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## Comparative Analysis of the Rule of Law: Perspectives from India and Pakistan

Imtiaz Hussain<sup>1</sup>

Prof. Dr. Rao Imran Habib<sup>2</sup>

<sup>1</sup> PhD Scholar, Institute of Social and Cultural Studies, Bahauddin Zakaria University, Multan. Email: [imtiazsanda95@gmail.com](mailto:imtiazsanda95@gmail.com)

<sup>2</sup> Dean Faculty of Law, The Islamia University of Bahawalpur. Email: [Imran.habib@iub.edu.pk](mailto:Imran.habib@iub.edu.pk)

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### ABSTRACT

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This research paper thoroughly compares the legal systems in Pakistan and India, looking at important issues such as constitutionalism, judicial independence, access to civil justice, and fundamental rights. The study uses legal frameworks and historical backgrounds to assess the effectiveness and implementation of the rule of law in both nations. India's judicial supervision procedures and democratic system are contrasted with Pakistan's historical struggles, which include military control and constitutional uncertainties. The judiciary's role in preserving the rule of law through the protection of fundamental rights and constitutional interpretations is discussed in this article. The study provides an analysis of the constitutional principles, legal institutions, and societal ramifications, highlighting the advantages, disadvantages, and current initiatives aimed at enhancing the rule of law in Pakistan and India.



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Corresponding Author's Email: [Imran.habib@iub.edu.pk](mailto:Imran.habib@iub.edu.pk)



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## 1. Introduction

The term “rule of law” originates from the French expression "la principe de legalite," which signifies "the principle of legality." This implies that a government should be based on the principles of the law rather than those of men and that the law should be the sole source of authority for any individual or society. It also serves as the foundation for administrative law. In simple terms, all individuals are bound by the authority of regular judicial systems, irrespective of their status or position, and no one is exempt from legal accountability. The expression "the rule of law" was first used in England by Sir Edward Coke, the Chief Justice during James I's reign. However, the idea was first expressed by Greek philosophers as early as 350 BC, who believed that the rule of law protected despotism. According to Plato, a state that has the law subservient to another power rather than the law being its master will eventually fall, and the people living in that state will then experience all of God's bounties. According to Aristotle, rulers must serve the laws because good law is good order and the law is order (Blecharž, 2023).

America was in an advantageous position than Great Britain in its quest for independence because the law was supreme and not the king himself. The concept of the rule of law, first articulated by Sir Edward Coke, was further expanded in 1885 by Professor A.V. Dicey. In his book "The Law of the Constitution," A.V. Dicey outlines the three fundamental principles of the rule of law: equality under the law, the authority of the law, and the prevalence of the legal perspective (Jain, 2018). His view, rooted in the British concept of the rule of law, asserts that individuals should not face disproportionate punishment for violating a law that is clear and forward-looking in guiding the conduct of individuals and transactions. Additionally, he believes that no one should be penalized retrospectively. Second, everyone is equally subject to the law; no class is exempt from it. Thirdly, common law or judge-made law, rather than the written constitution, is where the rule of law originates (Venice Commission, 2011).

The World Justice Programme has established four universal principles that form the basis of the definition of the rule of law: first, that government officials and agents must answer to the law; second, that laws must protect fundamental rights and ensure the safety of people and property; and third, that the enactment, administration, and enforcement of laws must be carried out by competent, moral, and independent representatives who provide accessible, equitable, and effective services (Agrast, 2013).

India and Pakistan have been united by the same history, culture, and customs throughout the past, the Middle Ages, and the Modern Era. These shared characteristics have guided their independence from the same monarch while also actively choosing a democratic system of governance.

To be able to establish and sustain democratic systems, a government must uphold the rule of law as its fundamental basis. In the Indian context, the constitution is considered the supreme law of the country. Alongside other constitutional concepts, the rule of law aims to promote the freedom and fundamental rights of the people (Shweta Singh, 2020). It is the duty of the state to carry out its operations in a just and equitable manner in order to guarantee the implementation of the concept of the rule of law. The Indian court was very important to the growth of the rule of law. In Pakistan, too, people say that the Constitution is the most important law in the country. The basic rule of law is the legal spirit that says the law always wins, everyone should be treated the same, and the law should be carried out by an impartial and separate court.

## **2. Literature Review**

According to Lord Acton, absolute power corrupts absolutely, and authority tends to corrupt. Additionally, Dicey thought that discretionary power fosters arbitrariness (Jain, 2018). Hence, in order to thwart absolutism and arbitrariness, it is imperative to establish a division of powers and ensure its supervision through a suitable framework of checks and balances. Baron de Montesquieu argues that the absence of freedom will result if the legislative and executive powers are consolidated within single institutional authorities. Therefore, it is necessary to segregate the judicial power from the legislative and executive branches. A.V. Dicey argues that courts ought to have a final and independent interpretation of the meaning of the law and that the rule of law will inevitably collapse in states where courts only serve as the will of the sovereign (Walters, 2012). As per the World Justice Programme, every individual is a stakeholder in the rule of law as enduring matters such as justice, governance, and fundamental rights have an impact on all of us. Traditionally, the rule of law has been seen to be within the purview of attorneys and judges. Merely possessing knowledge and comprehension of the country's laws and institutions is insufficient to assess the country's adherence to the rule of law. It is also imperative to know the legislative process (de jure), the actual application of the law (de facto), and the experiences of those governed by the law (Wennerström, 2007).

The Indian Constitution does not specifically define the division of powers, but Articles 50, 121, 211, 122, 212, and 361 guarantee the separate functioning of these three institutions and prevent any kind of overlap (Pandey, 1989). On the same line, Pakistan asserts its right to separation of powers under Articles 50, 175, 41(1), and 91(5) (Khan & Muhammad, 2020). However, the situation in Pakistan is not the same as that of India; in addition to her tracheotomy of state functions, there is an additional necessary stakeholder, the military. Over three decades of military control have harmed other state organs' ability to function in this country (Munir et al., 2020). In terms of adherence to the rule of law, India is ranked 79th in the Rule of Law Index (2021) while Pakistan is ranked 130th (Majhosev, 2021). There is a significant disparity in the rankings, particularly for the two nations that have almost the same history, attained independence nearly simultaneously, have written constitutions, and both prioritize the rule of law. The researcher conducted an effective analysis of how many legal fields are growing in the presence or absence of the rule of law since the two nations have different legal systems and have made hollow claims to practice and uphold the rule of law. Furthermore, there is a thin line between the rule of law from the rule by law, the latter of which implies that the government is above the law and that the guarantee of the public interest offered by the former is lost when the legislation is implemented.

## **3. Judicial Independence**

An independent judiciary ensures that the rule of law is upheld in all situations. India upholds the concept of checks and balances by giving the parliament the authority to modify the Constitution and the Supreme Court the authority to examine such revisions. In the matter of Raj Narain v. Indira Nehru Gandhi, the then-prime minister, Ms Gandhi, filed an appeal in the Supreme Court to defend her candidature after the high court initially ruled that she had won the election through illegal means (Indira Nehru Gandhi v. Raj Narain, 1975). However, the case was postponed due to court vacations, and in the interim, the court issued an injunction. During this period, an emergency was declared due to internal unrest, and just a handful of members of both chambers of parliament were placed in preventive detention. At that time, the Supreme Court once again considered challenges to the constitutionality of the 39th Amendment, which had been ratified at that juncture. As highlighted by Shweta (2020), "Although the presence of 10 Rajya Sabha members and 21 Lok Sabha members could not have affected the amendments' passage, the court held that the validity of the amendment could not be contested. However, clauses (4) and (5) of Article 329-A were declared unconstitutional because they violated the fundamental framework of the

Constitution, the separation of powers, the rule of law, and the principle of equality before the law as guaranteed by Article 14.” As a result, they were declared void.

Pakistan's judiciary has witnessed a distinct reality. The lower courts are plagued with incompetence and corruption, dominated by politicians and religious fanatics (Hashim Ali Gill, 2017). Although the 1973 Constitution prohibits treason for subverting and abrogating the Constitution, the higher judiciary in Pakistan has traditionally played a submissive role, justifying and legitimising every coup and military intervention. As asserted by Hassan (2007), “the Pakistani Supreme Court recognised General Musharraf's 1999 coup, and he dismissed judges who may have raised objections by enacting a new constitutional oath of allegiance.” However, Pakistan's Constitution does not contain a clause permitting this kind of state intervention (Davies, 2007). Justice Iftikhar Muhammad Chaudhary took it upon himself to address matters related to politics and public concerns, making efforts to reinstate the position of the Pakistani court. In the case of “Watan Party v. Federation of Pakistan,” the most important issues were the delay of the general elections, the disappearance of people, the president at the time having two privileged posts at the same time, and the privatization of Pakistan Steel Mills (Khan & Muhammad, 2020).

The country reportedly suffered financial loss when this mill—purportedly sold to Musharraf's friend—was not properly handled. Musharraf's government was appalled by these decisions, so he called the Chief Justice to the army house and requested his resignation. However, Mr Chaudhary declined, which went against the expectations of the then-president. As a result, he was placed under house arrest, charged with abusing his position, and declared ineligible, leading to the appointment of an acting Chief Justice (Hassan, 2007). But, after the coalition government was formed in 2008, several positive changes were made. These changes included prohibiting courts from approving the suspension of the Constitution, the establishment of judicial commissions and parliamentary committees, the appointment of judges, and prohibition of the President from unilaterally declaring an emergency (Khan & Muhammad, 2020).

#### **4. Application of the Rule of Law across Various Segments**

##### **4.1 Fundamental Freedoms**

Part II of the Pakistani Constitution of 1973 guarantees fundamental freedoms. The right to life, which entails a life of dignity, is a component of basic freedom. In “Sakhi Daler Khan v. Superintendent,” the court determined that the petitioner's detention was unlawful due to the infringement of their freedom. The case dealt with the retrieval of abducted women (Ahmed, 2021). However, regrettably, Pakistan has seen several military takeovers that have continued to violate people's basic liberties. For example, under Zia's rule, the police were granted more authority to ensure that Islamic customs and values were followed (Hassan, 2007). However, political, journalistic, and religious liberties have improved nationally during the past five years.

In India, the government is prevented from infringing upon basic rights under Part III of the Constitution. Nevertheless, instances of these rights being infringed upon have occurred. For example, the majority of judges in the “A.D.M. Jabalpur v. Shiv Kant Shukla” case believed that constitutional rights should be suspended while the country is under emergency. However, appropriate constitutional measures were taken for the declaration of emergency under clause (1) of Article 352 of the Indian Constitution (ADM Jabalpur v. Shivakant Shukla, 1976).

##### **4.2 Access to Civil Justice**

Civil justice includes making courts easily accessible and inexpensive, encouraging individuals to seek out legal solutions for their issues, resolving cases quickly and without undue delay, and establishing effective alternative dispute resolution procedures. As per the findings of a World Justice Project survey evaluating the effectiveness of Pakistan's legal system, a significant majority of respondents (82%)

identified frequent challenges recently encountered in the following areas: public services, consumer disputes, communities, and natural resources. Surprisingly, only 14% of respondents said they had sought third-party assistance for mediation or adjudication to resolve their dispute (The World Justice Project, 2018). In spite of fact that delays in justice cause people to make decisions about their cases outside of the court system (Shaikh, 2018).

India ranks higher than Pakistan in the Rule of Law Index 2021 for civil justice (Wennerström, 2007); nevertheless, the Indian judiciary falls short in terms of processing cases promptly. As of January 1, 2022, the Supreme Court of India recorded a total of 70,239 pending cases, as reported by the court (Supreme Court of India, 2022). This low level of faith in the State is reflected in the quote from William E. Gladstone that reads, "Justice delayed, is justice denied."

### **4.3 Representative Government**

The International Commission of Jurists believed that representative government was necessary for the rule of law to be effectively enforced. In Pakistan, the presence of Parliament and Provincial Assemblies ensures a government that represents the people. However, there is a deficiency in the delegation of power to local government bodies (Hashim Ali Gill, 2017). Furthermore, Pakistan has been governed by the military for almost thirty years, and during these military coups, the Constitution did not contain any legal protections. This has had a significant effect on people's mental processes and all institutions (Khan & Muhammad, 2020). India's population have benefited from the ability to vote and choose a representative government ever since the country gained its independence. Whether it is a majority win or a coalition government, it has always been an elected system of governance, and the constitutional process has always been followed to change governments.

### **4.4 Constitutionalism**

To guarantee individual freedom and the certainty that the State won't restrict citizens' freedom, a democratic system needs this spirit. At the same time, it makes sure that the government's powers are constrained and keeps a democratic system from becoming autocratic or dominant. According to Michel Rosenfield, to defend fundamental liberties, modern constitutionalism necessitates limiting the authority of the state and upholding the rule of law. In the same vein, B.O. Nwabueze asserts that the democratic spirit is essential for productive labour.

To accomplish the goals of constitutionalism, a state must exhibit the following characteristics: The key principles of a well-functioning government include political democracy, where power is held by the people; popular sovereignty, where the authority of the government is derived from the consent of the people; separation of powers, where the government is divided into several branches with distinct functions; civilian control over the armed forces, where the military is subordinate to civilian authority; an independent judiciary, where the courts are free from political influence; law-abiding police, who uphold the law and maintain public order; and judicial oversight, where the courts have the power to review and supervise the actions of the government. A constitution by itself does not ensure constitutionalism.

The Indian court has been given the authority to judicially assess government actions to prevent them from undermining democratic values, such as upholding the rule of law and protecting fundamental rights. According to Shewta (2020) "the well-known case of I.R. Coelho v. State of Tamil Nadu, any law created that violates a right protected in Part III of the Indian Constitution falls under the Ninth Schedule and is subject to judicial scrutiny, which serves to check the arbitrary authority of legislative bodies." Nevertheless, in the case of Pakistan, it was previously mentioned that when the Chief Justice suo motu tried to investigate certain issues related to President Musharraf, the President issued a decree preventing Mr Iftikhar from carrying out his responsibilities and designated Javed Iqbal as the interim Chief Justice of Pakistan, despite lacking the legal authority to suspend the Chief Justice (Ghias, 2010).

Rule of Law and Judicial Accountability:

The judiciary is the equaling organ with the legislative and executive branches of government, and Dicey recognizes this as the beauty of federalism. In his writing, he asserts that any legislation passed by Parliament, any legislation passed by a state legislature, and any provision within a state's constitution that contradicts the U.S. Constitution is considered null and void. Similarly, any legislation or governmental action that contradicts the Constitution is considered invalid and without legal effect, as stated in the 1973 Constitution. In a unitary system, the legislature has power over the judiciary. As stated by Dicey, "In England, every judge must obey every act of parliament while hearing the case"(Dicey, 2013). Dicey supports the concept of judicial review and highlights that the courts are empowered by due process to act as protectors of the Constitution. State courts have the authority to hear cases involving the interpretation of the Constitution. The Indian Constitution establishes a separate judiciary that possesses the power of judicial review.

A functioning democracy can only be maintained and preserved with the support of the rule of law and the independence of the judiciary, which are fundamentally interwoven. Judicial independence is essential to the notion of legal governance. Any endeavor to suppress judicial autonomy or silence opposition weakens the fundamental principles of a fair and unbiased legal system, so eroding public trust, which is the very basis of the entire judicial structure. The judiciary, lacking power over both military force and financial resources, highly values public confidence as its most valuable asset. The credibility and moral authority of the judiciary would be irreparably damaged if a judge rendered decisions not in accordance with the letter and spirit of the law, but rather according to what the government finds agreeable (Justice Qazi Faez Isa v President of Pakistan, 2022). Simultaneously, it is acknowledged that the promotion of the rule of law cannot be advanced if there is a lack of vigilance in holding the judiciary accountable. Judicial accountability is essential for upholding and strengthening the rule of law.

The current discussion revolves around determining who is responsible and in what manner. Recently, the Supreme Court was confronted with the accountability of its justices and the need to strike a balance between the judges' right to privacy and the right to be treated in accordance with the law. In light of their public office and trusted status, the majority believed that judges' and their families' financial information should be open to the public. Ensuring judicial accountability is crucial for upholding the credibility of the judicial system. Equally significant is the entitlement of a judge to be safeguarded by the law and treated accordingly. Similar to other forms of accountability, judicial accountability must adhere to the constitutional principles of due process. Conversely, the right to privacy encompasses the entitlement to personal autonomy, individual growth, and the ability to form and nurture connections with other individuals and the external environment, as established by the Supreme Court.

## **5. A New Dimension to the Rule of Law:**

The Court in Pakistan is now trying to find a balance between rights and duties. It is focused on government and how to make it better, as well as the duty of the executive part to follow its own policies, rules, and laws. The court used to set rights and remedies through public interest lawsuits or even suo moto authority, but this is different because there isn't always enough energy to make sure the paperwork is followed. One of the main reasons people go to court to get judicial review of executive action or inaction is because they think the government hasn't done enough to fix the problem or make the right response.

Recently, the Court has been notified of political concerns that belong to parliament or with the executive branch through letters to the Chief Justice, asking the Court to take notice of the situation and assist in resolving it. This undoubtedly raises numerous problems regarding the role of the judiciary and the scope of its jurisdiction, even though it may also imply a certain amount of faith and confidence in the court. As a result, the courts—especially the Supreme Court—are now concentrating on striking a balance between rights and obligations as well as investigating the reasons behind the government's inaction, poor

management, and carelessness. Furthermore, by giving meaning to the right to equality, the Court hopes to incorporate marginalized groups such as women, transgender people, people with disabilities, and religious minorities while also upholding fundamental rights.

The courts have consistently advocated for the use of participatory methods in the creation, administration, and enforcement of laws, and they have frequently forced the government to reconsider how it conducts business. Simultaneously, there exists the matter of the Court's jurisdiction, meaning the amount to which the Court can intervene and the boundaries it establishes. As a result, the courts have started to control themselves by outlining what constitutes judicial overreach, declaring that they do not act benevolently, and emphasizing the need to preserve and defend the rule of law.

## **6. Conclusion**

India and Pakistan have similar borders, a shared past, almost simultaneous independence, written constitutions, and acknowledge the rule of law as a fundamental component to live with. The true distinction lies in their commitment to upholding their respective constitutions and the degree to which the rule of law is enforced. In certain areas, India undoubtedly has to put in more effort to achieve the rule of law, but overall, it is doing better at upholding the law than Pakistan. In some situations, such as during emergencies, India has struggled to uphold the rule of law, but Pakistan lags in most of the requirements. Although, Pakistan claims to be a democratic nation, India remains the largest democracy in the world. Considering the past events, it is not unexpected for another coup to happen in the future. However, the occurrence of such an event will largely rely on the progress and independence of the judiciary in fulfilling its duties. But both nations have experienced a rise in the need for the rule of law in recent years and now is the time to pursue sustainable growth. A strong legal system and an efficient rule of law are necessary to accomplish this objective. As a result, the rule of law ought to be properly implemented and legal frameworks reinforced. The adoption of due process of law, an impartial and independent judiciary, and prompt matter resolution are all ways to fortify legal systems. Lastly, the entity responsible for upholding law and justice must implement it with the utmost caution, given that the law is a tool and the individual holding it carries substantial weight.

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