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Rule of Law: A Comparative Analysis of India and Pakistan

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ABSTRACT

The rule of law serves the joint aim of development processes of state-building and peace-building. It is the true basis of a democratic society; democracy will become an empty phrase without the rule of law, but it cannot exist without a fully independent judiciary and due regard for the judiciary by other two pillars of State, namely legislative and executive. This regard and Independence can be achieved through horizontal accountability, which is nothing but the capacity of the state organization to check the abuse of power by other state organizations. Basically, the cornerstone of the rule of law is the separation of powers between the state bodies. This paper will mainly focus on the role of the judiciary in the context rule of law; also, the paper will look into the facts that whether or not the governance in the exercise of its powers remain limited in regard to fundamental freedoms while comparing the situation of the rule of law in India and Pakistan. Same time the paper will analyze the impacts of a mere theoretical form of the rule of law on one side to its adherence on the other. Also, the paper will reflect how accessible is civil justice to people and the status of representative governments in the two countries.

Keywords: *The rule of law, Independence of judiciary, adherence to the rule of law, Constitutionalism*

I. INTRODUCTION

Rule of Law as a phrase is derived from the French phrase '*la principe de legalite*,' which means the principle of legality, which implies a government based on principles of law and not of men, an individual or society not be governed by other individual or ruler but by the law, it forms the basis of administrative law. In simple words, no person is above the law, and everyone is subject to the jurisdiction of ordinary courts of law irrespective of rank and position. The concept as 'the rule of law' has originated from England by Sir Edward Coke, who served as Chief Justice in the reign of James I, but its origin is older and traces back to the times of Greek philosophers around 350 BC, who were of the view that rule of law serves as a safeguard against tyranny. Plato had a view that the fall of a state is not far off where the law

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is subject to some other authority and not of its own instead of the law is master, then men of such State enjoy all the blessings of God. Aristotle said the law is order and good law is good order, and therefore rulers must be the servants of the laws². Paine was of the view that man knows no master save creating heavens³. In the struggle for America's Independence, it was on a better footing than Great Britain because the king was not the rule, but the rule was king. In 1885, Professor A.V. Dicey evolved the concept of the rule of law that Sir Edward Coke laid down. In his book 'The Law of the Constitution' A.V. Dicey has explained the three main pillars of the rule of law first is the supremacy of law, second is equality before the law, and third is the predominance of legal spirit⁴. Based on his ideology British approach to the rule of law is that no one should be punished otherwise for a breach of law which is certain and prospective for guiding peoples' actions and transactions, but no one should be punished retrospectively. Secondly, no one is above the law, and all classes are equally subjected to law. Thirdly, the emanation of the rule of law is not from the written Constitution but the judge-made law or common law⁵. So, the rule of law has derived from courtrooms, but the German approach is slightly different; it focuses more on State. Rechtsstaat emerged from the written Constitution. The main theorist of this notion, Robert von Mohl, was against conferring unlimited powers on the executives, but according to him, protection against absolutism should be provided by legislatures rather than by the courts alone⁶. The French approach to the rule of law is positivistic. Etat de Droit, as developed by Carre de Malberg, connotes constitutional or judicial review of ordinary legislation and that fundamental rights enshrined in the Constitution are guaranteed by the State against the legislator⁷. According to a report of United Nations Office of the Secretary General(2004), the rule of law as observed by the United Nations is a set of principles of governance in which all persons, private and public entities and institutions,

² Constitutional Rights Foundation, 2010), Plato and Aristotle on Tyranny and the Rule of Law. *Bill of Rights in Action*, 26(1), Retrieved from <https://www.crf-usa.org/bill-of-rights-in-action/bria-26-1-plato-and-aristotle-on-tyranny-and-the-rule-of-law.html>

³ Thomas Paine, 1776, *Common Sense* (Bantam Classic edition/ February 2004). Bantam Dell, A Division of Random House, Inc.

⁴ Ananya Jain, 2018, Rule of Law and its Application in Indian Polity. *International Journal of Law Management & Humanities*, 1(3), 1-2. <https://www.ijlmh.com/wp-content/uploads/2019/03/Rule-of-Law-and-its-Application-in-the-Indian-Polity.pdf>

⁵ Pieter van Dijk, Gret Haller, Jeffrey Jowell & Kaarlo Tuori, 4 April 2011, Report on the rule of law. *European Commission for Democracy Through Law (Venice Commission)*, 512/2009, 3-4. [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)003rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e)

⁶ Kaarlo Tuori, 4 April 2016, *Ratio and Voluntas: The Tension Between Reason and Will in Law* (1st ed.). Routledge. <https://doi.org/10.4324/9781315603629>

⁷ Erik O Wennerström, 2007, *The Rule of Law and the European Union* (PhD dissertation, Iustus Förlag AB). Retrieved from <http://urn.kb.se/resolve?urn=urn:nbn:se:uu:diva-7877>

See: Pieter van Dijk, Gret Haller, Jeffrey Jowell & Kaarlo Tuori, 4 April 2011, Report on the rule of law. *European Commission for Democracy Through Law (Venice Commission)*, 512/2009, 3-4. [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)003rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e)

including the State itself, are accountable to laws that are promulgated publicly, enforced equally and adjudicated independently and those are consistent with international human rights norms and standards. The U.N. puts forward that for the application of the rule of law, certain measures are required to ensure adherence to the principles of supremacy of law, fairness in the application of the law, equality before the law, separation of powers, accountability to the law, legal certainty, participation in decision-making, avoidance of arbitrariness and procedural and legal transparency. The World Justice Program has defined the rule of law based on four universal principles first is the accountability of government and its officials and agents before the law, second is, laws protect fundamental rights, the security of persons and property also the laws should be clear, publicized, stable and fair, the third principle is that the process of enactment, administration and enforcement should be competent, ethical and independent representatives deliver accessible, fair and efficient and fourth principle⁸. India and Pakistan, both countries have shared the same history, culture, and traditions, governed by the same principles and traditions in ancient, medieval, and in modern times till they got their Independence, got their Independence from the same ruler and at the same time, had chosen the democratic form of government consciously. Democratic government needs rule of law as its foundation, over which the democratic structures take their forms and come into life. As per to Indian approach of the rule of law constitution is the supreme law of the land; like any other constitutional principle, the aim of the rule of law is uplifting of freedom and fundamental rights of the people⁹. To ensure the execution of the concept of the rule of law state should be duty-bound to execute its functions in a just and fair manner. In India, the judiciary majorly contributed to the evolving rule of law¹⁰. In Pakistan also the Constitution is claimed to be the supreme law of the land. So, the basic rule of law is the legal spirit that keeps law supreme in all and every situation and expects every individual to be treated equally irrespective of the position held by them and at the same time ensures its implementation through an impartial and independent judiciary.

(A) Review of literature

Lord Acton was of the view that power tends to corrupt, and absolute power corrupts absolutely. Dicey also believed that discretionary power leads to arbitrariness¹¹. So separation

⁸ Mark David Agrast, Juan Carlos Botero, Joel Martinez, Alejandro Ponce & Christine S. Pratt, The World Justice Project, Rule of Law Index: 2012-2013. Retrieved from https://worldjusticeproject.org/sites/default/files/documents/WJP_Index_Report_2012.pdf

⁹ Shweta Singh, 12 October 2020, Rule of Law and its Relevance. *iPleaders, Intelligent Legal Solutions*. Retrieved from <https://blog.iplayers.in/rule-law-relevance/>

¹⁰ *Supra* note 3.

¹¹ *Supra* note 4.

of powers and its management through a proper system of checks and balances is necessary to avoid absolutism and arbitrariness. According to Baron de Montesquieu, there will be no liberty if legislative and executive powers are vested in the same body of magistrates; therefore, judiciary power should be separated from legislative and executive¹². Indian Constitution, although expressly has not defined separation of powers, Article 50, 121, 211, 122, 212, 361 ensure independent functioning of these three organs and avoid overlapping to an extent¹³. However, Pakistan claims to have separation of power via articles 50, 175, 41(1), 91(5)¹⁴.

Nonetheless, the situation in Pakistan is not the same; there exists one more inevitable stakeholder apart from this trichotomy which is the military. The military has ruled this country for more than three decades and has adversely impacted the functioning of other state organs¹⁵. Sadly, it was the judiciary that dismayed Pakistan at the time of the military coup, undermining the parliamentary sovereignty and justifying the military takeover stating it to be the law of necessity¹⁶. According to A.V. Dicey, courts should have an independent and final view on what law means, and in the countries where courts have the functioning limited to being the voice of the will of the sovereign, the rule of law is bound to fail¹⁷. As per World Justice Program, if implemented properly, the rule of law helps combat social problems like poverty, corruption, and injustice, and everyone is a stakeholder in the rule of law as day to day issues like fundamental rights, governance, and justice affect each one of us but, traditionally the rule of law is viewed as a subject matter under the purview of lawyers and judges. To evaluate the adherence to the rule of law in the country only having the knowledge and understanding of law and institutions of that country is not sufficient but having the knowledge that how laws are written(de jure) and at the same time the actual implementation of those laws(de facto) and experience of people who are subject to those laws is equally necessary¹⁸. According to the Rule of Law Index(2021), India stands at 79th position compared to Pakistan, which is at 130th rank when it comes to adherence to the rule of law¹⁹. The difference in ranking is huge,

¹² Public law practice notes: Separation of powers-legislative, executive and judiciary. Retrieved from <https://www.lexisnexis.co.uk/legal/guidance/separation-of-powers-legislative-executive-judiciary>

¹³ Jai Narain Pandey, 2012, *The Constitutional Law of India* (49th ed.). Central Law Agency.

¹⁴ Muhammad Ikramullah Khan & Ayaz Muhammad, *A Research Journal of South Asian Studies* Vol. 31, No. 1, January – June 2016, pp. 257 – 274, An Evaluation of Separation of Powers: A Case Study of Pakistan (2007-2013). Retrieved from <http://111.68.103.26/journals/index.php/IJSAS/article/viewFile/3045/1256>

¹⁵ Bakht Munir, Zaheer Iqbal Cheema & Jawwad Riaz, September 2020, Separation of Powers and System of Checks and Balances: A Debate on the Functionalist and Formalist Theories in the Context of Pakistan. *Global Political Review*, V(III), pp 11-23. [https://doi.org/10.31703/gpr.2020\(V-III\).02](https://doi.org/10.31703/gpr.2020(V-III).02)

¹⁶ *Supra* note 13.

¹⁷ Mark D. Walters, Spring 2012, Dicey on Writing the “Law of the Constitution.” *Oxford Journal of Legal Studies*, 32(1), pp 21–49. <http://www.jstor.org/stable/41418848>

¹⁸ *Supra* note 7.

¹⁹ World Justice Project. (2021). *Rule of Law Index 2021*. <https://worldjusticeproject.org/sites/default/files/documents/WJP-INDEX-21.pdf>

especially for those two countries which share the same history, which got Independence almost at the same time, have written Constitution and both have the rule of law as the aim of their constitutions. Hollow claims of practicing and adhering to the rule of law have brought two nations to a different footing of growth and evolution in different areas of law, which led the researcher to do an impact analysis of how those areas are evolving in the presence or absence of the rule of law. Also, there is a fine line between the rule of law and rule by law; the latter denotes government is above the law, and when it comes into force, the assurance of public interest provided by the former is lost.

II. JUDICIAL INDEPENDENCE

Enforcement of the rule of law is ensured by an independent judiciary. India adheres to the principle of checks and balances, providing powers to parliament to amend the Constitution and at the same time providing powers to the supreme court to review constitutional amendments. In the case of *Indira Nehru Gandhi v. Raj Narain*,²⁰ initially, the high court had held that Ms. Gandhi, who was the then prime minister, had won the elections using malpractices against which she made an appeal in Supreme Court to save her candidature, but due to vacations in court the matter could not be heard, and for meanwhile she got an injunction from the court. This was the time when due to internal disturbances emergency was declared, and few members of parliament from both houses were in preventive detention. It is when the 39th amendment to Constitution was passed, and again its validity was challenged in the apex court. The court held though the validity of the amendment can not be challenged because the presence of 10 members of Rajya Sabha and 21 of Lok Sabha could not have made any difference in the passing of amendments but, clauses (4) and (5) of Article 329-A were held unconstitutional as due to violative of the basic structure of Constitution, separation of powers, not in accordance to the rule of law, violative of the principle of equality before the law as guaranteed in Article 14 and hence these were held void.

Judiciary in Pakistan has seen a different world. Incompetence and corruption are pervasive in the lower judiciary, and it is in control of religious zealots and bar politicians²¹. The role of the higher judiciary in Pakistan has generally been docile as every coupe and military intervention was legitimized and justified by the courts despite the clear provisions of the Constitution of 1973 against the treason for subverting and abrogating the Constitution²². Similar way, a coup

²⁰ *Indira Nehru Gandhi v. Raj Narain*, (1975)1 SCC 262.

²¹ Hashim Ali Gill, 12 September 2017, *The Concept of Rule of Law and Whether Pakistan Fulfills its Requirements*. *Courting The Law, Mindblaze Technologies*. <https://courtingthelaw.com/2017/09/12/commentary/the-concept-of-rule-of-law-and-whether-pakistan-fulfills-its-requirements/>

²² Parvez Hasan, 2007, *Environmental protection, rule of law and the judicial crisis in Pakistan*. Asia Pacific

of 1999 by General Musharraf was legitimized by the Supreme Court of Pakistan, and potentially challenging judges were removed by General Musharraf through a new constitutional oath of allegiance²³. But, there was no such provision provided in the Constitution of Pakistan for this type of government intervention²⁴. Justice Iftikhar Muhammad Chaudhary was one of those few people who tried to revive the position of the Pakistan judiciary by taking suo motu cognizance of cases related to the political and public interest. The most important among those cases was the postponement of general elections, the legality of the then president holding two posts of benefit at a time, missing persons, and privatization of Pakistan Steel Mills as seen in *Watan Party v federation of Pakistan*²⁵. This mill was allegedly sold to Musharraf's friend, and the proper process was not followed, which caused monetary loss to the country. These decisions dismayed Musharraf's government, and he summoned Chief Justice to the army house and asked him to resign, but contrary to the then president's expectations, Mr. Chaudhary refused to resign, and therefore he was kept under house arrest and was accused of misuse of his office and hence declared non-functional and an acting chief justice was appointed²⁶. But the things have started returning to the right track after the formation of the coalition government in 2008, series of positive changes came in, courts were barred from validating the suspension of the Constitution, for appointment of judges, judicial commission and Parliamentary committee was formed, the president was barred from declaring emergency unilaterally²⁷.

III. RULE OF LAW ON DIFFERENT SEGMENTS

(A) Fundamental Freedoms

Basic freedoms are guaranteed in part II of the Constitution of 1973 of Pakistan. Basic freedom includes the right to life, which means a life with dignity. In instances like *Sakhi Daler Khan v. Superintendent*²⁸, where the matter was related to the recovery of abducted women, the court

Journal of Environmental Law, 10(3 & 4), 167-182. Retrieved from https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/apjel10&id=168&men_tab=srchresults

See: Muhammad Ikramullah Khan & Ayaz Muhammad, A Research Journal of South Asian Studies Vol. 31, No. 1, January – June 2016, 257 – 274, An Evaluation of Separation of Powers: A Case Study of Pakistan (2007-2013). Retrieved from <http://111.68.103.26/journals/index.php/IJSAS/article/viewFile/3045/1256>

²³ Parvez Hasan, *supra* note 21.

²⁴ Liz Davies, July 2007, Pakistan dictator takes on his judiciary. *Socialist Lawyer no.47*, pp 10–11. <http://www.jstor.org/stable/42947084>

²⁵ *Watan Party v federation of Pakistan*, 2006 PLD S.C. 697, as cited in Muhammad Ikramullah Khan & Ayaz Muhammad, A Research Journal of South Asian Studies Vol. 31, No. 1, January – June 2016, pp 8. Retrieved from <http://111.68.103.26/journals/index.php/IJSAS/article/viewFile/3045/1256>

²⁶ *Supra* note 23.

²⁷ *Supra* note 14.

²⁸ *Sakhi Daler Khan v. Superintendent*, (1957) P.L.D. Lah. 813 as cited in Naveed Ahmed, January-June Summer 2021, A Critical Analysis of Fundamental Rights Under The Constitution of Pakistan, 1973. *Journal of Political Studies*, 28(1), pp 15. Retrieved from http://pu.edu.pk/images/journal/pols/pdf-files/2-v28_1_2021.pdf

held that detainment of the petitioner was not as per law because freedom of petitioner was infringed. But unfortunately, there have been several military coups in Pakistan that kept on infringing the fundamental freedoms of people. For instance, during Musharraf's reign, additional power was given to the police to enforce the observance of Islamic practices and values²⁹. However, in the last five years, there has been a countrywide improvement in political, media, and religious freedoms. In India, Part III of the Constitution guarantees fundamental rights against the State.

Nonetheless, there are instances where these rights have got infringed. For instance, in the case of *A.D.M. Jabalpur v. Shiv Kant Shukla*³⁰ majority of the judges had a view that constitutional rights must remain suspended during the period of emergency. But for the proclamation of emergency, a proper constitutional procedure was followed under clause(1) of Article 352 of the Indian Constitution.

(B) Access to Civil Justice

Civil justice means accessibility and affordability of courts and awareness of people to seek legal remedies for their problems, timely disposal of cases without unreasonable delays, and efficient alternate dispute resolution mechanisms. According to a survey done by the World Justice Project to find out the effectiveness of the rule of law in Pakistan, 82% of the surveyed population believed that public services, consumer disputes, community, and natural resources are common problems experienced in recent years, and surprisingly only 14% amongst those surveyed sought third party help for adjudication or mediation for resolving their problem³¹ because delay in justice leads the people to decide their matters in other ways rather than choosing the legal course of action³². According to the Rule of Law Index 2021, India holds a better rank in civil justice as compared to Pakistan³³ but, the Indian judiciary lags in the timely disposal of matters. The statistics issued by The Supreme Court of India told that as of 01 January 2022, there are 70,239 pending matters only in the apex court³⁴, which dilutes the confidence of people in the State and as Willian E. Gladstone has rightly said, "Justice delayed, is justice denied."

²⁹ *Supra* note 23

³⁰ *ADM, Jabalpur v. Shivakant Shukla*, (1976) 2 SCC 521

³¹ World Justice Project, August-December2017, *The Rule of Law in Pakistan*. <https://worldjusticeproject.org/our-work/wjp-rule-law-index/special-reports/rule-law-pakistan>

³² Khalil-ur-Rahman Shaikh, 11 March 2018, Poor Rule of Law: Causes and Remedies. *Daily Times*, <https://dailytimes.com.pk/213048/poor-rule-of-law-causes-and-remedies/>

³³ *Supra* note 18, p 10-11.

³⁴ Supreme Court of India, 01 January 2022, Monthly Pending Cases-Types of matters pending in Supreme Court of India, Supreme Court of India. <https://main.sci.gov.in/statistics>

(C) Representative Government:

The International Commission of Jurists considered that for effective enforceability of the rule of law, representative government is required. In Pakistan, Majlis-e-Shoora, National Assembly, and Provincial Assemblies exist to ensure a representative government of the people but, there is a lacuna when it comes to devolution of powers to local government³⁵. Also, Pakistan has been under military rule for more than three decades, and there were no legal provisions provided in the Constitution at the time of these military takeovers. This has created a profound impact on all institutions and the thought process of people³⁶. Since India got Independence, its citizens have enjoyed the right to cast a vote and elect a representative government for them. Be a coalition government or a majority win government, but it has always been an elected form of government, and change of government has always been through the constitutional procedure.

(D) Constitutionalism:

It is a spirit which is needed for a democratic set up to ensure the freedom of individuals and the assurance that the State will not infringe upon the liberty of the citizens and the same time it ensures that the powers of government is limited and prevents a democratic setup turning into dictatorial and authoritative. Michel Rosenfield believes that modern constitutionalism demands putting limits on the power of government along with adherence to the rule of law for the protection of fundamental rights. In a similar line of thought, B.O. Nwabueze says that successful working depends upon the democratic spirit. A Constitution in itself is no guarantee of constitutionalism, to achieve the objective of constitutionalism, a state needs to possess the following features the supremacy of the Constitution and the rule of law, political democracy, representative government, popular sovereignty, separation of power, civilian control of the military, an independent judiciary, police governed by law and judicial control. Indian judiciary has been entrusted with the power of judicial review to restrict the governmental power so that it does not destroy the democratic principles, including protection of fundamental rights. In the famous case of *I.R. Coelho v. State of Tamil Nadu*³⁷, if any Ninth Schedule law is causing an infringement of any right guaranteed in Part III of the Indian Constitution and if any such law is made, it will be open to judicial review to limit any arbitrary power of legislative bodies. But as we had already discussed in the case of Pakistan, when the Chief Justice suo motu tried

³⁵ Hashim Ali Gill, 12 September 2017, The Concept of Rule of Law and Whether Pakistan Fulfills its Requirements. *Courting The Law, Mindblaze Technologies*. Retrieved from <https://courtingthelaw.com/2017/09/12/commentary/the-concept-of-rule-of-law-and-whether-pakistan-fulfills-its-requirements/>

³⁶ *Supra* note 14.

³⁷ *I.R. Coelho v. State of Tamil Nadu*, (2007)2 SCC 1

scrutinizing certain issues related to President Musharraf then, although he had no powers explicitly to suspend the Chief Justice, he made a presidential decree to restrain Mr. Iftikhar from performing his duties and appointed Javed Iqbal as the acting Chief Justice of Pakistan³⁸.

IV. CONCLUSION

India and Pakistan not only share their boundaries, but they share the same past, both became independent almost at the same time, both have written constitutions, both have accepted the rule of law as an integral part of their Constitution but what has brought in the real difference is allegiance to their Constitution and enforceability of the rule of law. Certainly, there are few segments where India needs to work hard to attain the rule of law, but when compared with its neighboring country Pakistan, it stands on a better footing in practicing the rule of law. There are certain instances when India has seen a hard time practicing the rule of law like, in times of emergency, but Pakistan lags in a majority of requirements of the rule of law. India is the largest surviving democracy in the world through Pakistan also claims to be a democratic country, but if we look at the past, it will be no surprise if we get to see another coup in the future, but it will majorly depend on how the judiciary has evolved over the time and how independently it can perform its functions and duties. However, in recent years, both countries have seen a surge in demand for the rule of law, and today is when we aim at sustainable development. To achieve this objective, a robust legal system with an effective rule of law is required. Therefore, the legal systems should be strengthened, and the rule of law should be effectively applied. Legal systems can be strengthened by the independent and unbiased judiciary, timely disposal of matters, adopting the due process of law. Lastly, the law is a stick, and the person holding it matters a lot so, the body administering law and justice should take utmost care in its implementation.

³⁸ Shoaib A. Ghias, 2010, Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf. *Law & Social Inquiry*, 35(4), 985–1022, pp 1002. Retrieved from: <http://www.jstor.org/stable/40926291>