

BY INVITATION

CALS-JONES DAY PROFESSORIAL LECTURE ON THE RULE OF LAW IN ASIA

Judicial Review and the Rule of Law in Pakistan*

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I am delighted to be standing here at one of the finest institutions in the world. This is my first visit to NUS and I must say from the little that I have seen, it is a beautiful campus, vibrant and full of energy. I would like to thank the Centre for Asian Legal Studies and the NUS Faculty of Law for inviting me, and especially Jaclyn Neo and her team for coordinating and making this trip possible.

When I was invited to speak at this Conference on the topic of the rule of law, I thought about what I can say to this forum with Pakistan ranked 129 out of 139 on the Rule of Law Index, while Singapore is ranked 17 out of 139 on the same Index. The more I thought about it, I realised that what makes my experience as a Judge relevant is the role of the courts in maintaining the rule of law and in ensuring that the rule of law prevails. What this means is that while the rule of law is the commonality between our countries, being a universal concept, what makes my experience relevant to the discussion is the scope and impact of judicial review, used by the Court in preserving and strengthening the rule of law.

From the origins of democracy in Athens,¹ the concept of the rule of law evolved so as to counter the reign of absolute power. It developed into a system that essentially restricted state power. As explained by Professor Joseph Raz: the principles of the rule of law are that the people should be ruled by the law and obey it and that the law should be such that the people be guided by it. This means that there must be rules and those rules must be capable of being followed.² So the rule of law basically serves the citizens of a system and protects the system from arbitrariness, from discrimination and wrongful exercise of power. It ensures that rights are protected and enforced. And as societies and democracies evolve, so does the rule of law.

Let me share with you how through judicial review, the superior courts of Pakistan have played a major role in developing the rule of law, while working towards its protection and stability.

By way of background, Pakistan has a unique history with four *Martial Laws*³ and three *Constitutions*.⁴ The courts have worked towards upholding the rule of law by recognising the fundamental rights pronounced in the Constitution and by imposing negative restrictions on the State not to interfere in the exercise of those rights by the people, while at the same time imposing positive obligations on the State to develop a quality of life based on underlying values, which is the bedrock of the rule of law. The courts have the delicate task of determining the extent of the power conferred on each branch of the government, its limits and whether any action of that branch transgresses such limits. This is the duty of judicial review, to determine the legality of executive action and the validity of legislation passed by the legislature. With time, judicial review has become

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¹Deborah G Keeling, Michael M Losavio & Thomas W Hughes, 'Rule of Law', in Wesley G Jennings et al (eds), *The Encyclopedia of Crime & Punishment* (Wiley-Blackwell 2016).

²Eric J Segall, 'Justice Scalia, Critical Legal Studies, and the Rule of Law' (1994) 62 *George Washington Law Review* 991.

³That is, 7 October 1958, 25 March 1969, 5 July 1977, and 12 October 1999.

⁴That is, of 1956, 1962, and 1963.

a powerful tool to ensure that the system works and that balance is maintained within the system, between rights and duties, and between parties and institutions.

Pakistan is governed by a written Constitution,⁵ which gives the High Courts and the Supreme Court the power to review executive actions and decisions, as well as legislation, and to seek the enforcement of fundamental rights where such actions and decisions are not consistent with the law and the Constitution.⁶ Judicial review is the jurisdiction that, when invoked, guards the rule of law and the people who are governed by the system, ensuring that the government and its agencies work within the confines of the law and are held accountable when they transgress their jurisdiction or the exercise of their power. It promotes democracy, involves the people, secures human rights and dignity, and much more. As far as the Supreme Court is concerned, it enjoys original jurisdiction so that a petition can be filed directly before the Supreme Court on any matter of public importance relating to the enforcement of any fundamental right conferred under the Constitution.⁷

Over the years, the judiciary has endeavoured to protect rights, ensure equality, access to justice, natural justice, due process and work towards transparency, fairness and good governance. As Pakistan is celebrating 75 years this year, if I divide the 75 years into categories, I can illustrate the role of the Court. These 3 periods would be:

- a. declaring rights;
- b. public interest litigation and *suo motu* exercise of power; and
- c. focusing on processes, procedures and guidelines to ensure that the government fulfils its obligations to the people (new dimension).

Declaration of Rights

The Constitution contains a chapter which enumerates twenty-three fundamental rights. The State is duty-bound to ensure the enforcement of these rights and to carry out all necessary steps for the realisation of this goal.⁸ The courts have played an important role in defining these rights, in expanding them, and in enhancing their impact. As we are governed by the Constitution and the law, judicial activism has paved the way for the evolution of the rule of law through the courts.

By exercising judicial review, these Articles have been declared and expanded by the courts to ensure that the basic fundamental right is protected. I illustrate this through the **right to life** guaranteed by Article 9 of the Constitution. In one of the earlier cases of the Supreme Court, *Shehla Zia v WAPDA*,⁹ the Supreme Court held that

the word 'life' has not been defined in the Constitution but it ... [cannot] be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally.

So here begins the understanding that the meaning of life is much larger than merely living and that it will include the right of enjoying life and maintaining an adequate level of living for the full enjoyment of all freedoms and rights.¹⁰ The Supreme Court has gone on to interpret the right to life to

⁵The Constitution of the Islamic Republic of Pakistan 1973.

⁶Constitution, arts 199, 184.

⁷Constitution, art 184(3).

⁸*Government of Sindh v Dr Nadeem Rizvi* 2020 SCMR 1 (Per Ijaz ul Ahsan J).

⁹PLD 1994 SC 693.

¹⁰*Employees of Pakistan Law Commission v Ministry of Works* 1994 SCMR 1548.

include the right to pure and unpolluted water,¹¹ the right to basic health care,¹² the right to livelihood,¹³ the right to a safe and health-friendly environment,¹⁴ the protection against adverse effects of electromagnetic fields,¹⁵ the right to enjoy pollution-free air,¹⁶ the right of access to justice,¹⁷ the right to food,¹⁸ the right to provision of electricity and gas,¹⁹ as well as the rights to education, civic and civil infrastructure, and transportation.²⁰ All this goes to show how the rule of law has evolved. Where governance has failed in its duty towards the people, it has triggered the courts towards protecting and enforcing rights and recognising the more qualitative aspect of life in order to enjoy the fundamental right to life. This is all in furtherance of the rule of law ensuring that people are able to live comfortably within a system that they can follow and that serves them.

The courts have recognised that **access to justice** is an integral part of the rule of law and has been defined as an equal right to participate in every institution where the law is debated, created, found, organised, administered, interpreted, and applied. It has been described as an integral part of the rule of law in constitutional democracies and a hallmark of civilised society.²¹ Today, stakeholder participation and public participation in decision-making has become relevant to ensuring effective and equal access to justice.

The Supreme Court in *Sh Riaz-ud-Din v Aqil-ur-Rehman Siddiqui*²² maintained that the State is constitutionally obligated to further the ends of social justice, which includes the duty to ensure **inexpensive and expeditious justice**. Based on this constitutional command, the Court held that parties who had settled their dispute out of court were entitled to a refund of the court fee, as failure to do so would be the end of speedy and cost-effective justice.

In a case of inheritance of land brought by a lady without the assistance of a lawyer, the Supreme Court noticed that she was incapable of conducting the complicated case herself and ordered that she be **provided with the assistance of a competent experienced civil lawyer** at state expenses, in pursuance of her fundamental right contained in Article 25(3), wherein the 'State' shall make special provision for the protection of women and children.²³ Similarly, directions for **sensitive handling of rape cases** were issued: that the statement of a victim should be recorded preferably by a female magistrate; that the trial should be conducted *in camera* and after regular court hours; that during the trial, screens or other arrangements should be made so that the victims and vulnerable witnesses do not have to face the accused persons; and that evidence of rape victims should, in appropriate cases, be recorded through video conferencing, so that the victims, particularly juvenile

¹¹ *West Pakistan Salt Miners Labour Union, Khewra v Director, Industries and Mineral Development, Punjab* 1994 SCMR 2061; *Shahzada Sikandar ul Mulk v Capital Development Authority* PLD 2019 Islamabad 365; *Zeenat Salim v Pakistan Naval Farms* PLD 2022 Islamabad 138.

¹² *Suo Motu Case No 19 of 2016* 2017 SCMR 683.

¹³ *Pir Imran Sajid v Telephone Industries of Pakistan* 2015 SCMR 1257; *Abdul Wahab v HBL* 2013 SCMR 1383; *National Bank of Pakistan v Nusrat Perveen* 2021 SCMR 702; *Jet Green (Pvt) Limited v Federation of Pakistan* PLD 2021 Lahore 770.

¹⁴ *Barrister Zafarullah Khan v Federation of Pakistan* 2018 SCMR 2001; *West Pakistan Salt Miners Labour Union Khewra v Director, Industries and Mineral Development, Punjab* 1994 SCMR 2061; *Suo Motu Case No 10 of 2010 (Contamination of Water of Mancher Lake due to Disposal Effluent from MNV Drain now converted into RBOD)* 2011 SCMR 73; *Shahab Usto v Government of Sindh* 2017 SCMR 732; *Shehla Zia v WAPDA* PLD 1994 SC 693; *Sheikh Asim Farooq v Federation of Pakistan* PLD 2019 Lahore 664; *Shehri v Province of Sindh* 2001 YLR 1139; *Shahzada Sikandar ul Mulk v Capital Development Authority* PLD 2019 Islamabad 365; *Zeenat Salim v Pakistan Naval Farms* PLD 2022 Islamabad 138.

¹⁵ *Shehla Zia v WAPDA* PLD 1994 SC 693.

¹⁶ *Haji Mullah Noor Ullah v Secretary Mines and Minerals* 2015 YLR 2349.

¹⁷ *Government of Balochistan v Aziz Ullah Memon* PLD 1993 SC 341; *Al-Jehad Trust v Federation of Pakistan* PLD 1997 SC 84; *Asfandyar Wali v Federation of Pakistan* PLD 2001 SC 607; *Munir Hussain Bhatti v Federation of Pakistan* PLD 2011 SC 407.

¹⁸ *Muhammad Ahmad Pansota v Federation of Pakistan* PLD 2020 Lahore 229.

¹⁹ *OGRA v Midway II, CNG Station* 2014 SCMR 220; *Iqbal Zafar Jhagrav Federation of Pakistan* PTD 2014 SC 243.

²⁰ *Naimatullah Khan Advocate v Federation of Pakistan* 2020 SCMR 622.

²¹ *Ishtiaq Ahmed v Hon'ble Competent Authority* 2016 SCMR 943.

²² PLD 1993 SC 76.

²³ *Mst Fazal Jan v Roshan Din* PLD 1992 SC 811.

victims, do not have to be present in court. This has been put into effect by establishing Gender-Based Violence Courts, which are designed to comply with the requirements set out by the Supreme Court in its judgment.²⁴

The Court's approach towards **fair trial and the administration of justice** focuses on procedures and processes to ensure that they are followed and adhered to by the State. This was explained in *Muhammad Bashir v Rukhsar*,²⁵ wherein the Court emphasised that a person arrested for an offence must be informed of the grounds of his arrest, must be permitted to consult with and be defended by a lawyer, must be provided with the information of the offence he was charged for, must be given an opportunity to cross-examine witnesses who deposed against him as well as to explain the circumstances disclosed in evidence against him, and must be provided an opportunity to produce evidence in his defence. Further, the Court has elaborated that the process of law, with its procedural safeguards under the Constitution, guarantees a fair trial without compromising on the principle of inherent human dignity.²⁶

The matter of freezing of foreign currency accounts in the wake of nuclear tests came before the Supreme Court in *Federation of Pakistan v Shaukat Ali Mian*,²⁷ which went on to protect and declare **the economic rights of citizens** in furtherance of the rule of law. Earlier, a single judge of the Lahore High Court upheld the action of the government. In appeal, a full bench of the Lahore High Court held that the action of freezing the foreign currency accounts under the *Foreign Exchange (Temporary Restrictions) Act 1998* was *ultra vires* to the Constitution as it violated the equal protection clause and was the result of excessive, unguided and arbitrary exercise of power by the functionaries of the State Bank of Pakistan. The Supreme Court, in appeal, upheld the findings of the full bench of the Lahore High Court with certain modifications. It was held that the measure was a violation of the provision laid down by the legislature in the *Protection of Economic Reforms Act 1992* that the State Bank of Pakistan or other banks shall not impose any restrictions on deposits in and withdrawals from foreign currency accounts, and that restrictions, if any, shall stand withdrawn forthwith.

In another case, titled *Orient Power Company (Pvt) Limited v SNGPL*,²⁸ the Supreme Court, in a dispute over the payment for gas, upheld the decision of the High Court that the domestic courts are to uphold the foreign (arbitration) awards. The Court took notice of the fact that fruitful foreign arbitrations bring in investments and help the economy. Thus, by encouraging parties to honour their commitments, the courts have time and again upheld economic rights.

The concept that **no one is above the law** was applied equally and fairly to the parties in *Al-Baraka Bank (Pakistan) Ltd v Province of Punjab*.²⁹ The issue was a long-standing dispute between cane growers and sugar mills. The cane growers, as per the statutory obligation, supplied cane to the sugar mills at a notified price, date, and quantity. However, they were not paid immediately in return, and often it was difficult for the cane growers to recover the money for the cane they had supplied. The question before the Lahore High Court was whether the cane growers, who had fulfilled their legal obligations and supplied the sugarcane, were entitled to recover the amounts due to them through the sale of bags of sugar by the Cane Commissioner on account of their statutory right, or whether the banks have a priority for the settlement of their debt over the bags of sugar because of the pledge in their favour. The banks claimed that the sugar mills had pledged bags of sugar to them in order to avail finance facilities; that the pledge remained intact and protected under the law; and that they had a superior right over the pledged stock due to the fact that they had constructive possession and were secured creditors. Thus, their preferential rights could

²⁴*Salman Akram Raja v Government of Punjab* 2013 SCMR 203.

²⁵PLD 2020 SC 334

²⁶*Ali Raza v State* 2019 SCMR 1982.

²⁷PLD 1999 SC 1026.

²⁸2021 SCMR 1728.

²⁹2018 CLD 626.

not be defeated by any claimant, especially not by unsecured creditors such as the cane growers. The Court held that while recognising the ownership rights of the cane growers, the statute recognised that a debt is created with respect to the price of the sugarcane, which must be paid to the cane growers. Therefore, by construing this requirement as a statutory retention of title in favour of the cane growers, the specific purpose of the statute was achieved. The Court elaborated further that the statutory retention of title gives the unpaid seller of goods priority over other creditors (secured or unsecured) in the event that the buyer fails to pay for the delivered goods. Essentially, an owner having a right to payment loses control over the goods but retains the title to ensure that if the price is not paid within time, title to the goods does not pass to the buyer. Thus, the goods do not become the property of the buyer nor do they become part of the buyer's assets. The Court interpreted the *Punjab Sugar Factories Control Act 1950* and the *Punjab Sugar Factories Control Rules 1950* using a purposive and progressive interpretation of the law to conclude that the legal right of the cane growers, being the owners of the sugarcane, was superior to the right of any other secured or non-secured creditor.

In *JDW Sugar Mills Ltd v Province of Punjab*³⁰ on the **protection of public interest against the interest of the executive**, the petitioners, who operated various sugar mills, impugned the issuance of a notification allowing existing sugar mills owned by government officials to relocate within the province. The basic grievance of the petitioners was that the respondents, in the garb of shifting/relocating functioning sugar mills, were in fact establishing new sugar mills despite the ban imposed under the *Punjab Industries (Control on Establishment and Enlargement) Ordinance 1963*. The question to be determined was whether a relocation of sugar mills fell within the ambit of the establishment of new sugar mills as provided under the Ordinance read with the ban imposed by an earlier notification. The Lahore High Court held that the establishment and the relocation of sugar mills were correlated when seen in the context of the ban and public interest, as the key element for both was the location of the sugar mill, and therefore the relocation of a sugar mill was the establishment of a new sugar mill in the local area. The Court observed that the decision-making process in the case, which led to the issuance of the impugned notification, was not initiated in the national or public interest, and that the process was initiated to protect certain business interests at the expense of public interest. The Court noted that there was a private interest of some government officials who were to benefit from this policy. The Court emphasised that where there is a conflict between private interest and public duty, it must be clearly identified, appropriately managed, and effectively resolved in order to ensure public confidence in public institutions. Further, it stated that the mandate of any elected government is based on trust and public confidence, both of which are tools of transparency, good governance and fairness in the decision-making process, and that any conflict will destroy public trust. It held that the public officers are trustees of public funds and public property and are expected to make decisions based on public interest. The Court struck down the provincial government's policy on the relocation of sugar mills.

The Court held that a balance must be struck between the **right to freedom of speech and information** on the one hand, and the right to fair trial in accordance with the law and due process on the other. Strict guidelines have to be implemented to prevent any prejudicial comment on pending cases, which would in no manner deprive the press of its freedom, as it would only serve to uphold the rule of law and fair and impartial trials in the larger interest of justice.³¹

In the context of declaring rights, the rule of law represents fundamental principles and values as declared by the courts. It is the system by which people choose to be governed. The Court has extended these values to make the system more efficient and effective. But the system cannot be efficient or effective if those judgments are not implemented and enforced. Nor can it be effective if the people it serves do not abide by it.

³⁰PLD 2017 Lahore 68.

³¹*In the matter of: Suo Motu Case No 28 of 2018* PLD 2019 SC 1.

Public Interest Litigation and *Suo Motu* Exercise of Power

Public interest litigation forms an important part of judicial review in Pakistan. The requirements for standing tend to be more relaxed. Public-spirited citizens are allowed to seek judicial review if they can show that they are litigating in the public interest and for the public good, or for welfare of the general public as *pro bono publico*. The *raison d'être* of public interest litigation is to break through the existing legal, technical, and procedural constraints, and to provide justice, particularly social justice, to a particular individual, class, or community, who, on account of personal deficiency, economic or social deprivation, or state oppression, is prevented from bringing a claim before the courts. The issues in public interest litigation are commonly related to state repression, governmental lawlessness, administrative deviance, exploitation of poor and disadvantaged groups, and denial of their legal rights. It has been held that the judicial review jurisdiction of the superior courts to enforce fundamental rights in the context of public interest litigation is intended to prevent arbitrariness or favouritism and must be exercised in the larger public interest.³² Any member of the public having a sufficient interest may maintain an action for the judicial redress of public injury arising from a breach of public duty or from violation of any provision of the Constitution or the law, and for the enforcement of such public duty and the observance of such constitutional provisions, but only if there is an element of public importance involved.³³ A letter highlighting the condition of schools was treated as a petition under Article 184(3) of the Constitution. The Court identified the issues, challenges, and problems faced by schools throughout the country, as well as the measures required to achieve the goal of compulsory and free education for children between the ages of five and sixteen as proclaimed in Article 25A of the Constitution.³⁴

Suo Motu Exercise of Jurisdiction by the Supreme Court

The Supreme Court exercises *suo motu* jurisdiction, which is the exercise of jurisdiction on its own motion, where it considers that a question of public importance relating to the enforcement of any of the fundamental rights involved. The Court took *suo motu* notice of the cutting of trees for a road widening project to assess whether the doctrine of public trust had been compromised.³⁵ In 2017, the Court took *suo motu* notice of a protest sit-in staged by a religious party in the capital. The protesters were advocating and propagating violence, and were destroying and damaging property. The Supreme Court held that the sit-in protest had effectively paralysed the capital city and its neighbouring city, and that the entire country effectively came under lockdown. The Court said that although the Constitution did not specifically stipulate a right to protest, democracy recognised such a right provided it did not infringe on the fundamental rights of others, including their right to free movement and to hold and enjoy property. The police and other law enforcement agencies were to develop standard plans and procedures on how best to handle rallies, protests, and *dharnas*, and ensure that such plans/procedures were flexible enough to attend to different situations, and that protestors who obstructed people's right to use roads and damaged or destroyed property were proceeded against and held accountable in accordance with the law.³⁶

Recently, the Supreme Court also took *suo motu* notice of the dismissal of a no-confidence motion against the then Prime Minister and the subsequent dissolution of the National Assembly, declaring the ruling and dismissal unconstitutional. The people of Pakistan cannot be deprived of their right to be governed by their elected representatives because ultimately it is the Government (along with other constituent elements of the State as defined in Article 7 of the

³²*Habib Ullah Energy Limited v WAPDA* PLD 2014 SC 47; *Suo Motu Case No 13 of 2009* PLD 2011 SC 619.

³³*Watan Party v Federation of Pakistan* PLD 2006 SC 697.

³⁴*Constitution Petition No 37 of 2012 (Petition Regarding Miserable Condition of the Schools)* 2014 SCMR 396.

³⁵*Cutting of Trees for Canal Widening Project Lahore* 2011 SCMR 1743.

³⁶*Suo Motu Case No 7 of 2017 (Action regarding Islamabad, Rawalpindi Sit-in [Dharna])* PLD 2018 SC 72.

Constitution) that is responsible for safeguarding the rule of law guaranteed to the people of Pakistan under Articles 4 and 25 of the Constitution. Any digression from the constitutional process of forming a representative Government will erode the rule of law and thereby jeopardise the cherished values promised to the people of Pakistan by the Constitution.³⁷

Today, there is a debate about the exercise of *suo motu* power and the extent to which it should be controlled, whether through rules or otherwise, but the basic concept of courts intervening when the public interest so requires remains an enduring practice. I would say that this is a new dimension of the rule of law because the issue now is really about how the court should regulate itself.³⁸ The exercise of the jurisdiction vested in the Supreme Court is controlled and regulated by several facts. Firstly, it can only be exercised by Benches duly constituted by the Chief Justice. Secondly, the Benches can only take up such cases as are listed before them and cannot select cases themselves. Thirdly, the cases listed before the Benches are those where the jurisdiction of the Court has already been invoked. In other words, the Constitution (and the existence) of Benches presupposes the existence of causes, appeals, and matters in respect of which the Benches will exercise the jurisdiction of the Court.

In furtherance of this *suo motu* jurisdiction and public interest litigation, the Court has relied on various tools. Some of the methods used are discussed below.

Continuing Mandamus

Some of the tools used within the power of judicial review to nudge and push executive action is the writ of continuing mandamus, which requires the officer of the authority to perform their task expeditiously for an unstipulated period of time to prevent a miscarriage of justice. The writ of continuing mandamus is a relief granted by a court of law through a series of continuing orders over a long period of time, directing an authority to do its duty or fulfil an obligation in the general public interest, as and when a need arises during the period in which a case is pending before the court, with the court choosing not to dispose of the case with finality. This happens in a situation that cannot be remedied instantaneously, but requires a solution over a long period of time, sometimes years. Used during Covid and now with the floods,³⁹ the Court monitors compliance with its orders and requires periodic reports from authorities on the progress of their implementation. It was also used by the Supreme Court to protect the forests of Sindh, where it was declared in the public interest that the work underway towards deforestation needed to be stopped.⁴⁰

Commissions and Standing Committees

Commissions and Standing Committees are effectively used by the courts for fact-finding, technical advice, and bringing stakeholders to the table to propose sustainable solutions and policies. The Lahore High Court in the *Asghar Leghari* case⁴¹ constituted a Climate Change Commission to oversee the implementation of the Climate Change Policy and required it to submit a regular progress report. In addition, after dissolving the Commission, the Court constituted a Standing Committee, which served to create an ongoing link between the Court and the executive. The Court argued that in the face of climate change, democracies must be redesigned and restructured to become more climate resilient, and that the fundamental principle of the rule of law must recognise the urgent

³⁷*Suo Moto Case No 1 of 2022 (Re: Ruling by the Deputy Speaker of the National Assembly under Article 5 of the Constitution qua voting on No-confidence Motion against the Prime Minister of Pakistan)* PLD 2022 SC 290.

³⁸*Suo Motu Case No 4 of 2021* PLD 2022 SC 306

³⁹*Mari Memon v Federation of Pakistan* PLD 2011 SC 854; *Sartaj Hyder v Province of Sindh* CP No D-1064 of 2022.

⁴⁰*Qazi Athar v Province of Sindh* CP No 52 of 2018.

⁴¹2018 CLD 424.

need to combat climate change.⁴² The use of the Commission and the Standing Committee therefore serves to overcome the Government's previous inaction.

In exercising its power of judicial review, however, the Court is cognisant of its own limitations and of the need to balance its own power. Interference with the decision-making process is warranted only where it is vitiated by arbitrariness, illegality, irrationality, and procedural impropriety, or where it is actuated by *mala fides*. The Supreme Court in *CEO MEPCO v Muhammad Ilyas*⁴³ stated that it is imperative that the courts do not derogate from their constitutionally mandated oversight function of judicial review. A judge must always stay within the four corners of the law and must not be swayed by emotion or his own sense of justice, for in doing so he would fail to decide the case in accordance with the law. When the judiciary encroaches on the domain of the executive, it is said to commit *judicial overreach*, which occurs when a court acts beyond its jurisdiction and interferes in areas that fall within the mandate of the executive and/or the legislature. Through such interference, the court violates the doctrine of separation of powers by assuming executive or legislative functions. Such a judicial role imperils the separation of powers, jeopardises the legitimacy of the judicial institution, and undermines constitutional democracy. It is imperative that the courts do not derogate from their constitutionally mandated oversight function of judicial review.

A New Dimension to the Rule of Law

Moving away from declaring rights and remedies through public interest litigation or even *suo moto* jurisdiction, the Court now seeks to balance rights and obligations, focusing on governance and ways to improve it, as well as the duty of the executive to implement its policies, rules, and regulations, because oftentimes even though the paperwork is done, there is not enough inertia to ensure its enforcement. This is one of the primary reasons for recourse to the courts for judicial review of executive action or inaction, where the public opinion is that the government has not responded in a suitable manner and has not been able to deal with the issue. Recently, even political issues that should be resolved in parliament or by the executive are being brought to the attention of the Court through letters to the Chief Justice to take note of an incident and help resolve the issue. While this may suggest an element of trust and confidence in the judiciary, it certainly raises many questions about the role of the judiciary and the extent to which it can exercise jurisdiction. Thus, the courts, particularly the Supreme Court, are now focusing on balancing rights with duties and obligations and also examining the causes and reasons for inaction, mismanagement, and negligence on the part of the government. In addition, the Court is conscious of protecting fundamental rights and seeks to include marginalised groups (such as women, transgender persons, differently abled persons, and religious minorities) by giving meaning to the right to equality. The courts have pushed for participatory methods in law-making, enforcement, and implementation, and have often enough required the government to rethink the way it does its business. At the same time, there is the question of the Court's own jurisdiction, ie, the extent to which the Court can interfere and where it draws the line. The courts have therefore begun to regulate themselves by defining judicial overreach, expressing that the courts do not act on compassion, and reiterating that the rule of law must be maintained and upheld.

Public Functionaries to Adhere to the Rule of Law in Public Service

The system of governance envisaged under the Constitution is founded on the concept of the rule of law. The courts are duty-bound to uphold the constitutional mandate and the principle of the rule

⁴²*DG Khan Cement Company Ltd v Government of Punjab* 2021 SCMR 834.

⁴³2021 SCMR 775.

of law. All acts of public functionaries should be performed in a transparent manner, after the application of reason and the fulfilment of all requirements.⁴⁴ Every authority in the State is bound to obey the dictates of the law and has no personal or absolute discretion.⁴⁵ Administrative discretion must be exercised fairly and in a transparent manner. Such discretion must be understood within the four corners of the concept of the rule of law.⁴⁶ Public functionaries must strengthen good governance, strictly follow the rules, and uphold the rule of law in public service. The obligation to act fairly on the part of the administrative authority has been developed to ensure the rule of law and to prevent judicial failure.⁴⁷ Public functionaries are not obliged to obey illegal orders from higher authorities.⁴⁸ If a government servant does not have the courage to refuse to carry out an unlawful order, they should face adverse consequences as well.⁴⁹ Illegal and arbitrary decisions militate against the rule of law, and the courts, in the exercise of their power of judicial review, can interfere with such decisions.⁵⁰ Pressure from the courts on legislation in the DRAP case⁵¹ and in cases concerning the cutting of trees, waste disposal planning,⁵² dog culling,⁵³ medical examination rules, and many other issues, is pushing for stakeholder participation,⁵⁴ due process, due deliberations, and legal certainty.

Institutions to Stay Within their Designated Constitutional & Legal Boundaries

The Court has held that the law applies to all, including those in government, and that institutions must act independently of those in government. When institutions stay within their designated constitutional boundaries and there is an effective system of checks and balances, citizens stay safe, and the State prospers. To ensure transparency and the rule of law, it would be appropriate to enact laws that clearly stipulate the respective mandates of the intelligence agencies. The Constitution expressly prohibits members of the armed forces from engaging in any form of political activity, including support for any political party, faction, or individual. The Federal Government, through the Ministry of Defence and the respective Chiefs of the Army, Navy, and Air Force, is to initiate action against its personnel when they have violated their oath.⁵⁵ The rule of law works well for the people when all institutions remain in their respective domains yet cooperate with each other.

High-Handedness of Law Enforcement Agencies

The Supreme Court in *President Balochistan High Court Bar Association v Federation of Pakistan*,⁵⁶ in the context of allegations of high-handedness on the part of law enforcement agencies in the insurgency that hit the Balochistan province, observed that it was the duty of the State to enforce the fundamental rights of citizens and to protect their life, liberty, and property. In case of any charges for any offence against any person, the accused should be dealt with in accordance with

⁴⁴ *Muhammad Afsar v Malik Muhammad Farooq* 2012 SCMR 274.

⁴⁵ *Syed Mahmood Akhtar Naqvi v Federation of Pakistan* PLD 2013 SC 195.

⁴⁶ *ibid.*

⁴⁷ *Pir Imran Sajid v Managing Director/General Manager (Manager Finance) Telephone Industries of Pakistan* 2015 SCMR 1257.

⁴⁸ *Ali Azhar Khan Baloch v Province of Sindh* 2015 SCMR 456.

⁴⁹ *Syed Yaqoob Shah v Xen, PESCO (WAPDA), Peshawar* PLD 2002 SC 667.

⁵⁰ *Orya Maqbool Abbasi v Federation of Pakistan* 2014 SCMR 817.

⁵¹ *Muhammad Fahad Malik v PMDC* PLD 2018 Lahore 75; upheld by Supreme Court in *PMDC v Muhammad Fahad Malik* 2018 SCMR 1956.

⁵² *Muhammad Yar v Province of Punjab* WP No 21857 of 2018

⁵³ *Hamza Khan v Province of Punjab* ICA No 277 of 2017

⁵⁴ *Mohammad Younas v Government of Punjab* WP No 25550 of 2014

⁵⁵ *Suo Motu Case No 7 of 2017* PLD 2019 SC 318.

⁵⁶ 2012 SCMR 1958.

the law by providing fair trial and due process. The Court directed that the Federal Government should ensure immediate action under the Constitution to provide security to the people of the province against all criminal aggressions, including recovery of mutilated dead bodies, missing persons, target killings, abduction for ransom, and sectarian killings; in addition, the Court ordered that the Provincial Government should expedite the process of registration of cases relating to the said criminal aggressions, and should pay compensation to the heirs of persons whose dead bodies had been recovered; and finally, the Court ruled that the Provincial Government should prepare a scheme for the purpose of providing maintenance and other kinds of assistance to the families of the killed persons, and that the Federal and Provincial Governments should immediately take steps for the rehabilitation of internally displaced persons in the province, not only regarding the restoration of their properties but also by providing security to their lives and property and restoring civil administration such as schools, hospitals, courts, police stations, etc.

The Supreme Court took *suo motu* notice of the killing of an unarmed citizen in Karachi at the hands of the Sindh Rangers, a federal paramilitary force called in to assist the police and civil administration.⁵⁷ The Court described the incident as ‘a classical case of highhandedness of the law enforcing agencies’ clearly indicative of barbarism, because once the victim had been overpowered, as evident from the video clip of the incident taken by a journalist, he should not have been fired upon in any case, and at most the Rangers could have handed him over to the police if there was any indication that he was involved in the commission of any offence. A Deputy Inspector General of the police was ordered to take over the charge of the investigation, and the Trial Court was directed to decide the case by conducting a trial on day-to-day basis, without being influenced in any manner by the proceedings of the Supreme Court. The culprits were later convicted and sentenced.

Courts to Rely Only on the Constitution and the Law

In another case,⁵⁸ where a student was expelled from school for non-payment of fees and insufficient attendance, the Supreme Court, stating that the courts must interfere sparingly in the affairs of academic institutions, held that it was best to leave the disciplinary, administrative, and policy matters of educational institutions to the professional expertise of the people running them. The Court also addressed the humanitarian aspect raised and concluded that it was important to highlight that the judges must decide disputes before them in accordance with the Constitution and the law, and not on the basis of their whims, likes and dislikes, personal feelings, or mere humanitarian grounds. Justice is tempered with mercy, but not at the expense of overriding the clear letter of the law. Compassion and hardship may therefore be considered by the courts for providing relief to an aggrieved person, but only where there is scope in the relevant law to do so, and not in contravention of the law.⁵⁹

Population Control

In a case where the Court took *suo motu* notice of the high rate of population growth, *Human Rights Case No 17599 of 2018*,⁶⁰ it justified its action by holding that there was an absence of policy initiatives on the issue, and that the Court, as the guardian of fundamental rights, had to intervene in the matter. A task force was constituted to prepare a policy document for the Court’s consideration. This was reviewed and a comparative analysis with other countries with similar problems was considered, and the Court found that these recommendations should accelerate the government’s

⁵⁷*Suo Motu Case No 10 of 2011: In the matter of Brutal Killing of a Youngman by Rangers* PLD 2011 Supreme Court 799.

⁵⁸*Aina Haya v Principal Peshawar Model Girls High School-I, Peshawar, etc* CP No 2824 of 2019.

⁵⁹*DG, National Savings v Balqees Begum* PLD 2013 SC 174.

⁶⁰2019 SCMR 247.

efforts to reduce the rate of population growth. The Court required that stakeholders at all levels be consulted to bring these recommendations into action and directed the government to play its role in controlling the population growth rate. This was an attempt to push for a policy or awareness campaign on the issue to get the conversation started, because implementing the rule of law is about changing mindsets. If the system is to work, then attitudes of all people in a society have to be such that they want the system to work.

Rule of Law, Independence of the Judiciary & Judicial Accountability

The rule of law and the independence of the judiciary are conceptually intertwined, and the only guarantee to the maintenance and preservation of a thriving democracy. Judicial freedom is fundamental to the concept of the rule of law. Any attempt to muffle judicial independence, or to stifle dissent, shakes the foundations of a free and impartial judicial system and thus undermines the public confidence on which the entire edifice of judicature rests. Public confidence is the most precious asset of the judiciary, which controls neither the sword nor the purse. A judge whose decisions are dictated not by fidelity to the letter and the spirit of the law, but by what they find palatable to the Government, would cause irreparable damage to the public's confidence in the judiciary, and consequently jeopardise its credibility and moral authority.⁶¹ At the same time, it has been recognised that the cause of the rule of law cannot be furthered if complacency is bred in judicial accountability, because judicial accountability seeks to uphold and bolster the rule of law.⁶²

The debate now centres on who is accountable and in what way.⁶³ The Supreme Court was recently faced with the question of the accountability of the justices of the Supreme Court themselves, and how to balance the judges' fundamental right to privacy with their right to be treated in accordance with the law. The majority held that because judges hold a public office, a position of trust, their financial position and that of their families should be transparent. While judicial accountability is critical to maintaining the legitimacy of the judicial institution, equally important is the right of a judge to enjoy the protection of the law and to be treated in accordance with it. Judicial accountability, like any other accountability, must be in accordance with the constitutional standards of due process. On the other hand, there is the right to privacy, which, as the Supreme Court held, includes the right to personal autonomy, personal development, and the right to establish and develop relationships with other human beings and with the outside world.

Judicial Restraint is Essential to the Continuation of the Rule of Law

The Court has emphasised that judicial restraint, exercised so as not to interfere with other branches of government, is essential to the continuation of the rule of law, and to the maintenance of public confidence in the political impartiality of the judiciary and of the voluntary respect for the law as laid down and applied by the courts.⁶⁴ For instance, investigation falls within the exclusive domain of the police, and if on the one hand the independence of the judiciary is a hallmark of a democratic system, on the other hand the independence of the investigating agency is equally important to the concept of the rule of law. Undue interference in the role of the respective other destroys the concept of separation of powers and is a major obstacle to justice.⁶⁵

⁶¹Justice Qazi Faez Isa v President of Pakistan PLD 2022 SC 119.

⁶²ibid (Per Yahya Afridi J).

⁶³Justice Qazi Faez Isa v President of Pakistan PLD 2021 SC 1.

⁶⁴Jurists Foundation v Federal Government PLD 2020 SC 1.

⁶⁵Muhammad Hanif v State 2019 SCMR 2029.

Rule of Law & the Bar's Conduct

The Court also noted that the Bar exists for the purpose of ensuring access to, and delivery of, justice, and is meant to stand up for upholding the rule of law. However, it could only fulfil these functions if its members abided by their code of conduct and were subject, like everyone else, to the rule of law.⁶⁶

Legal Education Strengthens the Rule of Law

Legal education plays a crucial role in strengthening the rule of law, social stability, governance, and economic development. There has been a significant decline in the standard of legal education in Pakistan for a number of reasons, the most important of which is the proliferation of substandard law schools that are motivated solely by commercial considerations rather than academic excellence. In addition, the Bar Council, an elected body, is entrusted with the role of improving the standards of legal education. However, as a greater influx of lawyers benefits the Bar Council itself by increasing the number of potential voters, standards of legal education continue to deteriorate. Such a shift in priorities has inevitably compromised the quality of education and hampered the intellectual development of law students. The provision of quality legal education is inextricably linked to the dispensation of justice, for which the Bar is responsible. In its capacity, the Bar must make a conscientious effort to standardise the institutions that award law degrees.⁶⁷

Conclusion

The judiciary, particularly the Supreme Court, has played an important role in furthering the cause of the rule of law in the country. The principle has been recognised as a prominent feature of the Constitution. Public functionaries are required to adhere to the requirements of the rule of law in public service. Institutions are instructed to stay within their designated constitutional and legal boundaries. The Court has also adhered to the principle of judicial restraint in order to respect the powers of other organs. Access to justice and fair trial have been guaranteed to ensure the implementation of the rule of law. Above that, the independence and accountability of the judiciary have been secured to realise the ideal of the rule of law. The role of legal education and the obligation of the Bar have also been clarified. And finally, a new dimension has been added to the ever-evolving concept of the rule of law: there is a growing tendency to bring political and social issues before the courts, which is where balancing power, judicial restraint, and legal clarity become relevant. Courts play a critical role in protecting the rule of law and creating an enabling environment, but it is also important that we remind the people for whom the system is made that they should live within the system and accept the system's outcomes.

⁶⁶*Salamat Ali alias Chamma v State* 2014 SCMR 747.

⁶⁷*Pakistan Bar Council v Federal Government* 2019 SCMR 389.