

Practice of conducting a "joint test identification parade" of the multiple accused persons in one go was not approved. It would be against the rule of law that the accused were put to identification simultaneously in one identification parade.

WITHOUT RULE OF LAW, HUMAN RIGHTS ARE MERE FARCE

Authored by:

BARAN KHAN SHERWANI

Advocate High Court

MUHAMMAD SHAHID

Civil Judge cum Magistrate

The Notion of Rule of Law is a globally recognized, subjective and value-laden constitutional concept. Rule of Law is the most powerful and often repeated political ideal in modern discourse. There is a universal agreement upon the fact that the rule of law is a major source of legitimation for governments in the modern world. A government that abides by the law is seen as good and worthy of respect. French Principle of "*La Principe de Legalite*", i.e., the principle of legality also refers to Government of Laws and Not of Men.

History of the notion can be traced but its definition and components have been remained debatable since its inception as Legal theorists have called it an '*essentially contested concept*'. This is because the explanation of the concept is hard to pin down. Its detailing varies from the man-to-man approach.

Credit for coining the expression 'the rule of law' is usually given to Professor A.V. Dicey, the Vinerian Professor of English Law at Oxford, who used it in his book an Introduction to the Study of the Law of the Constitution, published in 1885.....One author has traced the idea back to Aristotle, who in a modern English translation refers to the rule of law, although the passage more literally translated says: It is better for the law to rule than one of the citizens, and continues: 'so even the guardians of the laws are obeying the laws'. Another author points out that in 1866 Mr. Justice Blackburn (later appointed as the first Lord of Appeal in Ordinary, or Law Lord) said: It is contrary to the general rule of law, not only in this country but in every other, to make a person judge in his own cause..." The same author points out that the

39. 2017 SCMR 1189.

40. 2017 SCMR 1189.

1. Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?" (2002) 21 Law & Phil. 137.

expression 'The Supremacy of law' was used as a paragraph heading in 1867.²

According to Aristotle "Rule of Law is preferable to that of any individual".³ This rule has been championed by Roman jurists; medieval natural law thinkers; Enlightenment philosophers such as Hobbes, Locke, Rousseau, Montesquieu and the American founders; German philosophers Kant, Hegel, and the nineteenth-century advocates of the *rechtsstaat*.⁴

In England, Magna Carta provided "No free man shall be taken, imprisoned, disseized, outlawed or banished or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers and the law of the judgment."⁵ The conception was further elaborated by Bracton, Fortescue, Sir John Edward Coke, and others. In an Introduction to the Study of the Law of the Constitution, AV Dicey offers a detailed description of the rule of law. Dicey argues that the rule of law has three main aspects: (1) Absence of arbitrary powers: no one can be made to suffer in body or goods except for a distinct breach of a law; (2) Equality before law: no one is above the law and every man and woman, whatever his or her rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals; and (3) General Rules of Constitutional law are the result of judicial decisions.

Dicey's concept represents the classical approach to the concept of rule of law which was not only criticized by the political thinkers of his own era but also by Modern Political Thinkers. All the historical development of this Political Ideal was examined and developed in the light of Administrative Law which is merely concerned with the working and mechanism of Executive Organ of the state or of the Government with capital 'G'.⁶ What remained unaddressed is the expansion of Rule of Law viz-a-viz Human Rights. The question which needs to be answered whether the definition of Rule of Law includes Human Rights? And if yes, then how stringent is the relation between Rule of Law and Human Rights?

The Universal Declaration of Human Rights mentions rule of law only in the preamble, suggesting in typically cryptic fashion that "human rights should be protected by the rule of law." Neither the

2. Tom Bingham, "The Rule of Law" (2010) p.3

3. Aristotle, "The Politics" Vol, II P.16

4. Randall Peerenboom, "Human Rights and Rule of Law: What's The Relationship?" "Research Papers No. 05-31 University of California, Los Angeles School of Law, Public Law & Legal Theory Research Paper Series.

5. Magna Carta, 1215 Clause 39

6. Justice Retired Fazal Karim, "Access to Justice".

International Covenant on Civil and Political Rights (ICCPR) nor the International Covenant on Economic, Social and Cultural Rights (ICESCR), the other two main pillars of the "international bill of rights," mention rule of law. Nor do most other early rights treaties in general assembly, statements, committee reports or comments appeal to rule of law.⁷ According to Joseph Raz, to equate rule of law with the rights and political beliefs is a "Perversion of the Doctrine"⁸.

On the other side of the picture, other primitive and contemporary approaches include the factor of Human Rights within the component of the Rule of Law which make the issue highly debatable. Perhaps the most important example of this approach is to be found in the Declaration of Delhi, 1959⁹ according to which the rule of law implies *inter alia*, a right to representative and responsible government, certain minimum standards or principles for the law, including those contained in the Universal Declaration of Human Rights and European Convention, in particular, freedom of religious belief, assembly and association, and the absence of retroactive penal laws; that a citizen who is wronged should have a remedy against the state or government; the certainty of the criminal law, the presumption of innocence, reasonable rules relating to arrest, accusation and detention pending trial, the giving of notice and provision for legal advice, public trial, right of appeal, and absence of cruel or unusual punishments; the independence of the judiciary.

Tom Bingham in his famous work "the Rule of Law" provides principles of Rule of law within them he encompasses Equality Before Law, Adequate Protection of Human Rights and Fair Trial as ingredients of the doctrine.

For the United Nations, the rule of law refers to:

"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*

7. Supra Note 4.

8. Joseph Raz, "The Rule of Law and its virtue (1977) 93 L.Q.R. 195.

9. Declaration of Delhi (1959) 2 Jo. Int. Com. Of Jurists; pp 7-32 "The Rule of Law in a Free Society" in Report of International Congress of Jurists (New Delhi, 1959).

*procedural and legal transparency."*¹⁰ (Emphasis Supplied)

The providence and protection of Human Rights as a facet of the doctrine is not only considered by legal commentators or jurists but it has also been recognized by various Constitutions of the World and interpreters of the Constitution. According to American Jurists, the Constitution is the embodiment of the founders' belief in the rule of law. The idea is that government and society can be regulated by law, not subject to the whims of the powerful but potentially capricious ruler.

U.S Constitution did not embody any fundamental rights but after the continuous amendments, rights were guaranteed to the citizens. 5th and 14th amendment particularly provided for the rule of law and due process of law. These amendments have been extended not only to arbitrary powers of executive authorities but also to legislative powers and so many statutes have been declared void, being made in derogation of the fundamental rights contained in the said amendments. Supreme Court of U.S held "Congress could not infringe upon local rights of person or rights of property."¹¹

Rule of law has been adopted and incorporated in the Constitution of India. The preamble itself enunciates the ideals of justice, liberty, and equality. The government of laws and not of men is treated as the Basic Structure of the Indian Constitution.¹²

In Pakistan, the Constitution of 1973 embodies in various Articles the concept of Rule of Law. Especially, Article 4 is the emblem of Rule of Law. It states as: **Right of individuals to be dealt with in accordance with law, etc.** (1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.

(2) In particular:-

- (a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;
- (b) no person shall be prevented from or be hindered in doing that which is not prohibited by law; and

10. The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General, UN SC, UN Doc. S/2004/616.

11. Dred Scott v. Sanford (60 U.S. 393 (1857)).

12. Indira Nehru Gandhi v. Raj Narain (AIR 1975 SC 2299)

- (c) no person shall be compelled to do that which the law does not require him to do.

According to Muhammad Haleem CJ, any application of a principle of Anglo-Saxon jurisprudence, which might be destructive of the rule of law which is so worded in Article 4 of the Constitution as to give protection to all Citizens, has to be discouraged.¹³ So predominant is the position of Article 4 that it furnishes the only guarantee or assurance to the citizens when the fundamental rights stand suspended, for example, during martial law, so that no action detrimental to life, liberty, body, reputation or property of any person shall be taken except in accordance with law.¹⁴

In Pakistan, rule of law clause; enshrined in Article 4, protects its citizens from the arbitrariness of the ruler in the period of Emergency when their fundamental rights can be suspended but no such Article is present in the Indian Constitution.

Justice Khana in A.D.M Jabalpur vs. Shivkant Shukla (A.I.R 1976 S.C 1207), while dissenting with majority, observed that "Rule of law is the antithesis of arbitrariness. It is accepted in all civilized societies. It has come to be regarded as the mark of a free society. It seeks to maintain a balance between the opposite notions of individual liberty and public order. Even in the absence of Article 21 in the constitution, the State has got no power to deprive a person of his life or liberty without the authority of law. This is the essential postulate and basic assumption of the rule of law and not of men in all civilized nations. Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning... Absence of rule of law would nevertheless be an absence of rule of law even though it is brought about by law to repeal all laws."

The doctrine of Rule of Law developed from the Greek times to the modern world in order to protect the people from arbitrariness of the authorities and to make their actions subject to law so that rights of the people, whether personal or proprietary, cannot be snatched without any legal and reasonable justification, and if so snatched then it should be held liable. The Rule of Law has been the universal obligation of every civilized country. It means the supremacy of law. This supremacy guarantees absence of arbitrary power, equality before law and the rights of citizens.¹⁵ Thus, Rule of Law emerged not only as

13. Benazir Bhutto v. Federation of Pakistan (PLD 1988 SC 416).

14. Federation of Pakistan v. Ghulam Muhammad (PLD 1989 SC 26).

15. Sharaf Faridi vs The Federation of Islamic Republic of Pakistan Through Prime Minister of Pakistan (PLD 1989 Kar 404); Qaiser Iqbal vs. Province of Punjab (PLD 2018 Lah. 34).

a concept but also as a guardian of fundamental rights when even no rights have been given expressly or suspended otherwise.

Aristotle says in his book titled *The Politics*, "Where there is no rule of law, there is no constitution." If Aristotle is true in his statement, then without Constitution there would be no concept of Human Rights and its enforcement. Even if Rule of Law only means to limit the Government against Arbitrariness and making everyone in the eye of law then this very definition itself encompasses the element of Human Rights. An action becomes arbitrary when it violates the right of the other and if there is no concept of making a capricious person answerable for his wrong-doing the justice would not be served and whole system and spirit of the law would be shattered. Therefore, exclusion of Human Rights from the Components of Rule of Law is not justifiable as without Rule of Law Human Rights are mere elusive and farce.

THE DOCTRINE OF JUDICIAL NOTICE

By:

MIAN MUHAMMAD YAQOOB

Additional Session Judge Chonian

"Whenever a fact is so generally known that every ordinary person may be reasonably presumed to be aware of it, the Court "notices" it, either simpliciter or if it is at once satisfied of the fact without more, or after such information or investigation as it considers reliable and necessary in order to eliminate any reasonable doubt."¹

(Per Isaacs J)

Abstract

The exercise of judicial notice by the Court is mandated by the Qanoon-e-Shahdat Order 1984. It is a rule wherein a fact is accepted by the Court without formal proof by evidence. The judicial notice is an exception to the general rule that every fact is to be proved by oral or documentary evidence. Through this rule, law of evidence allows a fact to be introduced into evidence if the fact is so notorious or commonly known, or so convincingly attested, that it cannot reasonably be doubted. This exceptional rule is globally recognized as a shortcut of proof of facts through evidence and accelerates pace of Courts' proceedings for quick disposal of cases. There is need to empower Courts at district level by statutory provisions to take notice of adjudicative facts in Pakistan like USA and UK.

1. *Holland v Jones* (1917) 23 CLR 149, 153.