a necessary prerequisite of upholding the cardinal principle of the rule of law.

Is the Rule of Law Actually Implemented in Pakistan?

Hence, we can understand from the discussion hereinabove how the Pakistani Superior Courts have enunciated a lot of principles for the sake of upholding the rule of law. However, are these principles actually implemented in true letter and spirit? Can we really say that the rule of law is actually being upheld in Pakistan? Take Imran Khan's case for example. He was not at all treated in accordance with law.¹⁰⁸ The same goes for Zulfikar Ali Bhutto. It took the judiciary 44 years to admit that he was not at all given a fair trial.¹⁰⁹ The military trial of civilians is another case. Civilian trials before military courts are a violation of the rule of law, especially in particular due process of law.¹¹⁰ While the Supreme Court has declared it unconstitutional, prior to this, they suspended their previous order in which they declared it as unconstitutional in the first place.¹¹¹ Of course, these are all very recent cases. A full analysis of Pakistan's rule of law scenario in practice is beyond the full scope of this paper. Nevertheless, it can be understood that the rule of law despite its elegant enunciation by the Judiciary has not at been upheld in true practice and spirit in reality.¹¹² This is especially understood by the fact that the Supreme Court gave validity to martial law takeovers in the past.¹¹³

Conclusion

From the discussion hereinabove, we can conclude that the rule of law has philosophical roots. The English jurists have also discussed the rule of law by incorporating two central principles within it namely: the supremacy of law and equality before law. However, during the era of British India, the colonial authorities did not properly uphold it as discriminatory laws against the indigenous Indians were promulgated and as a result, they were not treated equally under law especially compared to the non-Indian population. In Pakistan, these principles have been incorporated within the

previous Constitution and even the present one as well. Articles 4, 5, 9, 10A, 25 of the current Constitution embody the rule of law. The Pakistani Superior Courts in their judgements have incorporated the following principles under the rule of law: separation of powers, independence of judiciary, judicial review, judicial restraint, comity of judges, due process of law, invoking Article 184(3) to protect fundamental rights and public interest, all public authorities must work within their respective and constitutional mandates, the Bar Associations also have a duty to uphold the rule of law and abide by it, the quality of legal education must be increased so as to make sure that the future lawyers, judges, academics, scholars and jurists play a far more significant role in upholding the rule of law. However, in reality, such principles as enunciated by the Superior Courts are not actually upheld in reality in Pakistan. They are not implemented in true letter and spirit.

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End Notes

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