

Rule of Law in Conflict: A Comparative Study of South Asian Constitutions

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Abstract

The definition of war has expanded drastically, giving it a broader horizon of nature and scope than before. Wars and conflict today majorly exist intra-nationally, rather than inter-nationally. Legal tools and strategies are required to manage conflict and to make and maintain peace and cooperation in such areas. The most sacrosanct attribute to be upheld in times of conflict and post conflict is the Rule of Law (Hereinafter, ROL). It is imperative for a state to guarantee equality and fundamental rights to its citizens and ROL is an inalienable tool in providing the same. If strategically implemented in times of conflict, ROL's role in pinning down accountability, conflict resolution and balancing powers and freedoms can dilute post conflict losses to a state and even prevent subsequent conflicts.

This paper discusses the importance of the ROL, both during and post conflict. Further, the author attempts to delve into the South Asian constitutions of India, Myanmar and Sri Lanka and studies them through a lens of ROL. Lastly, the author draws conclusions by correlating the constitutional approach to the ROL with the conflict coping mechanism of the said countries.

Keywords: *Constitution, India, Myanmar, Sri Lanka, Conflict, Rule of Law*

Introduction

Conflicts within states have predominantly been either ethnic or religious, mainly focusing on issues pertaining to self-determination and violent political struggles between opposing domestic political factions. (Kritz, 2007) According to the United States Institute of Peace, 93% of the major armed conflicts were on the same differences as mentioned before. To restore peace and resolve conflicts in these scenarios, domestic governments tend to rely heavily on the ROL and find a durable solution for both (or more) parties in conflict.

India, Sri Lanka and Myanmar have been blessed with significant geographical locations South Asia, which has contributed to vast research and attention given to their laws and constitutions. Even though they are third world countries of the Global South, the changing political dynamics of these countries have gathered international attention. With respect to the ROL in conflict, the author has relied on the constitution of these countries.

The inalienable attributes of fairness and openness make adaptation of ROL more favourable and the most effective way to incorporate it is through the constitution of the state. While some states have a pioneering history of adopting the ROL, such as the British jurisprudence, others have gathered inspiration and tailored it according to the social fabric of their society, such as India and Sri Lanka. However, there still exist some states such as Myanmar who are yet to establish a ROL in their constitutions.

While the absence of a constitutional adaptation of ROL may not seem of much importance on surface, it highly affects how states build solutions and delivers justice in times of conflict. The ROL forms a system of intersecting institutions and their respective mechanisms and procedures that recognise the sources of tension at an early stage, prevent any party to take a violent reaction and offer a fair and just solution.

Statement of Problem

The countries of India, Sri Lanka and Myanmar have faced inter state conflicts in the past decades such as the Kashmir issue, Sri Lankan civil war and Rohingya crisis, respectively. These issues have gathered international spotlight owing to the intensity and mass human rights violations. In such situations, the application of ROL in conflict shifts from international to intranational and the state relies heavily on the constitutions to cope up.

The primary legal caveat in such cases is the assumption that conflict only occurs *between* states and not *within* them. Therefore, there is a predominant culture of referring to international law and the

universal jurisdiction to persecute such crimes and violations.(Cheatham, 1936) Constitutions, while laying the scope of ROL do not include matters of internal conflict as doing so will give rebellion groups legitimacy. Following the same reason, governments are also against the opinion of such groups ratifying the Geneva Convention.

Literature Review

In the pursuit of comparatively the approaches to ROL by the constitutions of India, Sri Lanka, and Myanmar, various sources have been referred to. The primary sources are the ‘Constitution of the Democratic Socialist Republic of Sri Lanka’, the ‘Constitution of India’, and the ‘Constitution of the Republic of the Union of Myanmar’. Additionally, research of Harish Narasappa in India’s ROL: A Theoretical Analysis, (Narasappa, 2019) Benjamin Schonthal’s Success of Religious Rights in Postcolonial Sri Lanka, (Schonthal, 2014) and Stephen McCarthy’s ROL Expedited: Land Title Reform and Justice in Burma (Myanmar) are relied to understand the approaches to the ROL.

However, there persists a research gap as ROL in times of conflict has not been studied enough. This stems from the idea that at times of conflict, a universal jurisdiction will apply, and international law instruments will be enforced. But it is to be kept in mind that these countries are not parties to the Rome Statute and hence will not be obligated to abide by the decisions of international organisations. Also, in times of an internal conflict and non-international armed conflicts, the Geneva Convention will not apply which leaves the responsibility to hold the supremacy of the ROL on the states, through their Constitutions.

Research Questions

Through the course of this paper, the author aims to address the following research questions:

- ✓ What role does ROL play in conflict?
- ✓ How do the constitutions of India, Sri Lanka, and Myanmar approach the ROL in conflict?
- ✓ What are the loopholes in the constitutions of India, Sri Lanka, and Myanmar in the application of the ROL?

Research Objective

The intent of the author is to find out similarities in the approach of these third world countries who were colonised by the British in their application of the ROL through their respective constitutions. In doing so, the author will not generalise the countries as their socio economic and political scenarios have spanned out in contrasting directions post-independence form the British Empire.

Rule of Law in conflict

There is no clear definition of the ROL. Its significance can vary for a long time between various nations and legal practices. (Yu, Guernsey) The ROL is the key to peace-building cooperation, especially in the post-conflict regime. The lessons of human devastation, such as the genocide of Rwanda, the slaughter of Srebrenica, Bosnia and Herzegovina, are important reminders of the failure of ROL. The question, therefore, is how to use the rule of law as best as we can to reengineer, rebuild and improve society without risk factors. (Jaruma, 2013) The discussion is therefore structured to suggest an efficient method of ROL.

Today, reciprocal compliance with procedural principles is generally defined as the source of legitimacy. This implies, in the sphere of the ROL, equal and inclusive processes relating to administrative decision-making, legal conflicts, criminal prosecutions, as well as means of inclusive political participation that are constitutionally guaranteed. (Körtgen, 2019)

Byzantine interactions between different groups and sub-groups are marked by violent confrontation, and the current government also plays an important role in perpetuating the conflict. It is in such situations that, by de-escalating, mitigating the impact of conflict and fostering peaceful coexistence, non-state justice actors and other agents of peace can play a crucial role. As mediators, religious or traditional authorities may act, taking opposing partners to the negotiating table. Facilitators of restorative justice can provide relief from social tensions otherwise unaddressed by broken and crumbling structures of state justice.

How do the constitutions of India, Sri Lanka, and Myanmar approach the ROL in conflict?

India

The Constitution of India is based on the Rule of Law principle. All is unquestionably under the rule of law, whether personally or collectively. The Constitution has given a special mission to the judiciary in the country in order to ensure the establishment of the rule of law. One of the cardinal principles of the rule of law in a democratic system is the preservation of the dignity of the courts. (Goyal, 2019)

The definition of the Rule of Law in India can be traced back to the Upanishads. In epics including Mahabharata and Ramayana, Ten Commandments, Dharma Chakra, and other seminal texts, their traces can also be found. There are no drafts in modern times in which the Rule of Law is addressed or stated explicitly. It is interpreted that the rule of law as administered in India is embodied within many clauses of the Constitution. (Tewari, 2019) Not only were the framers of our Constitution familiar with the postulates of the Rule of Law as suggested by Dicey, but also as updated in British India by its

intervention. The Constitution is the basic standard of the country from which all other laws derive their power, thus acting subordinate to it and enforcing the provisions of the Rule of Law provided for in the Constitution of India.

In *Suman Gupta and Ors. Etc v. State of J & K and Ors.*,¹ the Court re-established the supremacy of ROL through Article 13(1), which states that '*any law that is made by the legislature has to be made in conformity with the Constitution failing which it will be declared invalid.*' Therefore every law in India must be in accordance with the provisions of the Constitution. The Preamble to the Indian Constitution contains the terms *justice, liberty and equality*, which, regardless of their stature in existence, are a strong sign of a just and equitable structure without any existing inequality between the masses. In Article 14 of the Constitution of India, which lays down the concept of equality before law and equal protection of laws, equality before the law as enumerated by Dicey is incorporated.

Sri Lanka

The history of Sri Lanka with emergency powers and the Prevention of Terrorism Act (PTA) illuminates the dynamic relationship between state violence and repression and non-state actors' violence and terror. The draconian steps taken by Sri Lanka have only enhanced the cycle of violence, contributing to the deterioration of the social and political structure of a democratic society, many commentators maintain. (Coomaraswamy, Reyes, 2004) In both the north and south of the island, the use of unbridled control by state authorities has led to many deaths, mounting disillusionment and violent backlash by aggrieved communities. Constitutional rights have been subverted by the use of emergency powers, often maintaining an atmosphere of terror and a lack of respect for the rule of law.

More than a quarter of a century of internal civil war between the government and the separatist Liberation Tigers of Tamil Elam (LTTE), which only ended in May 2009, has affected the growth of Sri Lanka's rule of law. The government was triumphant, but large parts of the country remain ravaged, especially in the north and east.

Public terror was perpetuated and a culture of irreverence for the rule of law was instilled, a pattern which could not be avoided by regulatory protections or by oversight bodies intended to serve as review mechanisms. The abusive exercise of power has brought foreign interest in the long history of ethnic violence in Sri Lanka.

¹ AIR 1983 SC 1235.

Appeals for the State to keep officials responsible for violent actions by national and international oversight bodies have gone unheeded. Therefore, Sri Lanka faces the challenge of creating a new culture that respects the rule of law while remaining attentive to the fundamental tenets of human rights.

Myanmar

According to Cheesman *'Myanmar manifestly does not conform to substantive models of the rule of law'* (Cheesman, 2009) Myanmar has a legal system of primarily common law. In Myanmar, in the late nineteenth and early twentieth centuries (as implemented in codifications planned for colonial India), the concepts of English common law were adopted when Myanmar (then known as Burma) was part of the British Empire. As a synonym for a forceful rule of law, the rule of law has been used and the 2008 Constitution itself provides evidence that the authoritarian approach lives on. Burmese terminology, which appeared as 'rule of law' in the official translation of the previous 1974 Constitution, is regularly rendered as *'prevalence of law and order'* in its English edition.

The report of the International Bar Association's Human Rights Institute on the Rule of Law in Myanmar concluded that *'The history of Myanmar means that expecting overnight transformations in this respect will be unrealistic, but improvements are necessary.'* There is a broad consensus across the political spectrum that advancing the rule of law and law reform efforts are a top priority, but there are different opinions on the timing of specific efforts by the government, opposition, and other parties.

While the need for rule of law and law reform is commonly spoken of most people believe that it implies rule by law and do not understand the variety of elements required for the rule of law to exist in a society. There is a broad consensus across the political spectrum that advancing the rule of law and law reform efforts are a top priority, but there are different opinions on the timing of specific efforts by the government, opposition, and other parties.

Critical Analysis

Through establishing legal mechanisms for addressing complaints and disincentives for crime and abuse, a clear rule of law that respects human rights helps deter and reduce violent crime and conflict. Poor economic growth and injustice, on the other hand, may be a source of crime and abuse. Crimes that though committed on national territory, breach national boundaries and impact entire regions, and ultimately the international community as a whole, are some of the greatest challenges to peace and security. This is an evolving threat to the rule of law and the defense of human rights and highlights the close ties between peace and security.

For Sri Lanka, a better future is based on a stable democracy backed by an expanding economy. This goal includes an independent judiciary, a free media and a confidence-driving constitutional structure.

Respect for the rule of law and its application to all facets of life and culture in Sri Lanka must underpin all this.

It is important to define the rule of law in Burmese constitution. Because if Suu Kyi is unable to express, communicate and achieve general consensus about what the Burmese people mean by the "rule of law," it tends to become merely a political slogan rather than a concrete goal to be calculated against which objective progress can be measured. This is easier said than done, however, since there are many distinct meanings of the "rule of law," much like the word democracy." (Bloom, 2012) Consequently, the political equivalent of rounding up a school of fish with her bare hands might be for Suu Kyi to both describe and gain a common understanding of the rule of law. But it's important for her to try.

The conflicts between the executive and legislative branches, on the one hand, and the judiciary and constitutional courts, on the other hand, and those between the ordinary and constitutional courts, on the issue of the rule of law in young democracies, are especially virulent. (Hein, 2011) A common characteristic of both democracy and the rule of law is that even though the latter is technically correct, a solely procedural approach does not say much about the actual consequences of processes and procedures. A fundamental distinction must be made between "rule by law" whereby law is an instrument of government and government is considered above the law, and "rule of law" when discussing the rule of law and democracy nexus, which means that everyone in society is bound by the law, including the government. Constitutional restrictions on authority, a central feature of democracy, ultimately involve adherence to the rule of law.

The government is responsible for showing that it has the political will to meet its own promises and obligations and to take action to uphold, protect and promote human rights and the rule of law. Whether or not the government is sincerely involved in democratic change, peace and reconciliation, however is the issue. (Fonseka, 2013) Crimes that though committed on national territory, breach national boundaries and impact entire regions, and ultimately the international community as a whole, are some of the greatest challenges to peace and security. This is an evolving threat to the rule of law and the defense of human rights and highlights the close ties between peace and security.

Conclusion and Recommendation

The ROL contains several elements that are important to relieve stress and minimize the possibility of further conflict. The challenges associated with accounting for past violations and establishing a new institutional order must be faced by those interested in post-conflict peace building and social restoration.

The courts should be established as the main venue for peaceful conflict resolution, but they should be part of the entire criminal justice system, including law-abiding police, jail and criminal defense attorneys.

- i. Commissions of truth and reconciliation should supplement criminal trials, serving a distinct yet essential purpose for transitional communities.
- ii. A balance is required between the legal exclusion from government institutions of individuals involved in repression and the prevention of widespread political purges.
- iii. Enabling society to engage in the drafting of the constitution ensures that time, content and money compromises will be involved in the process, but a constitutional framework that is more generally accepted and respectful of peace can be established.
- iv. Local ownership is important. This calls for new approaches based on local decisions which are guided by external advice.

The remedy must be to integrate and harmonize short-term and long-term initiatives and services in order to streamline them into coordinated action. The long haul should already appear on the strategic horizon when conceiving short-term steps. This only works if at an early stage of planning, all related participants exchange knowledge and coordinate project designs and programming accordingly. To this end, joint missions, joint production of policies for particular countries and regions and joint monitoring and evaluation of projects should be readily implemented.

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