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The Rule of Law



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Rule of Law and the 2030 Agenda

The rule of law is the defining relation between society and the state. It is the ultimate condition in which citizens and the state are held accountable to a set of laws that are, as Kofi Annan, the Secretary-General of the United Nations wrote in 2004, “publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.”

The rule of law requires, in Mr Annan's words, “measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.” We understand this today as the fundamental architecture of a just society.

Effective rule of law creates an environment in which a country can promote development, protect its citizens from discrimination, and ensure equitable access to justice for all. This means that all citizens have the opportunity to live in peace without fear, with effective recourse in law when their rights are abrogated, and an equal chance to flourish and build a prosperous life.

The 2030 Agenda for Sustainable Development envisions a world where all people live free of violence and fear, where hunger and poverty are eliminated, and where the planet is protected for future generations. This global transformation is predicated on the understanding that human rights, peace and security, and development are deeply interlinked and mutually reinforcing. Pakistan is a signatory to this global commitment to transform the world by achieving 17 Sustainable Development Goals (SDGs).

Of these, SDG-16 aims to create peaceful, just, and inclusive societies that live under the rule of law. This is the necessary condition in which all other goals – including those related to health, education, economic activity and other aspects of development – may be achieved. As such, this global aspiration ushers in a new kind of development, in which people make and influence the decisions that affect their lives.

The rule of law is also necessary for economic growth: businesses require the assurance of security, fairness and predictability to prosper. Globally, a quarter of the world's population live below the international poverty line of USD 581 per year; 790 million people lack adequate nourishment, a billion lack safe drinking water; and 880 million are deprived of access to basic health. Economic growth is essential to alleviate this human suffering, but it can only be sustainable and fair if its foundation is the rule of law.

Yet, ensuring the rule of law for all can pose challenges in Pakistan. In 2016, the World Bank's World Governance Indicators ranked Pakistan at the 20th percentile rank, meaning that 80 percent of the world's countries ranked higher in terms of rule of law. This is perhaps one of the greatest barriers Pakistanis face in living fulfilling lives, and in creating a better, more prosperous future for their children and their nation.

Even within Pakistan, there are differentials in terms of the rule of law. Parts of the country with lower rule of law indicators, such as the Federally Administered Tribal Areas (FATA) and Balochistan, tend to lag behind on socioeconomic fronts. For instance, 73.7 percent of the people of FATA are multidimensionally poor – the highest in the country. The literacy rate in FATA stands at 24 percent as opposed to 58 percent at the national level. Quick fix interventions, like economic recovery and infrastructure development, may bring immediate respite, but long-term success hinges upon mutual trust and support between state and society, and a strong system of the rule of law.

Recognizing this, the United Nations Development Programme (UNDP) works closely with the Government of Pakistan to strengthen the rule of law, particularly in areas where it has been weakened by years of displacement, conflict and insecurity. In Khyber-Pakhtunkhwa, for example, the European Union is a major funder of a long-running UNDP programme to strengthen the relationship between the population and rule of law institutions. This includes measures to improve policing through training, model police stations and forensics laboratories in Malakand division. To help ensure women have equal access to justice, the programme supports training for female lawyers, legal aid clinics and legal awareness, and women's desks in police stations. Fair, speedy and transparent justice builds trust in legal institutions; to achieve this, the programme is working on alternative dispute resolution methods in partnership with the judiciary and local government.

Such initiatives require close and long-term cooperation with the Government and the people of Pakistan to achieve SDG-16.

Notwithstanding the need for short-term social and economic gains, it is essential to recognize that it is the long, slow work of structural change that will lead to sustainable development and prosperity for generations to come. Once the underlying structure is strong, sustainable change will inevitably follow, and will benefit all citizens of Pakistan, regardless of their gender, socioeconomic level, ethnicity, caste or creed. By coming together to achieve an equitable and non-discriminatory rule of law, we lay the necessary foundations for realizing the 2030 Agenda.

RULE OF LAW – A Case Study of Pakistan

Introduction

In today's world, one of the key differences between developed and developing countries is the existence of the rule of law - a primary requisite for socio-economic development and democracy. Owing to its history of interrupted democracy, non-representative regimes, conflicting laws, conservative society, religious and sectarian turmoil, and above all, multiple layers of militancy, Pakistan has witnessed a limited growth in terms of the rule of law. As a result, not only did rule of law institutions weaken over time, in fact, citizens' dissatisfactions towards these institutions also escalated.

Defining the Rule of Law

At different times, the rule of law has been defined differently. Aristotle questions on what is better: whether to be ruled by the best man, or the best laws. His approach was one that not only gave importance to the type of law, but to the type of regime that enacts and administers laws.¹ British jurist and constitutional theorist, Albert Venn Dicey, defines rule of law as the absolute supremacy or predominance of regular law, which is opposed to the influence of arbitrary power. Dicey excludes the existence of arbitrariness, existence of prerogative and even the wide discretionary authority of the government.² Other writers called the rule of law a noble set of principles, according to which, regardless of racial, gender, educational or economic differences, the government treats each individual equally and fairly.³ This definition advances that public authority is bound by and accountable before pre-existing, clear and known laws; citizens are treated equally before the law; human rights are protected; citizens can access efficient and predictable dispute resolution mechanisms; and, law and order is prevalent.

The Secretary General of the United Nations termed rule of law as *"a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."*⁴

The various definitions of rule of law are generally divided into two broader categories. One category comprises of experts whose focus is on what the rule of law needs to serve in a country and society. This category includes law and order, and predictable and efficient judgments by courts and tribunals. The second category focuses on the institutional attributes required to stimulate the rule of law. This category includes the presence of comprehensive laws, well-functioning courts and well-trained law enforcement agencies. Both the categories postulate that the rule of law is not a single or unified object, but is comprised of different socially constructed ends which lead to predictable and efficient judgments and rulings.⁵ The definitions also highlight, that as principles of justice and democracy evolved, so did the rule of law. The focus, however, remains on the fact that the rule of law is opposite to anarchy where a form of self-justice prevails. In such circumstances, there is mistrust between the citizens and the state machinery which translates into private vengeance, use of force, and at times,

violence to enforce rights and regain order.

The Rule of Law: Principles and Applications

a) Constitutional and Legal System in Pakistan

Pakistan inherited formal laws from British India. This initial set of laws underwent several changes over time, so as to bring them at par with the Constitution and Islamic principles. To date, there remain two blocks of belief: one block desires for a state and laws built around Islamic principles, whilst the other desires for a more secular system. However, the preamble and objective resolution of the Constitution of 1973 makes it obligatory that every law, rule and regulation shall comply with Islamic injunctions and teachings.

The Constitution establishes three parameters for the government and justice institutions. Interestingly, all three foundational frameworks - common law, Islamic law, and customs and traditions - contradict each other and are often incompatible with each other, thereby allowing perpetrators to exploit to their own advantage.⁶ The resultant is discrimination and violation of fundamental rights. One such example is the special status of the Provincially Administered Tribal Areas (PATA).⁷ Citizens living in PATA have the right to vote and elect their representatives. However, their representatives cannot legislate for their constituencies. Moreover, laws enacted by the Parliament and Provincial Assembly do not apply at once to PATA, after promulgation, unlike other parts of Pakistan. This discrimination impacts upon the effective functioning of the rule of law in the region, quite evident from the poor socio-economic indicators that plague the region. This also results into a

Note: The main Analysis has been written in collaboration with Arshid Jan (Programme Specialist Legal Aid and Access to Justice - Rule of Law Programme, UNDP Pakistan).

1. Politics, Aristotle, translated by Benjamin Jowett, Batoche Books, Kitchener, 1999, page 75-78. Available at: <https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/aristotle/Politics.pdf>
2. Principe, Michael L., Albert Venn Dicey and the Principles of the Rule of Law: Is Justice Blind? A Comparative Analysis of the United States and Great Britain), Loyola Marymount University and Loyola Law School Digital Commons at Loyola Marymount University and Loyola Law School, page 359. Available at: <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1498&context=ilr>
3. Ibid
4. (S/2004/616) Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies. Available at: <http://www.un.org/en/ruleoflaw/index.shtml>.
5. Rule of law series - Carnegie Papers, Competing definitions of the rule of law Implications for Practitioners by Rachel Kleinfeld Belton, Democracy and Rule of Law Project, Number 55, January 2005, Carnegie Endowment for International peace. Available at <https://carnegieendowment.org/files/CP55.Belton.FINAL.pdf>
6. DAWN (2017), "Changes to tribal system against local customs opposed." Available at: https://epaper.dawn.com/DetailImage.php?StoryImage=24_05_2017_183_003
7. Article 246-247 of the Constitution of Pakistan, 1973.

sense of deprivation among the people, who consider themselves 'second class citizens'.⁸

Another example is of the Federally Administered Tribal Areas (FATA). The Constitution of Pakistan grants special status to this area as well.⁹ This area was governed, until recently, under the Frontier Crimes Regulation of 1901 (FCR) which vests absolute powers and authority in the office of the Political Agent, under which he/she can exercise executive and judicial powers. Indigenous justice systems such as those of Rewaj (the local customs and practices) and Jirga, provide alternate dispute resolution mechanisms for deciding criminal and civil disputes. Similar to PATA, people of FATA were also granted the right of adult franchise thereby allowing them to elect their representatives to the parliament. However, the Constitution forbids these representatives to legislate for FATA.

b) Uniform Laws and Processes

The effective functioning of the rule of law also requires standardization of justice systems in terms of principles and modes, as an essential principle. In Pakistan, parallel systems of justice all offer contradictory foundational frameworks. More than often, this inherent juxtaposition in the governance system often ignites confusion within and for institutions responsible for the provision of justice.¹⁰ In order for the rule of law to be effective, it needs to be devised based on a standard structure that is sustainable.¹¹

An example of this confusion is the legal provision concerning the right of inheritance to an orphan, whose father dies during the lifetime of his (the orphan's) grandfather. Section 4 of the Muslim Family Laws Ordinance of 1991 allowed children to inherit a share in the property after the death of their father. Ideally, after promulgation of the law, this matter should have been settled, but this is not the case.¹² The

Federal Sharia Court has termed the said provision against the principles of Islam. While this decision was also tabled in the Supreme Court, however, till date the matter remains in grey.¹³

Uniformity in the law also demands that the laws of a country remain unchanged, for the major part, irrespective of the governing authority that takes over. Like any other country, Pakistan has also seen its share of changing regimes. Along with these changing regimes, the laws have also been altered from time to time. For instance, during the tenure of General Zia-ul-Haq the Constitution and national laws, saw several modifications. Laws such as the Qisas and Dyet Ordinance, the Hudood laws (Islamic punishment for the use of liquor, theft, and adultery), establishment of Federal Shariat Court and of Islamic Ideology Council, were amended in order to bring them in conformity with Islamic injunctions. Moreover, to replace the national assembly, Gen. Zia selected his Majlis-i-Shora (Islamic Parliament), comprised of religious scholars, journalists, economists and intellectuals.¹⁴ Such changes had dire impacts upon the law and the judicial map of Pakistan.

c) Government Bound by Law

Another vital principle of the rule of law, is to make the government bound by laws and keep it from making arbitrary decisions. One of the earlier advocates of this principle was Aristotle, who opined that it was better if leaders judged not at discretion but rather in accordance with written laws.¹⁵ Later on, this idea trickled to Europe, which witnessed absolute monarchs for centuries. Subsequently, the English Bill of Rights of 1689, inserted another principle in the English legal system. It directed the King to exercise his actions of law-making and abrogation through the parliament.¹⁶ This resulted into establishment of the fact that a government must act through already written laws, not executing decisions or changing

laws arbitrarily, but instead, through clearly defined and established legislative directives. There are, however, numerous examples in the present world when governments have violated laws, through for example, forceful confiscation of lands, devoid of any compensation offered in return. However, the prevalence of a set of rules defined as the law, still acts a deterrent.¹⁷ In such cases, the role of a strong and independent judiciary that curtails the powers of the government and compels it to abide by the law, like an ordinary citizen, becomes integral.

d) Equality before the Law

Equality before the law, another invaluable rule of law principle, originates primarily from the Greeks. According to Dicey's modern definition of the rule of law, all people are equal before the law and government functionaries and clergy should be tried under the same courts as ordinary citizens.¹⁸ The norm, 'equality before the law', is a tool which ensures that all citizens irrespective of class, creed, social status or linkages to the government, have to be prosecuted for their wrongs under the same laws which will apply equally. With this norm, the rights of the most marginalized segments of the society, such as women, members of lower social and economic strata, racial and religious minorities, all are upheld and treated equally before the law. In some instances, the exploitative use of this authority undermines the fair functioning of the rule of law, its principles and its institutions, and poses a barrier to 'equality before the law'.

Another barrier to 'equality before the law' is culture. In certain societies, culture and societal traditions intervene and force the norm to shift. There are societies whereby, even though women are granted the right to education and the right to marrying by choice, yet there are some who use the garb of religion or societal tradition to conveniently snatch these rights. This is a trend usually witnessed in the developing world,

8. Jan, Arshid (2016), "The Sharia Nizam-e-Adal Regulation 2009, Issues and Solutions." MPhil Thesis (unpublished).

9. See Supra note 7

10. DAWN (2017), "Changes to tribal system against local customs opposed." Available at: https://epaper.dawn.com/DetaillImage.php?StoryImage=24_05_2017_183_003

11. DAWN (2016), "Fata reforms package has flaws: experts." by Ikram Junaidi. Available at <https://www.dawn.com/news/1291725>;

The Daily Times (2017), "FATA reforms has created confusion." Available at <https://dailymtimes.com.pk/22878/fata-reforms-has-created-confusion/>;

DAWN (2016), "Fata's merger with KP strongly advocated." Bureau Report, available at <https://www.dawn.com/news/1285993>;

The Nation (2017), "Ambushing FATA reforms." by Afrsiab Khattak. Available at <https://nation.com.pk/04-Feb-2017/ambushing-fata-reforms>

12. Section 4, the Muslim Family Laws Ordinance, 1961 (Ordinance NO. VIII of 1961), "In the event of the death of any son or daughter of the propositus before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stirpes receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive."

13. Allah Rakha and others vs. Federation of Pakistan and others, judgment passed by. Mian Mahmood Ahmed, CJ. Dr. Fida Muhammad Khan and Ch. Ejaz Yousaf JJ of Federal Sharia Court 2000. Published in P L D 2000 Federal Shariat Court 1. Available at: <https://gmlaw.wordpress.com/2013/10/03/fsc-judgement-2000-provisions-of-muslim-family-laws-ordinance-un-islamic/>.

14. Lubna Kanwal (2015), "Zia, Islam and the Politics of Legitimacy." Available at http://pu.edu.pk/images/journal/szic/pdf_files/4-%20Lubna%20Kanwal%20_june15.pdf

15. "Citizens and Statesmen: A Study of Aristotle's Politics," By Mary P. Nichols, Page 78. Available at:

<https://books.google.com.pk/books?id=gQEFAAQAQBAJ&pg=PA78&lpg=PA78&dq=it+was+better+for+kings+to+rule+with+discretion+or+in+accordance+with+law+Aristotle&source=bl&ots=gkhwYQRARJ&sig=sda9-j-635-BQhtRnS5zE56wgU&hl=en&sa=X&ved=0ahUKEwixtaDGleFYAhVC26QKH8M8B9MQ6AEILzAC#v=onepage&q=better%20for%20kings%20to%20rule%20with%20discretion%20or%20in%20accordance%20with%20law%20Aristotle&f=false>

16. English Bill of Rights, 1689. Available at https://www.law.gmu.edu/assets/files/academics/founders/English_BillofRights.pdf

17. Matthew Spalding (2010), "Rule of Law: The Great Foundation of Our Constitution," First Principles. Available at: <http://firstprinciplesjournal.com/articles.aspx?article=1434>.

18. Principe, Michael L., Albert Venn Dicey and the Principles of the Rule of Law: Is Justice Blind? A Comparative Analysis of the United States and Great Britain, Loyola Marymount University and Loyola Law School Digital Commons at Loyola Marymount University and Loyola Law School, page 359

in particular, in societies that are male dominated. Therefore, in such places, mere laws cannot offer sole protection to women.

This phenomenon is suitably fitting in the case of Pakistan, Bangladesh, Afghanistan, India and other developing countries. In case of Pakistan, for instance, the practice of 'marriage to the holy Quran'¹⁹ practiced in parts of Sindh, is a case study depicting how females are deprived even the right of marriage, just so as to deprive them of their lawful share in inheritance.²⁰ Similarly in India, the 'caste system' remains a strong driver that deprives the lower caste to exercise their rights. The question to bring the low-caste at par with the high-caste can only be resolved, not just through a formal recognition of the principle of equality before law, but by taking practical steps to establish equally other principles which in unison, define the rule of law.²¹

The extent of the rule of law itself sometimes becomes a barrier. For instance, the Constitution of Pakistan until recently, did not extend jurisdiction of the constitutional courts to FATA. Hence, even though laws and institutions both exist, yet they cannot be implemented.

When laws exist, but adjudication and implementation are weak, then the role of courts and law enforcement agencies becomes important, because equality before the law requires courts that are strong and independent. If this system of accountability is weak, then the rich can use their wealth to escape justice. Hence, access to justice can prove to be expensive in some cases. In many countries, the poor will not even consider to come to the formal justice system because they cannot afford it and they know that courts will simply uphold the power structure.²²

In addition, it also requires a strong and

committed government to uphold and to protect the rights of the marginalized. In modern democracies where rule of law prevails, citizens also hold willingness to play as catalysts for change.

e) Efficiency of Justice

The principle of the efficiency of justice is another step in strengthening the rule of law. The notion of efficient justice is derived from Magna Carta which first described that justice will not be denied or delayed.²³ As time passed '*justice delayed is justice denied*' became a settled principle of the rule of law. When justice is efficient, it supports other ends of the rule of law as well. It discourages all techniques of case delay employed by those who would benefit from the prolongation, as opposed to those who would benefit from the decision. Delay in justice sabotages and kills the basic purpose of justice. Often seen in criminal cases by the more powerful party in an attempt to settle the case outside the court via money or otherwise,²⁴ delaying tactics are one of the mostly frequently used tools to exhaust the opponent. Other causes include the defective process serving, procedural technicalities, frequent transfer and posting of judicial officers, manual case institution, corruption,²⁵ inconsistency in policies, inadequate capacity of judicial staff, weak investigation, and defective prosecution.²⁶

When it comes to Pakistan, a series of issues affects the efficiency of justice. Like a government, the popularity of the judiciary also rests in how much it enjoys the trust of people. Many a times, delays in the dispensation of justice forces litigants towards other choices, i.e. resolving disputes through traditional dispute resolution systems, such as a Jirga or Panchayat. The track record and efficiency of these traditional dispute resolution mechanisms is unreliable. Therefore, when

the traditional Jirga or Panchayat fails, often civil matters culminate into criminal cases.²⁷

An efficient judicial system stands on speedy and expeditious justice delivery, quality services, inexpensive litigation, access to formal courts, and satisfaction of the disputing parties, which are key challenges of the country's judiciary. Pendency is a key challenge for the judiciary in Pakistan, which even the superior courts are cognizant of. In a recent speech, the chief justice of Pakistan admitted that the judiciary in Pakistan is confronted with a massive pendency of 1,873,085 cases.²⁸

f) The Right to a Fair Trial

The right to a fair trial is another important component of the rule of law. This principle is designed to provide protection to individuals from arbitrary and unlawful curtailment and deprivation of basic human rights.²⁹ Article 14 of the International Covenant on Civil and Political Rights (ICCPR) provides that, "*everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.*"³⁰ The Article sets some key norms: all persons shall be equal before courts and tribunals; both in civil and criminal cases; every one shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law; and, every person charged in a criminal case shall be presumed innocent until proved guilty. The said article also establishes some guarantees including prompt information to the accused about the nature and cause of charge, adequate time for preparation of defense, access and engagement to a lawyer of choice, trial without undue delay, access to justice if the person so charged has insufficient means, right to examine witnesses against oneself, not to be compelled to testify against oneself or confess one's guilt, right to challenge one's

19. Zaman, Sara, Forced Marriage and Inheritance Deprivation, A research study exploring Substantive Structural Gaps in the implementation of Prevention of Anti Women Practices (Criminal Law Amendment), Act 2011, in six selected districts of Pakistan, Aurat Foundation, Page 95-98. Available at: https://www.af.org.pk/pub_files/1416847483.pdf

20. Ibid

21. Montesquieu, Spirit of the Laws, Charles De Secondat, Baron De Montesquieu, 1748, Translated by Thomas Nugent, 1752. Available at <https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/montesquieu/spiritoflaws.pdf>

22. PILDAT (2015), "Free Legal Aid in Pakistan," Position paper. Available at: http://www.pildat.org/Publications/publication/ROLR/FreeLegalAidinPakistan_PILDATPositionPaper.pdf

23. Magna Carta 1215. Available at <http://www.lordsandladies.org/magna-carta.htm>

24. Delaying Tactics Used by Lawyers in Dispensation of Civil Justice in Lower Courts of Pakistan, Pakistan Journal of Criminology, By Shah, Raza Ullah; Khan, Shadi Ullah; Farid, Sumera; Shah, Aman Ullah. Available at: <https://www.questia.com/library/journal/1P3-3947466241/delaying-tactics-used-by-lawyers-in-dispensation-of>

25. News Lens Pakistan (2016), "Justice delayed is justice denied: 1.8 million cases clogging up the courts," By Shaukat Korai. Available at <http://www.newslens.pk/justice-delayed-is-justice-denied/>

26. Express Tribune (2012), "Justice denied through delays, bribes and unions," By Taha Siddiqui. Available at, <https://tribune.com.pk/story/329680/justice-denied-through-delays-bribes-and-unions/>

27. Geo News (2016), "CJ calls police report on Karachi law and order 'baseless'." Available at: <https://www.geo.tv/latest/101911-CJ-calls-police-report-on-Karachi-law-and-order-baseless>

28. DAWN (2017), "Sindh police recommend steps to improve criminal justice system." Available at: <https://www.dawn.com/news/1340352>

29. Zafar Ahmad Farooqi, "The Role And Function Of Prosecution In Criminal Justice." Available at http://www.unafei.or.jp/english/pdf/RS_No53/No53_26PA_Farooqi.pdf

30. Civil Cases Culminating to Criminal Cases: A Baseline Study on Trends in Crimes in Swat and Dir Upepr, By Khurshed Iqbal Dean Faculty, KP Judicial Academy, 2012.

31. Qatar Daily Newspaper (2016), "Pakistan delays blasphemy appeal after judge steps down." Available at: <https://thepeninsulaqatar.com/article/13/10/2016/Pakistan-delays-blasphemy-appeal-after-judge-steps-down>

32. Angbeen Atif Mirza (2016), "Delays and lapses in Pakistan's criminal justice system." Available at: <http://eprints.lse.ac.uk/74605/1/blogs.lse.ac.uk-Delays%20and%20lapses%20in%20Pakistan%20criminal%20justice%20system.pdf>

33. Butt, Tariq (2018), "1.87 million cases pending in Pak courts," The News. Available at: <https://www.thenews.com.pk/print/268487-1-87-million-cases-pending-in-pak-courts>

34. Lawyers Committee for Human Rights (2010), "What Is A Fair Trial? A Basic Guide to Legal Standards and Practice," Page 1. Available at https://www.humanrightsfirst.org/wp-content/uploads/pdf/fair_trial.pdf.

35. United Nations, "International Covenant on Civil and Political Rights." Available at: <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>

conviction in appellate forums and protection against double jeopardy.³¹

Under the 18th Constitutional Amendment, Article 10-A regarding the 'right to a fair trial' was inserted into the Constitution, based on a two-thirds majority vote in the Parliament, post 2010. The role of the police in ensuring that the right to a fair trial is available to the citizen, becomes extremely crucial. According to a former judge of the Supreme Court, the right to a fair trial commences as soon as a person comes in contact with the police at the most initial stage of reporting a crime.³² However, in some cases, the use of force by police to extract confessions, becomes a barrier to the right to a fair trial.

Another barrier that sometimes hinders the right to a fair trial is the lack of financial resources. At times, the path to acquiring justice requires big financing. For instance, not everyone has the ability to hire a lawyer. The state is silent on the issue of legal aid to

ensure access to justice for everyone.³³

Another important covenant in ensuring the right to fair trial, is ensuring the safety of those dispensing justice. While the 'right to a fair trial' endeavors to protect the rights of citizens, it is equally important to ensure that lawyers and judges are also protected under the law. Several lawyers and judges practice hesitation in taking up cases along the lines of sensitive issues such as blasphemy, for fear of being targeted. In Pakistan, several judges, police,³⁴ lawyers³⁵ and journalists were killed and assaulted to stop them from hearing cases against the accused involved in terrorism and religious extremism,³⁶ while others left the country fearing for their lives.³⁷

Finally, a very popular rule of law dispensation modality in today's society, is 'self justice'. In such a situation, whereby citizens lack trust in the state to dispense justice, they take it in their own hands by using violence to enforce their rights and social

order. However, the rule of law cannot prevail where self-justice prevails.

Conclusion

While there can be an unending debate on the rule of law in Pakistan, one thing is clear: the future of this country lies in a strong, transparent, collective and accountable rule of law system. In order for this to happen, parallel justice systems need to be streamlined into one standard system that holds everyone accountable. Accountability and transparency of the law, along with proper dispensation mechanisms, are integral to achieving a stable rule of law in the country. At the end of the day, the rule of law is a collective phenomena. Limiting law and order reforms to police and other individual law enforcement agencies, will not allow the broader rule of law ends to be achieved. Citizens must also play their part in fulfilling their legal responsibility to ensure that justice and rights are upheld for all.

31. Article 14, International Covenant on Civil and Political Rights. Adopted by the General Assembly of the United Nations on 19 December 1966. Optional Protocol to the above-mentioned Covenant. Adopted by the General Assembly of the United Nations on 19 December 1966.

32. Seminar on Article 10-A 'Right to Fair Trial' Constitution of Pakistan, 25-26 September 2013, page 4. The Seminar was organized by United Nations Development Programme held in Ramada Hotel Islamabad. The Seminar was attended by Chief Justice Islamabad High Court, former Judges of Supreme Court, Senior Supreme Court Lawyers and members of Pakistan and Provincial Bar Councils, Supreme Court and High Court Bar Associations, Representatives of Law Schools, Human Rights Commission of Pakistan, Civil Society Organizations.

33. Ibid, page 5.

34. DAWN (2017), "AIG martyred in suicide blast targeting Peshawar police," by Ali Akbar and Hassan Farhan. Available at: <https://www.dawn.com/news/1372576>

35. Aljazeera (2016), "Quetta lawyers attack: 'irreparable blow to future.'" Available at <http://www.aljazeera.com/news/2016/12/quetta-lawyers-attack-irreparable-blow-future-161209085121086.html>

36. Reuters (2017), "Suicide bombers in Pakistan kill five in attack on court." Available at <https://www.reuters.com/article/us-pakistan-blast/suicide-bombers-in-pakistan-kill-five-in-attack-on-court-idUSKBN1600KC>

37. D.W., "Pakistani judge flees country after receiving death threats," By Manasi Gopalakrishnan (Reuters, AFP). Available at: <http://www.dw.com/en/pakistani-judge-flees-country-after-receiving-death-threats/a-6646576>

Rule of law, Democracy and Human Rights



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Ever since human beings began reconciling their desire for freedom with their need for collective organizations, which led to the emergence of the state, their quest has led them to rely more and more on the concept of the rule of law (ROL).

The Aristotelian dictum that "*law should govern*"¹ raised the question as to who made the law. John Locke's declaration that "freedom in society means being subject only to laws made by a legislature" eventually led to the conclusion that the legislature had to comprise freely elected representatives of the people.

Origins of the Rule of Law

Once democracy had been accepted as the most basic requisite of ROL, a search to define the nature and scope of the law began till humankind came to the current definition of ROL, that is, a system in which the law made by duly authorized legislators applies to all citizens of a state, including the members of the government and the lawmakers themselves, without any discrimination on the grounds of belief, race, ethnicity, gender or social status.

While a small number of free and advanced

states in the world arrived at the modern definition of ROL through centuries of trial and struggle, a much larger part of humankind, comprising the former colonies, received the package of freedom and ROL as a result of the revolution in political thought after the Second World War (1939-1945) when all people, regardless of their number or the size of their territory, their creed or colour, their state of economy and their experience of self-government, were declared entitled to independent statehood.

Redefining the Rule of Law

Soon thereafter came the Universal Declaration of Human Rights (UDHR)² that gave the essential features of ROL, the status of human rights that were derived from self-evident truths and were inviolable, and also universal and indivisible. Thus, all citizens of a state could claim equality before law and equal protection of law, the right to presumption of innocence and to defence and protection against retrospective application of punitive laws—all attributes of rule of the law—as rights enforceable by independent courts. In addition, all people became entitled to be governed democratically by their representatives elected freely after regular intervals. In this manner, rule of the law, democracy and an order based on respect for human rights, became interchangeable values.

Pakistan: ROL and Human Rights

All newly independent countries were requested to incorporate the universal human rights, including the salient features of ROL, into their national constitutions. Most of them did so. However, while including universal human rights in their national constitutions, quite a few countries expressed reservations on some of the rights. Pakistan started drafting citizens' fundamental rights within a few months of its emergence as an independent state, before the UDHR was adopted in December 1948, and these fundamental rights were approved by the Constituent Assembly in October 1950, although the country's first Constitution was not

adopted until 1956. While most of the provisions of the UDHR were incorporated into the fundamental rights chapter of the Constitution, there were some significant omissions and deviations.

Pakistan never included in its fundamental rights chapter, Article 16 of the UDHR, which grants men and women equal right to choose their spouses and guarantees them equal rights during marriage and at its dissolution.³ This concession to the majority community's belief is still an issue in the country and it has blighted the life of countless women who have been forced into marriage with men they did not choose and could not like. Likewise, Pakistan does not accept the right to change one's faith and the right to work, while the right to protection against torture is only partially recognized, and the right to fair trial was added to the chapter on fundamental rights as late as 2010.

The problem in fully acceding to the UDHR, in addition to the decision to build a religious state, is that while civil and political rights were largely included in the chapter on fundamental rights, the economic, social and cultural rights were dumped in the chapter on Principles of Policy, which are not enforceable by courts. To an extent, this partitioning of the rights could be justified on the ground of a lack of resources, but this could not be made into an excuse to deny the people some of their most significant rights. Just as the state's obligation to guarantee compulsory education at primary and secondary levels was recognized only in 2010, it will be necessary to continue the process of transferring the basic rights from the Principles of Policy, to the judicially enforceable fundamental rights.

But, recognition of a human right in the national constitution is never enough to ensure its enjoyment by citizens, unless laws are made to lay down the mode of enforcement, and the requisite mechanism has been put in place. For example, Pakistan's Constitution outlawed slavery

1. Phrase appears in Aristotle's book entitled 'Politics' in Book 3.

2. United Nations, "Universal Declaration of Human Rights." Available at http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf

3. Ibid, Article 16, p.34

and forced labour in 1973, but no law was made to deal with violations until 1992 when the Bonded Labour System (Abolition) Act was adopted. However, its enforcement was delayed till 1995 due to non-compilation of rules and non-creation of implementation forums and agencies.

In addition to its responsibility to enforce the rights enumerated in the Constitution, the state of Pakistan has assumed a wide range of obligations under the international treaties it has ratified over the past decades. These include the two Covenants of 1966,⁴ the Conventions on the Elimination of All Forms of Racial Discrimination (CERD) and Elimination of All Forms of Discrimination Against Women (CEDAW), and, the Conventions on the Rights of the Child (CRC) and Against Torture (CAT). These obligations are not being met for want of domestic legislation and appropriate implementation mechanisms and policies. Then, under the GSP Plus accord,⁵ Pakistan has made solemn commitments to comply with 27 international instruments on human rights, ILO conventions, and conventions relating to environment and corruption-free governance. It is in the best interest of the state and the people of Pakistan, to devise a mechanism to ensure compliance with all the treaties to which it has become a party.

A critical issue relating to enforcement of human rights is that all fundamental rights, except for the inviolability of the dignity of human person (Article 14 (1) of the Constitution), are subject to law and there are provisions in the Constitution itself and laws have been made that deny or curtail the duly recognized rights. For instance, the Constitution says all citizens are equal before the law, but the law of evidence denies this right to women and the Hudood Ordinances deny this equality to non-Muslim citizens. By denying certain high offices to non-Muslims and by providing for the state's proactive role in enabling the Muslims to follow their creed and making no such commitment regarding non-Muslims, the Constitution itself lays the foundations of discrimination.

Way Forward

All of these issues need to be addressed, as per the modern definition of ROL, within a democratic framework, but democracy has had problems in almost all newly independent countries. The main problem has been caused by attempts to impose a democratic superstructure over extra-democratic social formations. Some of these states were dominated by feudal

traditions while others were still in the tribal phase. Religious divisions ran deep in many countries while in other countries, indigenous people enjoyed preference over migrants, even though the latter had been living in the country for generations, and elsewhere new settlers had an advantage over the indigenous population. The net result was that while most of these countries adopted the democratic system, in its various forms, they failed to respect the first principle of democracy, namely, equality of citizens. Those denied equality in democratic rights also suffered denial of human rights and due protection of ROL.

Many examples of such discrimination can be cited in Pakistan. Non-Muslims do not have the same rights that Muslims can enjoy and women may be equal to men in theory but not so in practice. For example, men and women have equal rights as voters but women in many parts of the country are still fighting for their right to cast ballots. They will have to fight harder to be able to make democratic choices of their free will. One such example is of Fatma Shamsheh, who cannot vote of her free will as she has to abide by the will of her husband.⁶ In Malaysia, the *bhumi putras*, the sons of the soil, have more rights than others. In several Arab countries, women are still struggling to be granted their democratic and legal rights, such as working, marrying or travelling without the consent of a guardian.⁷

Most of the newly independent countries had little experience of running democratic institutions. They could make laws to ensure fair elections or get experts from developed countries to draft such laws for them, but in most cases, the process of election, the very foundation of a democratic polity, was monopolised by the social elite. Even in the India-Pakistan subcontinent, where elected assemblies began to be established a century ago, the franchise was extremely limited and adult franchise, though for both women and men, was introduced only after independence and Pakistan's tribal areas had to wait for this right until January 1996. The right to contest elections to the federal and provincial assemblies is still available to the very rich. The laws and rules do not offer a level playing field for the rich and less affluent candidates. However, with a new Elections Act 2017 recently passed,⁸ a movement towards fairer election has begun. However, the lack of democratic political parties and robust public opinion, the two other essential props of a democratic order, suggest that the transition to a

genuinely democratic dispensation may take many more years to be completed.

Since the parliaments in most developing countries including Pakistan, are dominated by the privileged elite-landlords, rich businessmen and professionals-their lawmaking priorities seldom include matters of concern for the underprivileged. This is best illustrated by the tardiness on part of many states, Pakistan included, in taking up matters related to the interests of the masses.

The task of enabling the state of Pakistan to bring the Constitution and laws into harmony with human rights norms, ensuring due compliance with international treaties and raising a democratic edifice that includes the excluded and abolishes all forms of arbitrary rule and decision-making, is truly gigantic. It may not yield to sporadic and piecemeal attempts at reform. This approach will not only entail delays, it might also fail to prevent fresh discrepancies from creeping into the laws.

The government of Pakistan will be well-advised to take a holistic view of the situation and evolve a four-pronged strategy to strengthen rule of the law.

First, a high-powered parliamentary committee may be constituted, on the pattern of the one that produced the path-breaking 18th Amendment, to remove all lacunae, inconsistencies and anomalies, that are incompatible with ROL, human rights or democratic norms, from the Constitution and the statutes.

Second, the task of implementing the changes suggested by the committee may be assigned to a permanent and autonomous commission.

Third, in order to ensure prompt fulfillment of obligations acquired under the various international treaties or instruments, the government may make ratification of an international treaty by parliament mandatory, within a month or so of its ratification by the government. It may also consider the possibility of amending the Constitution to the effect that an international treaty will become enforceable by the courts within a short period of its ratification by the parliament and the government, as has been done by some states. This will obviate the need for domestic laws for the enforcement of each treaty. It will also put an end to secret understandings with foreign parties.

4. The International Covenant on Economic, Social and Cultural Rights, and The International Covenant on Civil and Political Rights

5. Read more: DAWN (2013), "EU Grants GSP Plus Status to Pakistan." Available at <https://www.dawn.com/news/1072051>

6. USA TODAY (2013), "Women in Pakistan town can't vote. Why? Because men say so." Available at <https://www.usatoday.com/story/news/world/2013/05/05/in-pakistan-town-men-have-spoken-no-women-vote/2137223/>

7. DAWN (2013), "Nine things Saudi women still can't do." Available at <https://www.dawn.com/news/1225908>

8. Government of Pakistan, National Assembly, Elections Act 2017. Available at http://www.na.gov.pk/uploads/documents/1506961151_781.pdf

And, finally, the fact that democracy is still in the process of evolution, must be accepted by both the rulers and the ruled. All obstacles to a genuinely democratic

order must be removed so that a free, informed and democratically organised citizenry has identifiable stakes in an inclusive democracy, and will therefore be

able and willing to defend it against any subversion, while remaining within the rule of the law.



The Rule of Law: Concept and Practices in Pakistan



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Although Pakistan has a comprehensive constitutional framework and accompanying legal procedures, the rule of law, in practice, is still confined to conventional concepts of internal security and law enforcement. The common perception amongst policymakers and practitioners defines rule of law as being about the control and elimination of crimes, as well as conventional and non-conventional security threats. However, this concept appears inherently flawed as it misses out key principles. These include accountability and transparency before the law, equal and even application of just and clear laws including protection of fundamental rights, and accessible and impartial dispute resolution, to name a few. The differences in definitions has created an imbalance among security institutions and affected the functionality of law enforcement departments.

The rule of law is a democratic concept for the successful functioning of the polity. Weak democracies or democracies in transition suffer because of another competing notion: the writ of the state. Although both these concepts aim to maintain law and order but the writ of the state, in particular, refers to a government based on the principles of law and not of

men; though the terms are often used interchangeably. Arguably so, 'writ of the state' is often times used by law enforcement departments to justify their unconstitutional and extrajudicial practices. The question of the supremacy of the constitution or moral authority, further confuses the discussion.

Part of this confusion also arises from the fact that in Pakistan, military and paramilitary forces have, at times, also taken up the role of law enforcement and establishing writ of the state. Such temporary or situational arrangements, such as the deployment of paramilitary force Rangers in Karachi with diverse responsibilities also including policing, have contributed to the state's lack of political will to reform and empower civilian law enforcement structures. A similar but much compounded situation exists in Balochistan and FATA, where extraordinary circumstances have led the Frontier Corps and army, respectively, to take control of security as well as law enforcement, parallel to existing, though weak, law enforcement structures.

The interaction and coordination between military and civilian law enforcement agencies has also not been good, thus exposing some deeper structural issues linked to the rule of law and law enforcement in the country.¹ Indeed, paramilitary forces have been encroaching on civilian law-and-order affairs and strengthening their institutional and moral authority. On the other hand, civilian law-enforcement agencies have become so weak that they cannot even clarify their position in instances where they might be unable to act due to the dominant role played by paramilitaries.

The following factors and practices have been weakening the internal security infrastructure and require strong reforms for countering and correction:

1. Parallel Security and Justice Structures

The unprecedented terrorism challenge

forced the state to take exceptional operational, legislative and administrative measures. In the process, parallel to the security forces, the government also engaged paramilitary forces to combat the threat. This process not only exposed old fault lines but also gave rise to new challenges, including those linked to coordination and authority.

Each province has parallel security forces to combat similar threats. Punjab has the Elite Police force, which was created in 1997 to tackle counterterrorism and violent crime, but the province raised another dedicated counterterrorism force in 2014. Experts and police officials favour the restructuring and expansion of the elite force which has shown its worth in the past.

German journalist and lawyer Joachim Wagner discusses how the prevalence of parallel justice structures impact negatively on the rule of law.² He discusses how Muslim families in Berlin, Essen and Bremen "rely on Islamic tribunals" for dispute resolution. His research finds that families are most likely to put blame on the youngest member of the family in case of any crime committed. "This parallel justice that I describe ... which is not just an Islamic phenomenon but common to other clan structures, consists of three pillars: the arbitration, financial compensation and vigilante retribution," he says. Such examples denote how these parallel justice structures do not follow fair modes of decision making, thereby costing many their rights. As rule of law is directly related to upholding of fundamental rights, hence, such structures weaken the sustainability of an effective rule of law.

2. Increasing Role of Paramilitary Forces

The operational assistance of paramilitary forces in large-scale anti-terrorism operations has been significant and has usually been accompanied with very narrow terms of reference. However, in most cases, paramilitary forces have gradually expanded their role to include normal policing. Paramilitary assistance has not only put a financial burden on

1. The recent incident of Interior Minister Ahsan Iqbal not being allowed entry into the accountability court by paramilitary rangers reflects such inherent structural issues. For more information, read The Express Tribune: <https://tribune.com.pk/story/1520775/ahsan-iqbal-threatens-resign-rangers-deployment-outside-nab-court/>

2. Deutsche Welle (2012), "Parallel societies, parallel justice." Available at: <http://www.dw.com/en/parallel-societies-parallel-justice/a-15908155>

provincial governments, but has also weakened the law-enforcement infrastructure of the provinces.

In Karachi, for example, it has become difficult to conceive of normal policing in the city, at least in the near future. Coordination among civilian security forces was already an issue, but the 'rangerisation' of security has further complicated the situation. Although, rangers have played an instrumental role in improving the law and order situation in Karachi, yet, there are several layers of control. Big institutions have big egos and they expect a bigger, more leading role in managing affairs. Conventional law enforcement becomes passively dysfunctional and administration becomes habitual when these superior bodies are invited to handle critical situations so that the government does not have to take responsibility.

Henceforth, engaging paramilitary forces in urban counterterrorism and anti-crime campaigns, and assessing the progress of the paramilitary forces, is an issue that requires attention by the government. Empowering civilian security institutions and restoring paramilitary forces back to their original purpose of creation, is imperative to enabling a stable and sustainable rule of law in the country.

3. Issues of Capacity and Resources

The capacity building of law enforcement agencies, especially the police, is a long standing issue. In addition to capacity problems, the police is also under-resourced and lacks equipment. According to a report published by PILDAT in 2016,³ the existing annual budget allocation for Punjab Police is USD 0.79 billion, which is six percent of the province's total budget. Out of this, a mere 2.08 percent is allocated to trainings (Figure 1). Despite the fact that it is imperative to improve the operational capacities of the police; nevertheless, very limited budget portions are allocated for several capacities including, trainings, technological support, investigations and patrolling. However, instead of addressing these issues and allocating additional resources, the federal and provincial governments are investing in 'safe city projects'. These projects have not reduced the burden of physical security infrastructure in Islamabad and Lahore: they have been completed but have yet to provide sufficient relief to the common man. The Punjab government allocated around an additional PKR 50 billion for such projects in 2017.⁴

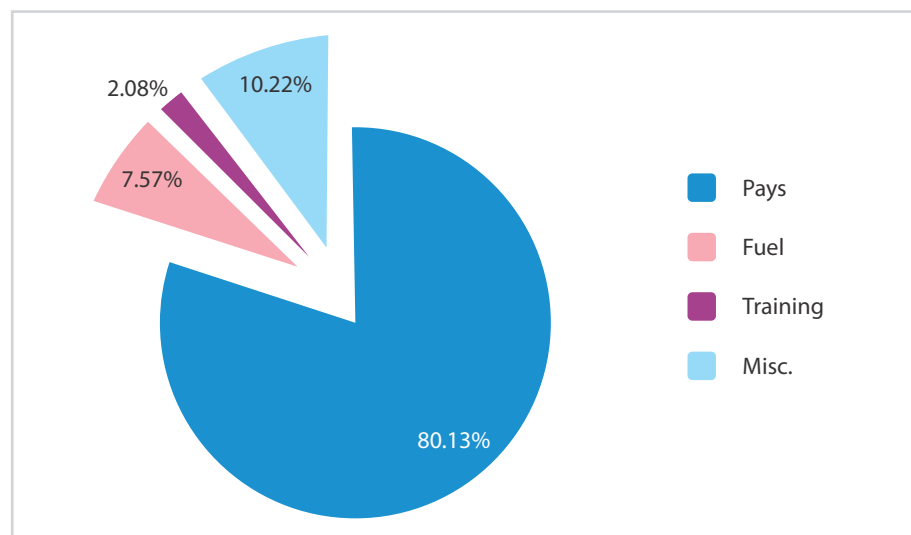
The government continues to spend

abundant resources on improving internal security and most federal and provincial security allocations are for parallel and purpose-built security forces. The federal government allocated PKR 91.8 billion in the last budget towards the maintenance of law and order in the country.⁵ Besides, an amount of PKR 15.6 billion was allocated for CPEC security, along with another security layer that was being created in the country.⁶

terrorism practices and function as a set of guiding principles. But instead of investing in structural reforms, the government preferred parallel monitoring institutionalization instead. International donor agencies also encouraged such practices by providing pilot or kick-off financial assistance for such initiatives.

Lackadaisical handling of the same kind

Figure 1: Punjab Police Budget Distribution (2015-16)



Source: PILDAT (2016), "Policy Brief - Policy Recommendations for Reforms in Police System of Pakistan."

4. The Case of NACTA

The National Counter Terrorism Authority (NACTA) was established to create synergy in the state's responses to counterterrorism, reduce the coordination burden of conventional security forces, and to some extent, provide operational cooperation. But NACTA has been lacking resources and capacity, besides being a victim of bureaucratic and institutional control. The government has further put the responsibility of implementing the National Action Plan (NAP) on the body, without addressing its capacity issues.

To fill the void, security institutions took control of much of that process, which included activating and leading the provincial apex committees, launching anti-militant military actions across the country, running the military courts etc. As a result, this made NAP far too military-centric and squeezed space for civilians. The sporadic waves of terrorist attacks inside the country also led security institutions to create a dedicated mechanism to monitor the implementation of NAP and duties were assigned to the national security adviser.

NAP was devised to correct counter-

stymied the functioning of NACTA as well. Till date, the authority is unclear regarding its exact role.

Apparently, NACTA has established a Joint Intelligence Directorate (JID) consisting of 413 officers from Military Intelligence, Inter-Services Intelligence and other agencies and departments.⁷ Although the JID is consuming most of the NACTA budget, little is known about its functions and what it has achieved so far. Moreover, it seems unlikely that it will be operating under civilian supervision, even though initially, a JID under the supervision of the Prime Minister's Secretariat was proposed. It was a workable idea. Parliamentary oversight would have ensured transparency and the initiative's success.

While on one hand the intelligence agencies appear reluctant to cooperate with NACTA, on the other, the organisation's bureaucratic structure makes it incapable of producing intellectually sound policy insights. It is unfortunate that the government is expecting a national narrative from a non-functional counterterrorism body.

Given it has failed to perform its main

3. PILDAT (2016), "Policy Brief-Policy Recommendations for Reforms in Police System of Pakistan." Available at: <http://www.pildat.org/Publications/publication/ROLR/PolicyRecommendationsforReformsinPoliceSystemofPakistan.pdf>

4. Malik, Mansoor (2017). DAWN, "Rs600bn ADP to help Punjab govt complete major projects." Available at: <https://www.dawn.com/news/1335828>

5. The Nation (2017). "With peanuts for Nacta, law & order given Rs91 billion." Available at: <http://nation.com.pk/27-May-2017/with-peanuts-for-nacta-law-order-given-rs91-billion>

6. Ibid

7. Amir Rana, Muhammad (2017). DAWN, "The Case of NACTA." Available at: <https://www.dawn.com/news/1354227>

functions, it is unrealistic to expect much from NACTA. Fortunately, the provincial counterterrorism departments of police are performing well, both in terms of launching anti-militant operations, as well as gathering information. The Counter Terrorism Departments (CTDs) of Sindh and Punjab police have, especially, done a commendable job in that regard. If the federal and provincial governments introduce a few accountability and transparency reforms and improve their capacity, these departments can perform even better. So far, these CTDs have been operating on traditional police lines, meaning they also inherit all the institutional ills of the police.

The Way Forward

Legal experts and practitioners have long been suggesting structural reforms for ensuring the rule of law in the country.

For one, the universally established principles of the rule of law should constitute the larger debate on the subject in Pakistan. That will not only correct the institutional balance in implementing one or another element of the rule of law in the country, but also ensure better coordination.

Second, the security or law enforcement aspect of the rule of law should also be

improved, mainly through enhancing the capacity of civilian law enforcement structures. For instance, as a new counterterrorism approach is evolving, the government and security institutions must incorporate the recommendations of law-enforcement agencies, which are usually ignored by the military establishment. These recommendations have the potential to enhance the capacities and capabilities of law-enforcement agencies, in combating terrorism.

Reducing reliance on parallel security structures is also an effective way to ultimately improve ROL, by empowering and strengthening existing structures. One of the ways to reduce reliance on parallel security structures is to build capacities of formal structures in counterterrorism. It is for that purpose that the police are demanding that a national databank be synchronised with the country's police departments, NADRA, NACTA, FIA and the State Bank. The databank should have the following: a synchronised national 'red book' containing updated information about wanted, suspected and apprehended terrorists and their affiliations. If some institutions have reservations in sharing information publicly, the national databank could be divided into two categories—one for public consumption, that would include details about terrorists

and their activities, and the other dedicated to police and law enforcement agencies containing details of bank accounts, financial transactions data, property and other assets of suspected and active terrorists, and those who have been listed under the Fourth Schedule. A common website can also be developed under the supervision of NACTA and all police and relevant authorities could be bound to provide weekly or monthly updates.

The new security framework takes the NAP as a major component of the counterterrorism strategy. It is a well-known fact that a major hurdle in the way of effective implementation of NAP was the lack of a centralized mechanism. To deal with the issue, the government has developed overlapping monitoring mechanisms. It appears that the government invested much more in monitoring the implementation of the NAP, than directly in counterterrorism initiatives.

Such an approach shifts the burden on to the police and its counterterrorism departments. However, it is important to understand that the police cannot function in silos, and will always need the strategic insight of the government and the support of other institutions in order to make their operations effective.

Rule of Law and Judicial Efficiency



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In essence, rule of law, that forms the basis for good governance and socio-economic development of a state, requires giving effect to four universal principles: Accountability, Just Laws, Open Government and Accessible and Impartial Dispute Resolution (Box 1).

While the realization of each of these four principles is indispensable for advancing rule of law in Pakistan, the primary focus of this article is on the expeditious delivery of justice by enhancing overall judicial performance through judicial efficiency.

In Pakistan, as in most developing post-colonial states with inherited English legal systems, the dispensation of justice remains laggard, with court dockets at all levels congested with an enormous backlog of cases.² A recent study conducted by the Lahore High Court and the district judiciary underscores the scale of the problem.³ The study reveals that the pending case load in Punjab crosses 1.2 million, with major district caseloads exceeding 670,000 cases.

Lamentably, it is thus not unusual for cases to linger on in Pakistan's courts across generations, notwithstanding Article 10-A of the Constitution guaranteeing fair trial and its Article 37 (d) whereby "the State shall ensure inexpensive and expeditious justice,"⁴ as well as statutory deadlines to complete civil, criminal, and terrorism cases. Even simplest matters like using

official courts to evict a non-paying tenant or collect a cheque, can take a full year on average to be resolved.⁵

Justice that is unnecessarily delayed is clearly an anathema to the rule of law.⁶ "Unjustifiable delay in justice postpones the rectification of wrong and the vindication of the unjustly accused. It crowds the dockets of the courts, increasing the costs for all litigants, pressurize judges to take short cuts, interfering with the prompt and deliberate disposition of those causes in which all parties are diligent and prepared for trial, and overhanging the entire process with the pall of disorganization and insolubility."⁷

Furthermore, inordinate court delay is not only likely to threaten the legitimacy of a country's judicial system and thereby breed vigilantism, but it can also result in a loss in legitimacy of the political system at large, that may ultimately lead to an embrace of violent, extremist, and insurgent ideologies by those bitterly disappointed with the prevalent system's inadequacies and inefficiencies.

Court delay also has important economic

Box1: The Four Universal Principles of the Rule of Law¹



1. Accountability

The government as well as private actors are accountable under the law.



2. Just Laws

The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property and certain core human rights.



3. Open Government

The processes by which the laws are enacted, administered, and enforced are accessible, fair, and efficient.



4. Accessible & Impartial Dispute Resolution

Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve.

1. World Justice Project, "The Four Universal Principles." Available at <https://worldjusticeproject.org/about-us/overview/what-rule-law>

2. Djankov, La Porta, Lopez-de-Silanes & Shleifer, "Courts." Available at: <http://www.doingbusiness.org/~media/WBG/Documents/Methodology/Supporting-Papers/DB-Methodology-Courts.pdf?la=en>.

3. Lahore High Court & District Judiciary Punjab (2017), "Case and Court Management." Available at <http://www.lhc.gov.pk/system/files/CaseManagementPlan.pdf>

4. Government of Pakistan, "The Constitution of the Islamic Republic of Pakistan." Available at http://na.gov.pk/uploads/documents/1333523681_951.pdf

5. Supra note 3.

6. Supra note 1.

7. Chaudhry Hasan Nawaz, "Delay Reduction with Effective Court Management." Available at <http://www.fja.gov.pk/articles.php>.

consequences. As a result of courts taking a longer time to resolve cases, fewer contracts will be entered in. There will be a lower division of labor and, at the end of the day, less income and growth. Moreover, timely settlement and enforcement of contracts fosters investment, and spurs entrepreneurship, a vital element of the 'click' and 'gig' economy.⁸

Beyond these socio-economic considerations, avoidable delays in justice could violate fundamental rights as well. For instance, detaining a suspect while he is waiting for his trial, represents a grave intrusion into his personal liberty.

In order to effectively address these concerns, judicial efficiency provides the means to reduce court delays and decongest court dockets, by strengthening contractual enforceability, removing improper filing practices and installing and maintaining case timelines. A successful example of this can be found in the Philippines, where the USAID's 'Judicial Strengthening to Improve Court Effectiveness Project' reduced median case processing times of trials across all types of courts, by 60 to 78 percent.⁹ Judicial efficiency, moreover, serves a crucial confidence-building function, boosting the confidence of the citizenry in the state's justice and political systems.

Notably, since delays could occur at pre-trial, trial, and post-trial stages, the efficiency of an entire judicial system is determined by the behavior of many actors. These do not only include judges and their staff, but also suspects and prosecutors in criminal cases, and plaintiffs and lawyers in civil cases. The behavior of these various actors is in turn, determined by their incentives as well as the entire organizational structure of the justice system.

The evolving corpus of academic literature on judicial efficiency correctly presupposes the measurability of judicial output and its suitability as a central criterion for evaluation of the judiciary.¹⁰ It also cogently debunks the misplaced notion that an emphasis on efficiency comes at the cost of search for truth in a case which eventually compromises the quality of justice.¹¹

Measures of judicial efficiency, in fact, assist in the search for truth in any particular case.

"The most erratic gear in the justice machinery is at the place of fact finding and possibilities for error multiply rapidly as time elapses between the original fact and its judicial determination. If the facts are not fully and accurately determined, then even the wisest judge cannot distinguish between merit and demerit. If we do not get the facts right, there is little chance for the judgment to be right."¹²

It is, therefore, hard to make a case against efficiency. Opposing it simply implies promoting the wastage of resources and that litigants should be waiting longer for decisions than necessary, given the number of judges.

Judicial efficiency principally aims to optimize court output with limited resources. There are several potential determinants of court output. These include: 1) The number of judges per capita and their education, age, and experience; 2) The incentives that judges are subject to, including payment schemes and career possibilities; 3) The number and quality of staff; 4) The available technology including software programs, connecting judges with each other and their administration, but possibly also with prosecutors, the police and prisons departments; 5) The complexity of the judicial system itself such as the number of court layers as well as appellate mechanisms; 6) The overall budget of the judiciary; 7) The number of non-judicial tasks allocated to the judiciary; 8) The percentage of vacancies, as it is not the potential number of judges that determine output but the number of judges who are actually employed and working; and, 9) The complexity of cases filed.¹³

Beyond these supply factors, there are several other factors that may impact judicial efficiency. These primarily deal with demand for court services and include: 1) The prevailing clarity in substantive and procedural law of a justice system, as well as in the precedents laid down by the judiciary; 2) Likelihood to settle out-of-court through availability of Alternative Dispute Resolution mechanisms such as mediation and arbitration; 3) The direct costs of access to courts as well as the indirect costs such as lost wages; 4) People's customs and cultural traits that determine their propensity to litigate; and, 5) The

willingness of lawyers to take a case to court based on their underlying fee structure and incentives.¹⁴

Bearing in mind the existing state of a particular justice system and its allocative goals, it goes without saying that to enhance judicial efficiency, some of these factors, such as those dealing with the organizational structure of the court system and the clarity in substantive and procedural law, may only be modified in the medium to long-term. Other factors, such as judges' individual incentives, and court and lawyers' fee structures may, however, be modified on a more short-term basis.¹⁵

Since, at least as far back as 1958, various Commissions, Committees, and international institutions like the Asian Development Bank, have engaged themselves in finding efficiency-based solutions to interminable delays in justice in Pakistan.¹⁶ Their findings, recommendations and proposals generally represent a thorough examination of the problem, and remain relevant even today.

The numerous causes of delay in justice in Pakistan that these Commissions and Committees have fittingly identified include: 1) Lack of proper supervision; 2) Unsatisfactory service of processes; 3) Lack of proper working conditions in the courts; 4) Lack of transport facility for process serving staff; 5) Lack of court/residential accommodation; 6) Lack of libraries and record rooms in the courts; 7) Shortage of judicial officers; 8) Shortage of ministerial staff and necessary equipment in the courts, including stationery and furniture; 9) Non-observance of the provisions of procedural laws; 10) Delay on the part of investigating agencies; 11) Non-attendance of witnesses; 12) Delay in writing and delivering of judgments; 13) Frequent adjournments; 14) Dilatory tactics by the lawyers and the parties; 15) Frequent transfer of judicial officers and transfer of cases from one court to another; 16) Interlocutory orders and stay of proceedings; 17) Inadequate means of alternative dispute resolution like mediation and arbitration; and, 18) Un-attractive service conditions of subordinate judicial officers.¹⁷

More recently, from December 2001 onwards, Pakistan, with the assistance of Asian Development Bank's USD 350 million

8. Matthieu Chemin, *The Impact of Judiciary on Entrepreneurship: Evaluation of Pakistan's Access to Justice Program (2008)*, Available at: <http://matthieuchemin-research.mcgill.ca/research/6%20Chemin%202009%20JPUBE.pdf>.

9. USAID Project Report, "Judicial Strengthening to Improve Court Effectiveness," Available at <https://www.usaid.gov/philippines/partnership-growth-pfg/justice>

10. Stefan Voigt (2014), "Determinants of Judicial Efficiency," Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2390704

11. Ibid.

12. Supra note 7.

13. Supra note 10.

14. Ibid.

15. Ibid.

16. Supra note 7.

17. Ibid.

'Access to Justice' Program,¹⁸ has taken positive steps towards reducing backlog of cases in its courts and improving the overall efficiency of its justice system.

The reform's most important component was the 'Delay Reduction Project' carried out in a limited number of pilot District Courts in Peshawar, Lahore and Karachi. Its objective was to develop and implement a management plan based on an analysis of completed cases and backlog, and the introduction of appropriate case processing standards, manual record management and case-flow management systems. It did not involve increased incentives for judges to improve efficiency, but merely provided them with more training. Nonetheless, the reform significantly enhanced efficiency, with a quarter more cases than before disposed off in the pilot courts.¹⁹

Additionally, in the last decade and a half, Federal and Provincial Judicial Academies have been established to train the subordinate judiciary in court and case management techniques; the Law and Justice Commission has been empowered via an amendment to the Law and Justice Commission of Pakistan Ordinance 1979, to *"take measures for developing and augmenting human resources for efficient court administration and management"*²⁰; and superior courts have upgraded their websites to provide on-line cause-lists and

other case management information such as last hearing status etc.

To augment these encouraging steps and ensure that the momentum from the previous decade and a half is carried forward, automated case-flow management systems should be introduced on a priority basis at all court levels across the country. Bar councils should be taken on board and sensitized to these upgrades in court management techniques. Judicial incentives and promotions, moreover, should be tied to performance in training programs and improved efficiency in the disposition of cases.

Judicial efficiency could be further enhanced by segregation of criminal and civil work among the subordinate judiciary, as well as through increased reliance on forensic evidence obviating the need for eye-witnesses.

For arbitration to contribute towards judicial efficiency by taking root as a viable alternative to litigation in Pakistan, especially in commercial matters, it is imperative to iron out the ambiguities in the Arbitration Act 1940 and Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards Act) 2011, and harmonize them with Pakistan's international law obligations arising under the New York Convention 1958. Alternative

Dispute Resolution Centers should also be established, preferably adjacent to the courts.

Delay reduction in the justice system would be difficult to achieve without the positive association and cooperation of the bench and the bar. The District Judges may be asked to constitute Bench-Bar Committees to facilitate this cooperation. Undoubtedly, the main reason for delay in the disposition of cases is indiscriminate adjournments and extension at all stages of the trial, both in civil and criminal cases.²¹ The frequent adjournments sought by the lawyers as well as their seemingly endless strikes, may also be contained through cooperation between the bench and the bar.

Around the turn of the nineteenth century, Lord James Bryce memorably stated that: *"There is no better test of the excellence of a government than the efficiency of its judicial system, for nothing more nearly touches the welfare and security of the average citizen than his sense that he can rely on the certain and prompt administration of justice."*²² As Pakistan begins its eighth independent decade, its political and judicial leadership must garner and sustain the will required to nurture and institutionalize a judicial ecosystem where rule of law flourishes and judicial efficiency is optimized.

18. For further reading on ADB's "Access to Justice Program in Pakistan," please visit: <https://www.adb.org/documents/pakistan-access-justice-program>

19. Supra note 8.

20. Law and Justice Commission of Pakistan Ordinance, Ordinance No. XIV of 1979, section 6 (2) (a). Available at: <http://ljcp.gov.pk/Statutes/Ordinance%20LJCP.pdf>

21. Zafar Sherwani, "Case Flow Management System and Court Automation." Available at: <http://www.supremecourt.gov.pk/ijc/articles/20/1.pdf>

22. James Bryce (1901), "Studies in History and Jurisprudence." Available at the Online Library of Liberty: [http://oll.libertyfund.org/titles/bryce-studies-in-history-and-jurisprudence-vol-](http://oll.libertyfund.org/titles/bryce-studies-in-history-and-jurisprudence-vol-1)

Rule of Law in Conflict Areas: The Case of Pakistan's 'Lawless' Federally Administered Tribal Areas



Naveed Ahmed Shinwari

Founding CEO,
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The rule of law (ROL) is based on justice and security. The strengthening of the rule of law to prevent, mitigate or recover from conflict entails a complex set of interrelated problems ranging from concrete manifestations of violence and injustice, to broader institutional gaps and socio-economic needs. The breakdown of ROL is the most significant indicator of an escalating conflict, and thus critical to conflict prevention. In an ongoing conflict, the protection of civilians warrants empowerment of national capacities to counter the 'rule by force' with the rule of law through early recovery. In the aftermath of a conflict, the ROL is paramount in creating a safe and secure environment in which recovery can foster. Finally, maintaining an effective ROL is integral to achieving the Sustainable Development Goals through keeping governments responsible and accountable, giving businesses the confidence to enter into and enforce contracts, and enabling and ensuring effective dispute resolution.

Pakistan bears a unique ROL landscape in terms of its specific historical, ethnic and cultural background. Over time, several factors have and continue to impact upon the overall peaceful functioning of the state and its institutions, including, religious/sectarian clashes, ethnic cleavages,

political insurgency, as well as conflicts in neighboring countries, both in the past and present. These factors extend across provinces and districts. Table 1 sketches a summary of the various conflicts that multiple regions have been host to over the years, along with their impacts upon ROL.

Though Pakistan is faced with multiple and

overlapping conflicts, affecting the overall law and order situation in the country, this paper chiefly examines the case of the Federally Administered Tribal Areas (FATA), as one of the most fragile regions in Pakistan.

Pakistan's Federally Administered Tribal Areas is affected by violence and armed

Table 1: Conflicts and their Impacts

Type of conflict	Region(s)	Impact on ROL
Violent extremism and terrorism	<ul style="list-style-type: none"> FATA Khyber Pakhunkhwa Pakhtun districts of Balochistan Karachi 	<ul style="list-style-type: none"> War on terror' has taken the lives of more than 60,000 Pakistanis, including civilians, security forces, and combatants Forced internal migration and slow recovery Breakdown of civilian administration and weak security capacities Injustices and failure of dispute resolution mechanisms (formal and informal) Over USD 100 billion losses to national economy, owing to incidents of terrorism.¹
Sectarian conflict	<ul style="list-style-type: none"> Southern Punjab Quetta FATA: Kurram, Orakzai and Khyber Agencies 	<ul style="list-style-type: none"> Sustained violence as a result of increasing sectarianism: 1359 cases of sectarianism exist² Genocide of Hazara community (in Quetta) Forced migration Breakdown of civilian security institutions Injustices and failure of dispute resolution mechanisms
Baloch insurgency	Baloch inhabited districts of Balochistan	<ul style="list-style-type: none"> A total of 1498 alleged enforced disappearances exist as of November 2017.³ Attacks on ethnic minorities, e.g. Punjabis and Hazara Breakdown of civilian security and justice institutions
Criminal gangs	Interior Sindh	<ul style="list-style-type: none"> Although a decrease has been witnessed, kidnappings for ransom and 'gun-point' incidences continue Migration of minorities to India and other neighboring countries Breakdown of civilian security and justice institutions

1. Finance Wing, Government of Pakistan (2017), "Pakistan Economic Survey 2016-17." Available at: http://www.finance.gov.pk/survey/chapters_17/Pakistan_ES_2016_17_.pdf

2. Human Rights Commission of Pakistan (2017), "Media monitoring and human rights violations and concerns in Pakistan." Available at: <http://hrcomonitor.org/>

3. Commission of Enquiry on Enforced Disappearances (2017), "Press Release: Month wise receipt disposal of cases." Available at: http://coioed.pk/press_release/

militancy. The NATO occupation of Afghanistan in retaliation to the 9/11 terrorist attacks in the United States has triggered violence in its neighbouring FATA, and has shaped the fragile landscape to become even more complicated. Partner in the 'war on terror', the Pakistani military's invasion into FATA to hunt down insurgents, dramatically changed the security dynamics of the land. These military operations, nevertheless, have caused mass internal migration; they were successful in restoring people's trust in the security apparatus of the country.

Security and conflict resolution instruments in FATA

Centuries old colonial justice systems and authoritarian governance structures are amongst the contributing factors for widespread poverty, illiteracy, injustices, lack of economic and employment opportunities, and exclusion from the mainstream political process for the region. Moreover, the citizens' lack of trust in traditional and corrupt formal institutions, has triggered militancy and extremism in the FATA region.

Regarded as a 'Draconian law', the security and justice services in FATA fall under the colonial relic called the Frontier Crimes Regulation (FCR). First tested in the second half of the 19th century and finally promulgated in 1901, FCR is actually a marriage of the British system and the tribal Rewaj (customs). Largely tribal in nature and fiercely independent in parts, FATA is neither governed under Pakistan's mainstream legal and administrative frameworks, nor subject to its regular formal justice system.⁴ On the basis of Rewaj and local power structures, the British integrated the tribal chiefs (maliks), other tribal notables and elders, into the system of governance and dispute resolution through a skillful mixture of the 'carrot and stick' policy. Colonial administrative and legal framework in FATA was exclusively aimed to quell the regular rebellion of the unruly Pakhtun tribes through coercive mechanisms and punishment.

The FCR empowers the Political Agent to run all political, judicial and administrative affairs in each tribal unit or Agency.⁵ He also awards development schemes under the 'nikat system'⁶ to the pro-administration

tribal elite in territory under his command. This prejudiced arrangement has largely contributed towards underdevelopment in FATA, making it lag well behind in some very basic human needs when compared to the rest of Pakistan.

FATA's governing spectrum is divided into 'protected' and 'non-protected' areas. The 'non-protected areas' signify a large landmass where the authority of the state ends, and that of the traditional Jirgas begin.⁷ For the maintenance of law and order in non-protected areas, tribes are awarded the privilege to nominate a khasadar force (tribal police) under the nikat system. The khasadars, paid by the political administration, are offered a meager monthly salary, a pair of shoes and a uniform on a yearly basis. The force has not received any technical human rights training and is ill-equipped to combat greater security threats. In the absence of a proper police force, the local tribes protect their 'honor' with the help of Pakhtunwali.⁸

Meanwhile, in 'protected areas', the political agent exerts his authority with the help of a Levies Force. Recruited and equipped by the Ministry of State and Frontier Regions (SAFRON), a total of 11,789 Levies are operating across FATA. The ill-equipped khasadar and limited Levies force have been unsuccessful in quelling the threat of militancy in FATA, and therefore, military intervention was required, and till date, continues to regulate law and order in the region. A series of military campaigns, however, have caused destruction and mass migration, whilst simultaneously, are equally successful in regaining people's confidence in returning to their homeland.

According to Article 247 (3) of the Constitution, acts of National Parliament do not extend to FATA unless the President so directs. Lack of representation in democratic institutions, combined with the non-applicability of parliamentary acts in FATA, constitutes a serious democratic deficit. In addition, Article 247 (7) of the Constitution does not allow the judicial system of the country to exercise its jurisdiction in FATA. The question of conflict resolution thereby depends upon conflict geographies. For example, in 'protected areas' where the state exerts its control, disputes are settled by the FCR Jirga (sarkari Jirga) under the

influence of the political administration, whereas in 'unprotected areas,' tribes manage all their affairs through qaumi or Olasi Jirga (or people's Jirga). Both Jirgas, however, settle criminal and civil disputes.

Popular perception of the justice system in FATA

The legitimacy of a system of dispute resolution does not only depend on its legality. Popular acceptance is equally crucial in order to make the system work. This depends upon its fairness and efficiency, as well as its compliance with local and social values.⁹ Pakhtun tribes generally prefer *qaumi jirga* and view it as an efficient and fair institution. *Sarkari Jirga*, perceived as corrupt and largely influenced by the political administration, favoring the rich and influential, has put its status and future at stake. In a survey of 1500 respondents conducted in FATA in 2010,¹⁰ respondents were asked numerous questions on both *jirga* systems, and over two-thirds of the respondents (70.5 percent) identified *qaumi jirga* as the most trusted one. In contrast, only 31.3 percent viewed *sarkari Jirga* as fair. Understandably, *qaumi jirga* enjoys a considerable level of acceptance among the citizens of FATA, owing to a lack of a better alternative and low awareness of human rights. However, it does tend to violate human rights, especially women and minorities, and the state is obliged to protect its citizens in such cases. Though the *Khasadar* force is faced with the daunting task to maintain internal security, even then the need for it to be replaced or transformed into a professional police force, is imperative.

Confluence of traditions and colonial relic: conditions for instability and human rights violations in FATA

Reichert argues that "a founding principle of human rights embraces the notion that human rights belong to everyone wherever he or she resides – human rights are universal"¹¹ As per several Pakistani jurists, the administrative and legal framework of FATA does not comply with the concept of rule of law and is a blatant violation of basic human rights norms. Neither FATA's institutions and entities, nor its laws and legal frameworks are accountable to the laws of the country at large. FCR is not publicly promulgated, equally enforced and independently adjudicated. Funda-

4. Siddique, Osama (2012), "The Other Pakistan: Special Laws, Diminished Citizenship and the Gathering Storm." Available at: SSRN: <https://ssrn.com/abstract=2185535> or <http://dx.doi.org/10.2139/ssrn.2185535>

5. The FRs, however, differ from the Agencies in the chain of command and each FR is administered by the Deputy Coordination Officer of the adjacent settled district of Khyber Pukhtunkhwa province.

6. Nikat system (ancestral line) whereby the tribes regulate profit and loss on the basis of collective responsibility.

7. The term *jirga* refers to an institution and a practice. In this essay, the focus is on *jirga*'s dispute resolution services.

8. Pakhtunwali is a mix of various concepts, central among them are four. First, honour (*izzat*) is of cross-cutting importance; it forms the basis of the principles of respect for anyone, bravery (*turah*) and protection of weak (*nang*) and of women (*naamus*). Second, openhanded hospitality (*milmastya*) and protection accorded to all who may or may not demand it – even an enemy may demand it. Third, *badal* refers to a set of customs and actions concerning revenge. The custom gives an offended person the right to revenge by retaliation regardless of the consequences. Fourth, *nanawati* is the principle of forgiveness.

9. Guzman, M. M. P. (2005), "Legal Pluralism as an Approach to Indigenous and Tribal Peoples' Rights." Human Rights in Development Yearbook, 2003, 45. page 53

10. The Survey has been conducted by the Community Appraisal and Motivation Programme. For more information, refer to, Shinwari, N. A. (2008), "Understanding FATA: Attitudes Towards Governance, Religion & Society in Pakistan's Federally Administered Tribal Areas." (Peshawar: Community Appraisal and Motivation Program, 2008), p.164

11. Reichert, E. (2006) "Human rights: An examination of universalism and cultural relativism." Journal of Comparative Social Welfare, 22(1), 23-36.

mental guarantees of its citizens cannot be safeguarded due to the complete absence of superior judiciary in FATA.

Article 25 of the Constitution establishes the equality of citizens and entitles them to equal protection of the law. If this provision were to strictly apply, full constitutional rights would have been granted to all citizens in FATA.¹² The equality clause, however, clashes with Article 247 (3) cited above, which quashes all constitutional norms, including the equality clause. This contradicts with international law and the principle of equality must take precedence as enshrined in the Universal Declaration of Human Rights (especially Articles 1, 7, and 10).¹³ Pakistan's ratification of the International Covenant on Civil and Political Rights (ICCPR) on 23 June 2010 without any reservations, thereby validates the FCR to be potentially challenged under the 'fair trial rights' of the ICCPR. Despite the fact that it was reformed in 2011, the FCR still does not meet these requirements. For instance, the problematic 'collective punishment' may be imposed without any

process and is thus in sharp violation of Article 14 of the ICCPR.¹⁴ Claims to repeal the FCR have been made recently,¹⁵ but only time will tell the fate of the region.

Conclusion

Seven decades post Pakistan's independence in 1947, the archaic system of governance and conflict resolution mechanisms under the FCR in FATA, remain yet to be replaced with modern state institutions. Since the 1970s, there have been more than a dozen attempts to reform the governance and justice sectors in FATA, yet, there is nothing substantial being done. The introduction of the Adult Franchise Act in 1996 and the Extension of Political Parties Act 2011, were two major political reforms achieved. Setting up of a FATA Tribunal and limiting the powers of the Political Agents in FATA, were also part of the Amended FCR 2011, however, they lack implementation.

The recent proposed FATA reforms, despite some limitations, has received popular applause for its proposals to merge FATA

with Khyber Pakhtunkhwa, introduce local bodies, and extend the influence of the superior judiciary to FATA. Nevertheless, the 81-pager recommendation report was equally criticized for its proposal to replace the FCR with Tribal Areas Rewaj Act. Certain practices under the local *Rewaj* were seen as a grave violation of human rights, especially against women, for example, *swara* and honor crimes. While the reform process is moving at its own pace, it is essential to keep it apolitical and focus on the human rights perspective, where people of FATA deserve a chance to live their lives with dignity and respect, and become equal citizens of Pakistan.

Over time, several conflicts and internal migrations have caused diversions, making the tribal society more dynamic and fluid. If provided with accountable democratic institutions, FATA can also, like the rest of Pakistan, provide an enabling environment for a range of development outcomes—from improved basic service delivery to increased private sector investment and reduced corruption.

12. Röder T.J., Shinwari N.A. (2015) Pakistan: Jirgas Dispensing Justice without State Control. In: Kötter M., Röder T.J., Schuppert G.F., Wolfrum R. (eds) Non-State Justice Institutions and the Law. Governance and Limited Statehood. Palgrave Macmillan, London, page 41

13. Ibid

14. In FCR (Amended) 2011, punishment includes, besides arrest and detention, the possibilities of confiscation of property, prevention from entering other territories of the country (Section 21) and fines on communities (Articles 22 and 23).

15. DAWN (2017), "Draconian Frontier Crimes Regulation to be repealed in Fata within a week: SAFRON minister." Available at: <https://www.dawn.com/news/1375339>

Interview



Jean-François Cautain

Ambassador
EU Delegation to Pakistan

Khyber Pakhtunkhwa (KP) has scored well in the Pakistan Institute of Legislative Development and Transparency's (PILDAT) rule-of-law index. In your view, to which area has the European Union (EU) contributed most significantly within the rule-of-law sector in Khyber Pakhtunkhwa (KP)?

This is a very interesting question. For the EU, rule of law is not only a sector, it is a fundamental governance principle and one of the funding principles, as well as a core value of the EU and its member states.

In Europe, it was a long way to get closer to the rule of law-the legal framework had to be harmonized and in line with European values and human rights, governments and institutions had to be held and made accountable, citizens needed to be informed of their rights and an independent press and an active civil society to constantly monitor progress, had to be established.

In our development cooperation with Pakistan, we have agreed with the Pakistani government on a comprehensive approach. Our contribution to sustainable development, which is in line with our vision, could not be possible without strong democratic governance based on human rights and the rule of law. A rights based approach and gender equality are core values mainstreamed in all our development programmes.

Our cooperation programme with Pakistan has three key sectors: Rural Development; Education, Skills Development and Good Governance; Human Rights and, Rule of Law with an indicative envelope of EUR 97 million for 2014-20.

We support the rule of law and sustainable development in KP with a variety of programmes within our thematic priorities, such as parliamentary support, local governance, rural development, education and TVET (Technical and Vocational Education and Training) and Human Rights.

For rule of law in the sense of security and justice, we finance the 'Citizens Justice and Peace Programme' (2015-2018) with UNDP and Coffey as partners, and contribute by strengthening the law enforcement and police capacity, as well as civil oversight over police by line ministries and citizens.

The European Union has supported SDG 16-"Peace, Justice and Strong Institutions," through the Rule of Law and Justice programmes in KP and Punjab. Do you foresee the EU supporting such efforts in other provinces, for example Balochistan,

say that again

"...A rights based approach and gender equality are core values mainstreamed in all our development programmes."

where the rule of law situation remains fragile?

Balochistan is one of our priority provinces in the development cooperation with Pakistan. As we know, Balochistan is the most deprived province in Pakistan with the lowest social and economic development indicators. We have cooperation programmes in line with our priorities and currently, we focus very much on local governance, education and TVET.

We are concerned about the security situation in Balochistan, as we think that internal conflicts, multi-layered violence and serious human rights violations hamper the development of the province. In 2017, we received a request from the Pakistani government to further collaborate in good governance and to provide technical assistance in the strengthening of the rule of law, particularly, in the process of the planned merger of the Federally Administered Tribal Areas (FATA) with KP. We are currently preparing this programme. We may consider extending the planning of the programme to Balochistan as well, but have not finalized our internal decision making process yet.

The European Union has helped enhance the quality and legitimacy of alternate dispute resolution (ADR) mechanisms in KP by sensitizing practitioners to human rights standards, gender and national laws and mediation standards. Do you believe these mechanisms can be implemented in Balochistan, as well?

We, as the EU, do respect diversity and different cultural understandings and methods of conflict resolution, but we do believe in international human rights standards and gender equality as prerogative. We have our concerns in view of the integration of those values in the traditional and ADR mechanisms in Pakistan and not only, but particularly, regarding women's rights, as women have historically had no say in the alternative justice system.

We do know, that the formal justice system in Pakistan is rather inefficient as well, and the majority of Pakistani citizens prefer to address conflicts through traditional justice and ADR mechanisms. We supported UNDP in the Citizens Justice and Peace Program, in the strengthening of the ADR Plans. We plan to extend our interventions under the governance pillar of our cooperation, with special focus on the formal justice and security system, particularly in KP and Balochistan where the need was further felt. We would be ready to support the recently developed rule of law road maps. ADR systems have to play a role to complement the formal system and to ensure that some form of justice is accessible for the citizens. We could

imagine to support ADRs if the scope is limited and we think they are particularly useful in generating legal awareness and legal empowerment of marginalized and poor citizens.

The European Union played a key role in empowering women in Khyber Pakhtunkhwa by supporting those wishing to join the legal profession. Other support came in the form of gender desks and consultative meetings between the Police and women community members. In your view, how have these interventions lead to an increased access to justice for women in KP?

When you talk about access to justice, you talk about cultural sensitivity. Women will feel more at ease in dealing with problems through women, and that is where our programs have had an impact. They are facilitated in terms of easy access to the law and the judicial system through, for example, women police officers. Hence, by keeping in mind cultural sensitivities and providing comfortable mediums of accessibility, the interventions have helped in increasing access to justice for women.

The European Union support was instrumental in the Rule of Law Programme's considerable success. Can you identify any areas within these successes that could be improved upon?

There is always room for improvement, it is an ongoing learning exercise. For instance, in the setting up of model police stations, there can be improvement in terms of enhancing the design and layout of the police station. Better and more effective use of available equipment can also be another avenue for improvement. Moreover, these existing projects can also be used as learning blocks for the future, when there are plans of replication or expansion.

Interview



say that again

"...When the law is applied equally, then things are much better in terms of law enforcement."

Flt Lt (Retd.) Muhammad Khalid Khattak

Former Inspector General
Islamabad Police

In your opinion, does Pakistan have governance mechanisms in place that ensure transparency and accountability of state institutions? How effective are these governance mechanisms?

We derive all our laws from the Constitution of 1973, including police laws as well. In so far as the police department is concerned, the required governance mechanisms are in place and they do ensure accountability and transparency. Our efficiency and disciplinary rules ensure accountability is maintained.

The police deals with crimes which are listed in the Pakistan Penal Code. For crimes of a different nature such as corruption or misuse of authority, other institutions such as the National Accountability Bureau, provincial anti-corruption departments etc. take charge. At times, other departments approach us for help but that help is limited to the enforcement of law and order, and rules and regulations: the police is not directly responsible for the working efficiency of other departments.

Do you think that Pakistan's law and order systems, including police and judiciary, offer equitable access to justice to its citizens? What necessary steps need to be taken to ensure that the rule of law is upheld?

The mandate of the police is to ensure implementation of laws and maintenance of the rule of law.

As far as the Islamabad police is concerned, we have taken a number of steps to ensure the rule of law. For instance, the office of the Inspector General (I.G) ensures that the units working on ground register cases freely. Apart from that, there is also monitoring of investigations. The basic premise of the office of Inspector General (I.G) is to partake a supervisory role, whilst the day to day policing is done under the Senior Superintendent of Police (SSP) Operations and his team. But whenever there is any complaint, the office of I.G steps in and aids the complainant and the process. Justice is given full due regard.

In ensuring easy access to justice, we also have the e-complaint system so as to facilitate people in registering their complaints online as well, including through social media and the website. We also have an online complaint management system that provides a monitoring role. In rural areas, where easy access to justice is a hindrance, the district police officers have an elaborate system for the addressal of complaints.

Moreover, in Pakistan, the media is also a strong tool to highlight crime and injustice, which in turn also aids the police department. Whenever we launch any campaign against a certain violation, we ensure we reach the masses through mass media and by visiting different institutions to educate people. This initiative has helped to uphold the rule of law and maintenance of order and security. The use of technology can be explored further to assist people in rural areas and improve their access to justice.

In addition to the role of state, society in general has a major role in ensuring basic human rights are respected. In your opinion, is the society appreciative of the human rights of fellow citizens? What is required to bring wider societal change and acceptance of basic human rights?

Ensuring basic human rights are upheld is a priority for the police. In Islamabad, for instance, we have directed all our Station House Officers (SHOs) to eradicate illegal confinement. We have also directed our SHOs to eradicate torture and provide basic rights to people in custody. We are also in the process of appointing human rights officers, who are police officers but have been designated a certain role. We are also involving citizens from the society to keep an eye on the police themselves, and inform senior officers in case of any suspicion of abuse of power. So, the police is working hard to ensure that human rights are not only upheld, but that people are also actively involved in the process.

The concept of restorative justice is also a model that can be replicated in Pakistan. Currently being practiced in countries such as Australia, it is a process in which the victim, the offender and all stakeholders related to the crime, sit together and try to resolve the issue. However, in order for this concept to be successful, it needs to be incorporated into law.

In recent years Pakistan has been embroiled in internal conflicts that have had repercussions on the overall security landscape of the country. How can strengthening rule of law be an effective tool in conflict prevention in fragile areas?

In Islamabad, we do not experience such issues. Of course, strengthening rule of law would minimize issues in conflict areas for sure. When the law is applied equally, then things are much better in terms of law enforcement.

say that again

"...Access to justice will only improve if we enhance the capacity of the judiciary with specific training.."



Irum Ahsan

Senior Counsel, Law and Policy Reform
Office of the General Counsel
Asian Development Bank (ADB)

In your opinion, does Pakistan have governance mechanisms in place that ensure transparency and accountability of state institutions? How effective are these governance mechanisms?

I believe that for any country, including Pakistan, it is established that equitable distribution of benefits is the prime responsibility of state institutions - mainly judiciary, executive and legislature. Robustness and responsiveness of these institutions results in effective social and economic policies. For example, judiciary needs to protect and enforce peoples' rights; legislature must prescribe laws and regulations for enforcement of governance mechanisms and accountability for lapses; the executive must make policies for supply of public goods and services, and so on and so forth. Access to these governance institutions by common citizens must be easy, efficient and affordable, to ensure equal opportunities and progress.

Do you think that Pakistan's law and order systems offer equitable access to justice to its citizens? What necessary steps need to be taken to ensure that rule of law is upheld?

In my opinion, all law and order institutions are part of a society influenced by various factors including but not limited to, a patriarchal mindset, stereotyping, and a lack of, or a misunderstanding of Islam as a religious law. A lot of opinions are shaped by the media and irresponsible reporting can hamper justice in a big way. Having said that, judicial institutions should be above these considerations and should only decide cases in accordance with the law. Judicial training includes education in dealing with biases and neutrality. In Pakistan, there exists a dearth in such trainings. Hence, the judiciary should not be blamed if proper education is not being provided.

ADB's recent experience with the judiciary in Punjab was on gender sensitization. ADB was invited to conduct a training on request from the Chief Justice of Lahore High Court, for his judiciary. Punjab is the largest province of Pakistan and is considered the epi center of violence against women. Thus, this was a great opportunity for making a difference. During the needs assessment, judges frequently stated that their courts are indiscriminate because they decided cases based on the law, which is non-discriminatory; and "gender neutral" logic and common sense, and yet the conviction rate in rape cases was only two to three percent in 2016. ADB delivered a very comprehensive training which resulted in a first ever trained judiciary that was taught how to deal with unconscious biases, structured and unstructured discrimination, Islamic jurisprudence regarding Gender-Based Violence (GBV), and

international best practices. Our work also resulted in a notification of gender equality policy for the judiciary and Pakistan's first ever specialized court for GBV cases.

The ADB has also been working with the judiciary in Pakistan on environmental law capacity development since 2012. Pakistan established a judicial "Committee on Enhancement of Environmental Justice" (CEEJ). ADB, under the guidance of CEEJ, assisted Pakistan's judiciary in establishing green benches in all provincial courts. Furthermore, ADB also prepared an environmental law curriculum to be taught in judicial academies. This was a sustainable training program. It was needed because environment was not even taught as a subject when these judges were in law schools.

To answer your question, access to justice will only improve if we enhance the capacity of the judiciary with specific training. Judiciaries uphold the rule of law directly by interpreting laws, constituting specialized benches and indirectly, by leading the legal profession towards a credible rule of law system. This fact emphasizes the need for their constant training even more.

In addition to the role of state, society in general has a major role in ensuring basic human rights are respected. In your opinion, is the society appreciative of the human rights of fellow citizens? What is required to bring wider societal change and acceptance of basic human rights?

A very fundamental need of the day is a broad shift in mindsets. In Pakistan, most human rights violations are directed towards girls and women. GBV has been normalized, unfortunately. When people see two men fighting on a street, they all jump in to stop them, but if they see a man beating a women, they all step aside defining it as a 'private matter'. This is what needs to change at all levels. Parents need to provide similar upbringing to both sons and daughters- they should let the son play with a tea set and let a daughter play with a car. The education curriculum needs to emphasize that human rights are inalienable and cannot be taken away, be it within the four walls of the home or at a public space. Curriculum needs to eradicate the gender stereotyping-why is a nurse always a woman and a pilot always a man? Media needs to report responsibly and stop shifting the guilt on to the victim to make the news sensational. For example, instead of a headline saying, 'honorable man killed his mother and her acquaintance', the news should read as, 'man kills his mother and another person in cold blood'. The societal shift in mindset is only possible if it is fixed at all levels.

In recent years, Pakistan has been embroiled in internal conflicts that have had repercussions on the overall security landscape of the country. How can strengthening rule of law be an effective tool in conflict prevention in fragile areas?

Rule of law across the board is the only solution to conflict prevention in any country. It provides legitimate protocols and processes that protect human rights and prevent violence and crime. Poverty and the lack of a due process of law, leads to frustrations that ultimately translates into crimes and violence. This situation is further aggravated in already fragile areas. It is very important for nations to adhere to international protocols and treaties that they have ratified and adopt them at a domestic level. It is also important that all law and order institutions are aware of their obligations under the international treaties. Peace and security can be maintained and sustained, if anchored on the rule of law.

say that again

"...Strengthening rule of law can bring the state back as a guarantor of legitimate rights."



Ahmed Bilal Mehboob

President

Pakistan Institute of Legislative Development And Transparency – PILDAT

In your opinion, does Pakistan have governance mechanisms in place that ensure transparency and accountability of state institutions? How effective are these governance mechanisms?

In my opinion, the mechanisms of transparency and accountability of state institutions are in place, with varying degrees of effectiveness. In general, the legal and constitutional framework is in place and the institutions have been created to implement the laws, but the quality of implementation and effectiveness of the institutions is questionable. For example, we have a reasonably good accountability law in the form of the National Accountability Ordinance (NAO), 1999 and we have created an institution called the National Accountability Bureau (NAB) to implement NAO. Sadly, NAB was subjected to political pressures right after its inception and has been used to victimize political opponents, pushing them to switch sides. NAB, despite this major constraint, has done a lot of good work, however in most cases as it has apparently not been able to assert its independence, it has lost much of its trust amongst the people. Similarly, we now have excellent Right to Information Laws in at least two provinces (Punjab and Khyber Pakhtunkhwa), and their Information Commissions have started making some difference, but the appointment of the new set of Information Commissioners was delayed in Punjab, and the release of budget and the appointment of staff, has been a major constraint thereby rendering the Punjab Information Commission from becoming an effective institution.

Do you think that Pakistan's law and order systems, including police and judiciary, offer equitable access to justice to its citizens? What necessary steps need to be taken to ensure that rule of law is upheld?

I do not think that the present systems relating to Police and Judiciary offer equitable access to justice. In the case of police, its lack of independence and vulnerability to political considerations, right from recruitment, placement and promotion, to basic decision making, is a major weakness. To start with, a progressive Police Law is needed which guarantees the internal operational autonomy of the police force. Merit-based recruitment, placement and promotions are the basic requirement of a viable police force with effective mechanisms of accountability. Adequate allocation of budget, beginning with police station budgets, trainings and well-being of the police force, are areas that require attention. Capacity-building of police, especially its investigation wing, is absolutely essential to effectively fight crime. Judiciary is inundated by the case load. Evening Courts and Alternative Dispute Resolution (ADR) seem to be the only options to address the problem. In addition, vacant

positions of judges should be filled in time and the required number of judges should be evaluated constantly, ensuring that there are enough judges to handle the case load.

In addition to the role of state, society in general has a major role in ensuring basic human rights are respected. In your opinion, is the society appreciative of the human rights of fellow citizens? What is required to bring wider societal change and acceptance of basic human rights?

In my opinion, society, in general, is NOT appreciative of the human rights of fellow citizens. A large number of people do not realize the importance of human rights and many others attribute it to being a 'western agenda'. There is a need to intensify 'Human Rights Education and Awareness' at all levels of the society including schools, colleges and universities. This awareness campaign should be directed at media persons, public officials like MNAs, MPAs, Local Government elected officials, police and other security agencies. Mass Media should be asked to focus on human rights in their public interest messages, which they are under obligation to allocate time for. Institutions like the National Commission on Human Rights need to be made more effective and its work needs to be made more visible.

In recent years, Pakistan has been embroiled in internal conflicts that have had repercussions on the overall security landscape of the country. How can strengthening rule of law be an effective tool in conflict prevention in fragile areas?

A weak rule of law is one of the main drivers of civil strife. It is extremely difficult, expensive and time consuming to secure justice if an excess is committed against a person of modest means. Many militant groups have gained public acceptance and even popularity because they have arranged for quick 'justice' through informal channels. Strengthening rule of law can bring the state back as a guarantor of legitimate rights. On the other hand, the individuals and groups who are operating beyond the bounds of law can be brought to justice if there is an effective rule of law. Hence, an effective Rule of Law will go a long way in preventing conflict in the society.

Youth Voices



Bakhtawar Bilal Soofi

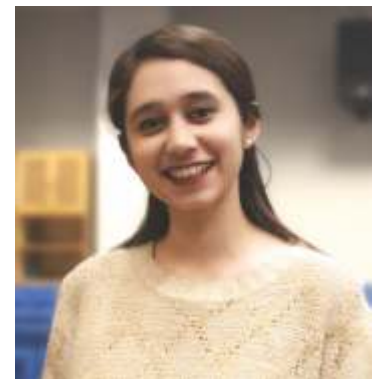
Lawyer and Co-Founder
Next Generation Pakistan (NGP)



One of the major challenges in maintaining a stable rule of law in Pakistan is addressing the issue of 'elite capture' which allows people with influence, money or power to buy or force their way out of the legal system. This problem is perpetuated by a system of 'self-accountability' that is prevalent across all our major institutions: the army regulates itself and is not subject to the constitutional jurisdiction of the court, the judiciary - on the pretext of judicial independence - regulates itself and the appointments to the superior courts. Likewise, the lawyers are also regulated by their own kin. The accountability boards that we have are also captured by the executives. The behavioral incentives created by these regulatory structures must change before we can even start talking about a stable rule of law in Pakistan. To this end, we need more of this country's youth to step into academia where they can conduct research and come up with (indigenous) policy proposals to reform our constitutional and legal landscape.



Absence of corruption, maintenance of order and security, and upholding fundamental rights are the three essential factors required to maintain a stable rule of law. These factors impact people individually, economically, socially and politically. In this regard, the youth should acquire education and create awareness of the most significant development problems faced by Pakistan, and try to practically solve them in their own capacities. By conducting awareness workshops in their local communities and designing strategies with the help of their peers to solve problems, and by helping the weak and unheard raise their voices, the youth can work towards attaining a successful development goal.



Sara Raza

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Maintenance of the rule of law is dependent on ensuring that people's belief in the legitimacy and authority of the legal regime is revitalized. Some of the key factors for this are, (i) Ensuring swift implementation of court orders; (ii) Improving access to justice by reducing the time taken for adjudication in courts; and, (iii) Carrying out-of-court proceedings in local languages so that court decisions become comprehensible to all. Youth can facilitate the process by pushing for a transparent and digitized legal setup with a move towards inclusivity, since they carry substantial power in terms of influencing government policies.



Youth Voices

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The rule of law, in legality, refers to the notion that laws rather than individuals should govern a nation. The three essential factors required for it to be successfully established in Pakistan include clarity in laws (including awareness of existing laws), accountability at the public service level, and access to swift and absolute justice for citizens.

The youth can play an integral and monumental role in the maintainability of the rule of law by using their power in terms of numbers, education and opportunities, to come together and advocate for change.

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Razia Monnoo

Barrister,
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Kinnaird College for Women



Omer Aamir

Law Student
Lahore University of Management
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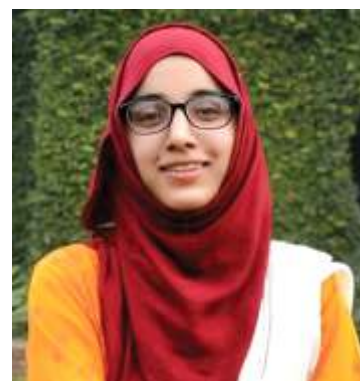
I believe the three vital ingredients to maintain a stable rule of law in Pakistan are an efficient and effective judicial system, responsible bar associations and supremacy of the parliament. The presence of these can ensure that basic fundamental human rights do not get trampled upon. In this regard, the youth can play a vibrant role acting as an original source to disseminate information for the development of the society and strengthening (Vis-à-vis checking) these three crucial institutions of the state.

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The three essential factors required to maintain a stable rule of law are stable policy formulations by the policy makers, defining roles and responsibilities at the policy implementation stage and strengthening already existing institutions rather than creating new ones. Youth can play a crucial role in recognizing their responsibilities at the individual level and leaving their impact.

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Bushra Aziz

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Youth Voices



Arslan Mahmood Goraya

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In Pakistan, the rule of law can be maintained by the independence of the judiciary; a fair, impartial and transparent appointment procedure of judges; and amendments in the constitution whereby vague articles and those contrary to the essence of rule of law are removed. These pivotal factors would rule out the political biases and justice would be ensured. The youth through the use of their only weapon-the 'pen'-can create awareness among the public regarding the sensitivity of the issue.

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Maintenance of a stable rule of law include the establishment of a system based on clear, fair and stable laws; equal treatment of all citizens, irrespective of their status, designation, caste, creed etc.; and, awareness of laws. Keeping in view the state of legal rule in Pakistan, it is fair to say that a very small percentage of the population is fully aware of their rights and duties. The combined action of the above three factors together with an independent and impartial judicial system, can culminate into a very powerful rule of law in Pakistan. As U.S. Supreme Court Justice Anthony Kennedy said, "When we talk about the rule of law, we assume that we're talking about a law that promotes freedom, that promotes justice, that promotes equality."

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Saira Ghauri

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Internalisation of law is imperative; an acceptance of the judiciary by all factions, responsible legislation accompanied by better regulation of sanctions, will alleviate the situation. The youth ought to follow this responsible governance, with exemplary trust in our system for the general population to follow.

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DEVELOPMENT ADVOCATE
PAKISTAN