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An Investigation of India's and Pakistan's Legal Systems through the Lens of Rule of Law



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Abstract: *The rule of law furthers the goals of nationhood and peace throughout developmental processes. It's the bedrock of a free society, and democratic values are nothing more than a buzzword if the courts aren't entirely independent and the legislature and president don't treat them with the respect they deserve. Respect and autonomy thrive when one state institution may rein in the authority of another state institution (a phenomenon known as "horizontal accountability"). The principle of separation of powers among governmental authorities is essential to the rule of law. This paper will compare the rule of law in India and Pakistan, with a particular emphasis on the role of the judiciary in each country's legal system. It will also investigate the facts surrounding the question of whether or not governmental powers are constrained when it comes to protecting citizens' basic liberties. At the same time, the effects of a purely hypothetical version of the rule of law on its observance will be examined. The study will also compare and contrast the two nations' levels of representative government and the ease with which citizens may obtain civil justice.*

Key Words: Rule of Law, Constitutionalism, Legal System, India and Pakistan

Introduction

The phrase "la Principe de legalite," which translates to "the principle of legality," is whence we get the word "rule of law," which describes a system of governance that is founded on the principle of law rather than the principle of man (Vyas, & Ranawat, 2020). This principle is the foundation of administrative law. Put another way, no matter how far up in the hierarchy you are, you are still not immune to the regular courts of law. Sir Edward Coke, the Chief Justice of England during the reign of James I, is credited with developing the concept of "the rule of law," although the idea really has its roots in the

thinking of Greek philosophers from approximately 350 BC, who saw the law as a protection against tyranny (Chesterman, 2008). When the law is subservient to an external power rather than being the master of its citizens, the state is doomed to fail, according to Plato (Sempill, 2020). According to Aristotle, laws are representative of order and good laws are representative of good order, rulers are required to abide by the laws (Fournier, 2019). Paine believed that man had no higher authority than his own ability to create heavens. Because the ruler was king and not the king, the United States had a leg up on Great Britain in the fight for

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independence. According to AV Dicey, the rule of law consists of three interrelated concepts: legal certainty, legal equality, and legal individual rights in his book "The Laws of the Constitution" (Dicey, 2013). His worldview is based on The British view of the rule of law is that individuals should be held accountable for their acts and transactions in accordance with the law, but no one should be punished retroactively for breaking that law. Second, all social groups are treated the same under the law. Third, the Constitution is not the source of the rule of law but rather positive or common law. Thus, the rule of law originates with the judicial system. However, the German perspective is fundamentally different since it places greater emphasis on the state. The Constitution was the foundation of the Rechtsstaat. Robert von Mohl, the leading proponent of this view, argued against giving presidents absolute authority but believed that legislators, not just judges, should guarantee citizens against tyranny (Nedzel, 2023). The French have a positivist stance towards the rule of law. According to Carre de Malberg's conception of Etat de Droit, basic rights guaranteed by the Constitution are protected by the State against the legislature (Pech, 2004). The United Nations defines the rule of law as a set of principles of governance under which all actors, including nations, are expected to act in accordance with laws and norms that have been publicly publicized, are universally implemented, and are independently adjudicated in a way that is compatible with international human rights norms. The United Nations has issued a demand for specific steps to be taken in order to put the rule of law into effect in a manner that promotes and preserves the rule of law, equality before the law, fair application of the law, separation of powers, legal clarity, and public engagement in decision-making. It is important to avoid arbitrariness and maintain legal and procedural openness. In order to build the rule of law, the Global Justice Project lays out four fundamental concepts. First, the government and its agents are answerable to the law; second, the law safeguards fundamental liberties; and third, the law is unambiguous, transparent, stable, and fair (Emerson, 2022). Representatives must be knowledgeable, trustworthy, and impartial in order to provide services that meet the needs of their clients. India and Pakistan are two neighbouring nations that have a lot in common,

from their shared history and culture to the fact that they followed the same ideals and customs throughout ancient, mediaeval, and contemporary times until they acquired independence and intentionally opted to become independent democratic governments. For democratic systems to take shape and flourish, the rule of law must serve as the bedrock upon which they rest. The Indian formation of the rule of law is that the constitution is the highest authority and that the rule of law, like all other constitutional principles, exists to protect and advance people's liberties and rights (Hussain, 2019). The rule of law relies on the state's capability to carry out its responsibilities in an impartial and just manner. In India, the rule of law owes a countless deal to the contributions of the judiciary. The Constitution is proclaimed to be the highest legislation of Pakistan as well. Therefore, the rule of law is the legal principle that upholds the supremacy of law in all circumstances, mandates that everyone be treated fairly regardless of their social status, and guarantees its application via a fair and independent judicial system (Ellis, 2010).

Literature Review

According to Lord Acton, power always corrupts, and total authority is the most dangerous kind of power (Werlin, 2007). Even Dicey agreed with the argument that discretionary authority breeds arbitrariness. Decentralization and management of power via a proper system of checks and balances may, thus, prevent absolute power and arbitrariness (Buterin, 2014). Baron de Montesquieu argued that separation of powers was necessary since it was impossible to have freedom if the legislative and executive branches were under the same set of judges (Bowie, & Renan, 2021). Articles 50, 121, 211, 122, 212, and 361 of the Indian Constitution maintain the separation of these three branches of government and prevent them from interfering with each other. Articles 50, 175, 41(1), and 91(5) of the Pakistani constitution, however, purport to establish a separation of powers (Khan, & Muhammad, 2020).

However, the military in Pakistan is an additional, unavoidable player in the Pakistani political system; therefore the situation there is unique. There has been a negative effect on the performance of other state organs due to the military's dominance of this nation for almost

three decades (Rahman, & Shurong, 2021). The judiciary of Pakistan was a major source of national disappointment during the years leading up to the military coup when it undermined legislative sovereignty and provided legal cover for the coup by declaring it to be "the law of necessity" (Khan, 2021). A.V. Dicey argues that the rule of law would collapse in nations where the courts are only the voice of the will of the sovereign rather than having any independent authority to interpret the law (Dicey, 2013). According to the World Justice Programme, everyone has a vested interest in the rule of law because issues of basic rights, governance, and justice affect all of us on a daily basis; however, up until recently, the rule of law was considered the purview of the judicial system (Pech, 2011). To evaluate a country's dedication to the rule of law, it is not sufficient to just know its laws and institutions; one must also know how those laws are written (de jure), how they are really enforced (de facto), and how people perceive them. The Rule of Law Index (2021) places India at 79th and Pakistan at 130th in terms of how well their respective governments uphold the rule of law (The World Justice Project, 2021). While comparing two nations with similar histories and constitutional goals (the rule of law in both cases) but vastly different rankings, the discrepancy becomes extremely glaring. The researchers conducted an impact study to see if the development and evolution of certain fields of law are being influenced by the existence or absence of the rule of law in two countries that both claim to practice and adhere to the rule of law. There is not a significant gap between upholding the rule of law and looking out for the general public's best interests. Also, there are no advantages afforded to the government because of the rule of law.

The Independence of the Judiciary

An impartial court system is essential for upholding the rule of law. Parliament in India has the authority to alter the Constitution, and the Supreme Court of India has the authority to assess any proposed changes. In the case of "*Indira Nehru Gandhi v. Raj Narain*", the Supreme Court found that the then-Prime Minister, Mrs. Gandhi, had fraudulently won the election (Chakrabarty, & Hazra, 2016). She filed an appeal with the Supreme Court in an attempt to overturn this ruling and keep her position as Prime Minister. A

state of emergency had been enforced at the time because of internal unrest, and a small number of lawmakers from both chambers were placed in protective custody. It was at this time that the Supreme Court challenged another encounter to the constitutionality of the 39th Amendment to the Constitution. It has been decided that Sections (4) and (5) of Article 329-A are unconstitutional because they contradict the fundamental framework of the Constitution (Sharma, & Bhandarkar, 2021), the concept of the separation of powers, they are in conflict with the rule of law, and they violate the fundamental principle of equality before the law.

There is now a new reality in Pakistan's legal system. Despite the 1973 Constitution's explicit prohibition of treason on grounds of subversion and abrogation of the Constitution (Khalil, & Ahmed, 2020), the lowest echelons of Pakistan's judiciary are dominated by religious extremists and political attorneys and are plagued by inefficiency and corruption. In the meanwhile, the position of Pakistan's highest judicial authority is often submissive. In a similar vein, the Supreme Court of Pakistan upheld General Musharraf's 1999 coup and dismissed potentially challenged justices through a new constitutional oath of allegiance (Qureshi, 2009). However, the Constitution of Pakistan does not include a clause authorizing this kind of state involvement. It is one of the few things that Judge Iftikhar Muhammad Chowdhury had done to help rebuild faith in Pakistan's judicial system (Ghias, 2010). He is doing this by arbitrarily considering cases that involve political concerns and public interests. The most notable of these instances were "*Watan Party v Federation of Pakistan*", which included the delay of general elections, the legitimacy of the then president holding two offices of emolument at once, the forced disappearances of individuals, and the privatization of Pakistan Steel Mills (Qureshi, 2009). There was a loss of funds due to the improper sale of this steel mill to a buddy of Musharraf, according to reports. After Musharraf's government was dismayed by these rulings, the chief justice was called to the army house and asked to resign. However, opposite to the expectations of the then president, Mr. Chaudhary declined, and as a result he was house arrested, accused of misappropriation of office, and professed non-functional, leading to the

appointment of an acting chief justice (Khan, [2007](#)). After the coalition government was formed in 2008, however, and the court granted suspension of the constitution, things began to look better; a judicial commission and a Parliamentary committee were established to appoint judges; and the president was forbidden from unilaterally declaring an emergency (Kennedy, [2012](#)).

Applicable Law to Various Sections

Basic Rights

Part II of Pakistan's Constitution 1973 ensures citizens' right to basic freedoms. The right to life, which encompasses the right to a dignified existence, is a fundamental freedom. In cases involving the return of kidnapped women, such as "*Sakhi Daler Khan v. Superintendent*" (Ahmed, [2021](#)), the court ruled that the petitioner's detention was not legal since it violated the petitioner's right to freedom. Unfortunately, however, there have been a number of military coups in Pakistan, each of which has continued the suppression of basic civil liberties. For instance, during Musharraf's rule, the police were granted expanded authority to ensure that Islamic norms and customs were followed. But in the previous five years, freedom of speech, the press, and religion have all expanded throughout the nation (Mezzer, & Sial, [2010](#)). Part III of the Indian Constitution protects citizens against abuses by the government.

However, there are situations when these rights have been violated such as "*A.D.M. Jabalpur v. Shiv Kant Shukla*" is one the case. A majority of the judges believed that the suspension of fundamental rights was necessary during the emergency (Tadge, & Bhagat, [2020](#)). Article 352 clause (1) of the Indian Constitution mandates that due process be followed before declaring a state of emergency.

Availability of Civil Justice

To ensure that all citizens have equal access to the courts, courts must be affordable, cases must be resolved quickly and without unnecessary delays, and there must be effective alternatives to the judicial system. As part of their research into the rule of law in Pakistan, the World Justice Project found that 82% of respondents agreed that issues pertaining to public services, consumer disputes,

communities, and natural resources were on the rise in recent years (Khalil, & Ahmed, [2020](#)). However, just 14% of respondents pursue the aid of a third party to address their concerns, either via mediation or separation (The World Justice Project, 2017). Civil justice in India is ranked higher than in Pakistan on the Rule of Law Index 2021, although cases are not resolved quickly in Indian courts (The World Justice Project, 2021). As of 01 Jan 2022, there are 70,239 outstanding issues solely in the top court (Supreme Court of India, [2022](#)), according to data released by The Supreme Court of India, which undermines public trust in the government and, as William E. Gladstone put it so well, "Justice delayed, is justice denied."

Government by the People, Not the Few

According to the International Commission of Jurists, the democratic rule of law enforcement requires representative governance. The Majlis-e-Shoora which is containing the Senate and National Assembly, and also the Provincial Assemblies all exist in Pakistan to guarantee that the country's administration is responsive to its citizens, yet they fall short when it comes to devolving authority to the provinces and municipalities (Khan, [2012](#)). There were no constitutional protections in place when the Pakistani military first took power, and the country has been ruled by the military for nearly three decades now. This has had a far-reaching effect on society as a whole and on people's way of thinking generally. The people of India have had the freedom to vote and choose their own government since the country gained its independence (Aiyar, & Tillin, [2020](#)). Changes in government have always followed the constitutional process, whether the administration was formed by a coalition or a majority victory (Ibid: 119).

Constitutionalism

It is a mindset required for a democratic system to prevent the government from becoming authoritarian and dictatorial, protecting the rights of its citizens and guaranteeing that the state will not infringe upon those rights. Michel Rosenfeld maintains that the rule of law and restraints on government authority is necessary for a contemporary constitution if individual liberties are to be safeguarded (Rosenfeld, [2020](#)). B.O.

Nwabueze echoes this sentiment, arguing that a commitment to democracy is essential to a productive workplace. Constitutionalism needs more than just a set of rules on paper. A political democracy, a representative government, popular sovereignty, separation of powers, civilian control of the military, independent courts, law-abiding police, and judicial review are all essential components. The Supreme and High Courts in India are mandated with judicial review to ensure that the executive branch of government does not overstep its bounds and threaten democratic ideals like the safeguarding of basic liberties (Tharani, [2021](#)). If legislation on the Ninth Schedule violates a right protected by Part III of the Indian Constitution, as was the case in the landmark case “*I.R. Coelho v. State of Tamil Nadu*”, the law may be challenged in court. This is intended to check the excessive authority of legislatures. However, in the case of Pakistan, as we previously discussed, when the Chief Justice *suo motu* tried analyzing specific concerns associated with President Musharraf, by presidential proclamation, he limited Iftikhar's authority and installed Javed Iqbal as interim Chief Justice of Pakistan (Kennedy, [2012](#)).

Conclusion

India and Pakistan both drafted constitutions, and they both recognized the rule of law as an inherent element of the constitution, and they both got independence about the same time; nevertheless, the actual distinction resides in the

faithfulness to the respective constitutions, as well as the extent to which the rule of law is implemented. India still has some ways to go before it can be considered a nation where the rule of law prevails, but it is well ahead of its neighbour Pakistan in this regard. Pakistan falls short in satisfying the great majority of the conditions for the rule of law, in contrast to India, which has had difficulty in implementing the rule of law in certain situations, such as during times of emergency. Despite the fact that Pakistan asserts itself to be a democratic nation, history suggests that it may not be surprising to witness another coup at some point in the future. This, however, will largely depend on the development of the judiciary and its ability to carry out its roles and responsibilities independently. There has been a growing need for the rule of law in both nations in recent years, and now is the time to work for long-term prosperity. In order to accomplish this goal, there must be an effective judicial system and a robust commitment to the rule of law. Thus, the rule of law must be strictly enforced and decisive initiatives should also be taken to improve the legal systems. The independence and impartiality of the court, the prompt resolution of cases, and the application of due process all contribute to the efficacy of legal systems. Last but not least, the agency responsible for enforcing the law and delivering justice must use the greatest caution when using the law as a stick since the person in charge makes a huge difference.

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