

British and Pakistani Constitutional Systems and the Rule of Law

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In my LLM study of Comparative Constitutional Law and Human Rights I became increasingly interested in the relationship between executive legislature and judiciary in general, and executive judiciary in particular. My research work will focus on the system of government of Britain, how successfully it works, the relationship between the institutions of the state, and how it constrains governmental power, which is crucial for maintaining the rule of law. I would be comparing it with the governmental system of Pakistan, where, though the constitution is codified, the system does not work. My paper will also consider and analyze the collective action of law students and lawyers for the implementation of the rule of law, a doctrine that is fundamental for democracy. This paper will also propose the mobilization of the legal community to counter violations of the law by the ruling elite. It shows how collective actions play a crucial role in implementing the rule of law. However, the efficiency of such collective action in a particular country depends on the institutional capacity of its legal association and on the position of the professional elite leading it. Civil unrest led to the occurrence of collective action against the President of Pakistan, who resigned following the protests on the dismissal of Iftikhar Muhammad Chaudhry from his post as the Chief Justice of the Supreme Court of Pakistan. President Pervez Musharraf did not only depose Chaudhry, but declared martial law and dismissed additional high court judges. After a few months of confrontation, Musharraf resigned in August 2008 under the threat of impeachment.

In March 2009, Chaudhry and other dismissed judges were reinstated^[1]. No doubt that without the independence of the judiciary, the rule of law cannot be.

I have drawn inspiration from the British institutional and legal model, mainly, because of being associated with teaching Public law for sixteen years. I have observed that the rule of law is an exhaustively interpreted doctrine that is constantly in conflict with parliamentary sovereignty, which is the cornerstone of the British constitution. After extensive learning, I am inspired by the manners of how the judiciary in Britain adequately manages the conflict to preserve the rule of law. I am inspired by the significant decision of the House of Lords in the GCHQ case (1985), a significant development in Public law where the exercise of prerogative powers was subject to judicial review. Lord Diplocks' classification of grounds of judicial review, and Lord Roskills' handy list of prerogatives that were unreviewable. The landmark decision maintained and preserved the constitutional principles of the separation of powers and the rule of law. I am also impressed, during the course of teaching Public law, how the judiciary in the Thoburn decision created the hierarchy of statutes, upholding the basic concept of parliamentary sovereignty and at the same time respecting the supremacy of the EU.

Moreover, recognizing that the uncodified flexible British Constitution, many of the times, provides no

clear answer to many of the major questions on constitutional aspects; however, In a recent High Court judgment, *R (Miller) v Secretary of State for Exiting the European Union* (2016), on the constitutional significance of the EU referendum and the interpretative significance of the reception of Article 50 of the TEU, Court implied, it seems, that the principle of parliamentary sovereignty can act as a trump on popular sovereignty. In real terms, this means that it could be constitutionally and legally permissible for parliament to refuse to trigger Article 50, the result of the referendum notwithstanding[2].

The remarkable role played by the judiciary in contributing to the development of the fundamental constitutional principles, evident in the cases, is a reflection of the independence of the judiciary, and its capacity to determine legal questions is imperative.

The rule of law, being a slippery slope concept, is a process that takes place in different countries at different paces and with different degrees of success. It is associated with changes in the economic and social structures and is often referred to by comparative lawyers as the ‘reception of foreign laws’; it may also involve the cross-fertilization of legal institutions, which is often aided by conscious efforts toward the harmonization and unification of rules and procedures in various areas of law^[3].

Realizing all this, I still ponder over the so-called democracy prevailing in my part of the world, but still, we have to see the transparency and independence in our state institutions. Is the rule of law doctrine, in reality, an elusive concept that could be interpreted according to the whims of the rulers, or does it truly mean curbing the arbitrariness of the governmental power? I would like to understand, while researching, how could the rule of law be strengthened in Pakistan and what accountability mechanisms be built to hold the rulers accountable.

It is thus submitted that though there is an abundance of literature on the rule of law and the quality of democracy, however, research on these issues has not, so far, put the rule of law in the systematic context of Pakistan’s prevailing democracy. Unfortunately, the facts have been awfully otherwise. Law and its competitive authorities have always been the tool in the hands of political elites to subject the downtrodden and helpless proliferates of the nation, so much so that the general masses of the country do not trust the law and its enforcing agencies anymore.

Against this backdrop, the present study, while focusing on the curbing of governmental power to achieve the rule of law, is a complementary contribution to the existing literature on the Pakistan case, as well as to the comparative literature in general.

Bibliography

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See generally, Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*, Vol. 1(Oxford,

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