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**VIOLENCE AGAINST WOMEN AND RULE OF LAW IN
PAKISTAN AND AFGHANISTAN****Dr. Rafia Naz Ali**

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The fundamental values of justice in a country are reflected in its legal system and the social structure of its society. The constitutional and administrative doctrine of the rule of law is one of the fundamental principles of any law, convention or declaration. The indicators of VAW are the same in Pakistan and Afghanistan. These are physical and sexual violence, customary practices, economic disparity, political and religious dimensions and absence of rule of law. Individual tribes and ethnic groups in these countries developed their own customary laws. These customary behaviours were passed down from generation to generation and eventually became socially obligatory. But, being a party to the UDHR, United Nations declarations and resolutions of the United Nations Security Councils, Pakistan and Afghanistan is under an international obligation to enact its local law in consonance with rule of law. The purpose of the study is to look into the matter of VAW in Pakistan and Afghanistan in the context of the rule of law.

Keywords: Pakistan, Afghanistan, Rule of Law, Violence against Women, Comparison

Introduction

The rule of law includes two essentials: equality before the law and equal protection of the law. It supports the equality of all citizens before the law, which includes all the laws, norms, institutions, processes, and enforcement mechanisms of rights. The judiciary, prosecution, and police are mainly responsible for enforcing the rule of law. For this purpose, the application and adjudication of law and the legal roles of administrative officials are to be impartial and consistent in similar cases irrespective of class, creed, status, or sex (Britannica).

The fundamental functions of the rule of law are to impose legal restrictions on state institutions, maintain order in society, and harmonise relations between citizens (Tamanaha, 2007). The rule of law enforces these functions through the legal institutions of the country, which include all institutions that promote and administer justice by the application of laws and rules consistent with human rights principles.

Customary laws in both countries are misogynist in nature and application. These laws are hostile and discriminatory when it comes to violence or offences against women. For example, trading a woman in settlement of a dispute called *badl-e-sulh* in Pakistan and *Baad* in Afghanistan is a prevalent practice. Women often face violations of their basic rights from verdicts issued by informal justice systems and customary practices. Moreover, punishment for moral crimes in the form of honour killing is also a prevalent practise in both countries. These customs are widely practised in the tribal and frontier regions of Pakistan and Afghanistan.

Prolonged conflicts in Afghanistan and terrorism in Pakistan have eroded the rule of law. In Afghanistan, it created a legal vacuum which was filled by tribal and customary laws, particularly in the era of the Taliban government (US Institute for Peace, Special Report 117 (2004)).

The security situation is continuously deteriorating in Pakistan and Afghanistan. Both countries are facing the challenge of growing Islamic militancy and terrorism, which has already caused hundreds of victims. This crisis is exacerbated by an economic crisis, water and energy shortages, as well as drug and human trafficking. To confront and solve these complex problems, the states of Pakistan and Afghanistan must guarantee the rule of law, particularly in well-established and independent judicial system.

Another factor weakening the rule of law in Pakistan and Afghanistan is the parallel legal systems. The existing parallel legal systems have deficiencies and contradictions that mainly affect women and minorities in both states. For example, there are certain accepted practises that are crimes and are partly considered crimes, including early marriages, honour killings, or the award of compensation to girls and women as part of peace agreements between families. In fact, these are crimes that are practised in the name of tradition, justified by Sharia and solved by Jirgas. Furthermore, domestic violence against women is not yet considered a crime. Furthermore, the process of filing the first information report (FIR) is too complicated and difficult. Police stations or courts are often prejudiced against women. Another problem is that court procedures are expensive and ordinary people, particularly women, can hardly afford these expenses. For that reason, people prefer the local Jirga system, a council of elders, to seek justice. For women, however, it is almost impossible to seek justice in this traditional system (Gohar, 2009).

Normative conflicts within societies often stem from alternative or parallel normative orders, in particular religious normative orders. These orders exist alongside common laws and may get into conflict with them. With the existence of secular constitutional law and Islamic law, two parallel normative systems exist to avoid conflicts within society. Social conflicts can be caused by the collision of the law with other social norms. These norms require certain behaviours that contradict the law. The contradictory norms question the validity claim of the laws, which leads to a loss of legal certainty and destroys the rule of law (Kotter, 2009).

The rule of law and sustainable development have a strong correlation and are interdependent. The rule of law is an organic process that grows gradually and cannot be mechanically installed or enforced. There is a great difference between theory and practice. It is not difficult for Pakistan or Afghanistan to have adequate laws, but enforcing these laws is the problem. The application of the rule of law is fundamental and depends on political institutions such as parliaments to reflect the political will of a society, the executive branch, which guarantees its application, and the judiciary as a monitoring instrument. The roles of political parties, the media, and civil societies are also essential to ensure the rule of law (Iqbal, 2009).

In Afghanistan, the rule of law has never been strong. Prolonged internal and external aggression has been almost entirely displaced by the "rule of arms". In most of the country, regional powers, whether holding official positions or not,

exercise political, police, and judicial authority. The judicial system and law enforcement lack human resources and physical infrastructure. Furthermore, the incoherence of regimes over the last half century has left a mosaic of different and overlapping laws. Although Afghan and international officials often refer to the development of the rule of law as a high priority, the necessary measures are not urgently addressed for the enforcement of the rule of law. The Afghan government and foreign donors will have to work together for a long time to rebuild and reform the country (USIP, Special Report, 2005).

The constitutions of many Muslim countries provide equal rights and equality to all their citizens. For example, Syria, Algeria, Tunisia, Morocco, Oman, Bangladesh, Tajikistan, Uzbekistan, Turkmenistan, Pakistan, and Lebanon. For example, according to articles 18 and 46 of the constitution of Uzbekistan, "All citizens of the Republic of Uzbekistan have the same rights and freedom and are equal before the law regardless of differences in gender, race, nationality, language, religion, social origin, beliefs, and personal or social position." Privileges may be established only by law and must be in accordance with the principles of social justice. "Article 40 of the Egyptian constitution states that "all citizens are equal before the law." They have equal public rights and duties without discrimination due to sex, ethnic origin, language, religion, or creed. "The citizens are equal before the law in their rights and duties" is provided by article 25 of the constitution of Syria. Islam provides clear guidance regarding gender equality and women's rights. The problems of gender inequality arise in jurisprudence. This is due to misunderstanding or misapplication of the Qur'anic text, cultural distortions, and patriarchal prejudices (Nawabi, 2003).

The status of women declined in Muslim societies due to mediaeval Arab practices. Customary laws became part of Islamic legal systems as the early jurists belonged to Arab society and culture. Due to lack of knowledge and understanding, most Muslims consider customary practises as injunctions, divine and binding in nature, which badly effects the Quranic concept of gender justice. Moreover, Islamic sayings about women's rights and protection were not acceptable to the patriarchal mind and society. The problem is more cultural, but the religious zealots try to rationalise these transgressions in the name of religion (Engineer, 2011).

In Pakistan and Afghanistan, women are in a disadvantageous position because of misinterpretation of Islamic law or its enforceability and the patriarchal structure of society. In Pakistan, two constitutional bodies, namely the Council of Islamic Ideology and the Federal Shariat Court, were established for the interpretation and implementation of Islamic law. Furthermore, they also give their recommendations to governments at central and provincial levels for enactments on issues related to Islam. But the role of these bodies remains controversial in relation to women's rights (Yilmaz & Ahmed, 2018). The Council declared the DNA test as not conclusive evidence and it is essential for the victim of rape to produce four male eyewitnesses to prove her case. It also opposed the "protection of women against violence bill, 2016". The Council was criticised from various quarters and was accused of being responsible for the rise in violence against women (Wasim, 2016).

Why Comparison?

Comparative research will often yield a blend of similarity and difference. (Pakes, 2010). According to Balvig (1988), it means "less to know about somewhere else than to understand one's own country better". There are several theoretical and practical reasons to learn about others' criminal justice systems. For example, how their own system works, to learn about its problems, how to improve it, to understand another system or practice, or for reform purposes. On the other hand, according to Nelken (2010), "comparison could mean trying to understand another society only in its own terms". These terms may be points of similarity or difference. "But it is impossible to make sense of a thing without some background, which may be in the form of historical, political, economic, religious, or cultural context. It is also critical that the questions raised are visible in both the systems and the culture. Fairchild and Dammer put it this way: "the fact is that a nation's way of administering justice often reflects deep-seated cultural, religious, economic, political, and historical realities." Learning about the reasons for these different practises can give us insight into the values, traditions, and culture of other systems (Fairchild & Dammer, 2001). These domestic arrangements are considered normal and right, which frequently occur in the spheres of culture and religion. In most instances, women are deprived of their right to have access to justice or resolved through the informal justice system, i.e., Jirga and Shura, which is a common practise between the two states. A fact-finding report (Hamburg, 2005) states that in Afghanistan, 80% of VAW cases are resolved through Jirga. Having knowledge of the legal systems in neighbouring countries is pivotal in establishing and developing cooperation at different levels. For instance, there are various border (Anglo-Afghan Treaty of 1919), trade (The Afghanistan–Pakistan Transit Trade Agreement, 2010), and refugee agreements between Pakistan and Afghanistan.

Similarities and differences can be found in "significant absences" (Lacey & Zenyder, 1988). This may be the absence of written law, or an effective judicial system and institutions. In Pakistan, this "significant absence" is the law on violence against women, while in Afghanistan it is the effective judicial system. In Pakistan, there is no specific law on the subject, but in Afghanistan there is an EVAW Law which is specifically framed to combat women's violence. Moreover, in Pakistan, the Ministry of Justice and the Commission on the Status of Women are working on women's issues, while in Afghanistan there are several institutions bound under EVAW law to take cognizance of crimes and violations against women.

There are many factors at micro and macro levels responsible for women's violence in Pakistan and Afghanistan. On the gender development index, Pakistan ranked 125th out of 169, which shows the economic disparity. Acceptability of violence, economic disempowerment, lack of education, joint family system, patriarchal norms and values, and lack of awareness of legal and other supportive systems are also contributing factors (Karmaliani, Pasha, & Hirani, et al., 2012). In Pakistan and Afghanistan, violence against women is largely caused by weaknesses in the legal, institutional, and policy framework. Moreover, incoherent laws, that are statutory legislation and customary practices, are also responsible for the issue (Qazi zada, 2021).

According to WHO (2015), in Afghanistan, 90% of women have experienced domestic violence, 17% of sexual violence and 52% of physical violence. Another

reason is the attitude of the judiciary towards VAW cases. Another similarity in both countries is the lack of proper representation of women in national institutions, in particular in the legislative and judicial organs of the state. Due to the non-existence of women in leadership and decision-making processes, VAW cases are at a distressing stage in Afghanistan (Samar, 2019).

In both countries, religious fundamentalism and customary law are other reasons for women's violence. The coexistence and de facto prevalence of Islamic and customary law within a formal legal system in itself creates a substantial departure from international human rights standards. Again, Afghanistan shares this problem with many other legal systems, such as neighbouring Pakistan, where there is also a large gap between official law and de facto legal reality (Lau, 2003). There is a widespread misunderstanding and misinterpretation of sharia laws related to women's rights (USIP, 2016). Violence is more prevalent in those areas and societies where there is scarcity of resources and poverty, which ultimately lead to gender discrimination (Afghan Women's Network, 2009). Moreover, high levels of illiteracy and low socio-economic conditions are contributing factors to violence, in particular domestic violence (Lubker, 2004). Kaya (2009) observes that women's economic dependence on men makes them vulnerable because they lack the resources to deal with the opposite situation. A lack of harmony and compatibility between laws and policies has hampered efforts to provide better protection for women (Qazi zada, 2021).

The growing interconnectedness of states and societies is called globalisation (Held, 2000). The movement of people, goods, ideas, news, and issues compresses time and space is true for Pakistan and Afghanistan. Both share a border of 2,640 kilometres. Both Pakistan and Afghanistan have dozens of ethnic groups. The eastern border bisects the huge Pashtun ethnic group, sharing the same culture and way of living. Pashtuns make up 42% of the 33 million population in Afghanistan, while they make up 15% of the 221 million in Pakistan. In Afghanistan, it is a politically dominant group. Furthermore, Pakistan is currently hosting more than 1.4 million registered refugees from Afghanistan (UNCHR, 2018). In Pakistan, 96.46% of the population are Muslims, while in Afghanistan it is 99% predominantly Sunni Muslims (Wahab & Youngerman, 2007).

Normative commitments establish, relates to, or derive from a standard or norm, especially of a particular behaviour (Nelken, 2010). Both the states follow a strict code of honour. For example, forced marriage and honour killing become forms of normative commitments that lead to built-in leniency for violence against women. A comparison can be made to identify distinct patterns or ways of responding to threats or crimes (Fukumi, 2009). These patterns or ways can be seen in the civil law, customary law, and religious law or in the judicial system of a country.

There are three major legal traditions in the world: English Common Law, Continental Civil Law, and Religious Law (Glendon, Gordon & Carozza, 1999). Pakistan and Afghanistan are both substantially Muslim states where Islamic legal traditions and sub-traditions are followed (Quran, Sunnah, Ijma, Qiyas, and ijtiḥad). In Pakistan the common law system has an Islamic law influence, while in Afghanistan there is a mixed legal system of civil, customary and Islamic law. Legal institutions created in accordance with the 1964 Constitution and subsequent legal regulations continue to exist in Kabul and Mazar-i-Sharif.

However, it is unclear to what extent courts exist and function outside the main cities of Afghanistan. It is equally unclear what vision of law and human rights informs the Afghan judiciary and how the judiciary sees its own role in the development of the Afghan legal system. In practice, the courts apply Islamic law rather than the provisions of the 1964 Constitution or applicable statutory laws. However, even in the period from 1964 to the outbreak of the civil war caused by the Soviet invasion in 1979, Afghanistan's constitutional and statutory laws appear to have played only a minor role in the administration of justice (Lau, 2003). Pakistan has a written constitution that explains, how the country is run. It embodied the composition and role of the organs of a state. Article 175 of the Constitution of 1973 talks about the constitutional courts, and articles 199 and 184 explain the enforcement of fundamental rights. Pakistan has an established judicial system. Apart from the courts, disputes are resolved through mediation outside the courts (Hussain, 2006).

Since ancient times, men have considered women as their proprietary rights. To sustain this dominating role over women, men used violent means that were considered his legal right and got social acceptance. In Pakistan and Afghanistan, customs and traditions were given preference over any other law, which infused the notion of women being subordinate to men in societal norms (Awan, 2011).

Some of the legal problems are: the absence of substantive laws on the question of violence against women and gaps in the procedural law, the absence of legal literacy in women, the insensitive treatment of the aggrieved party by the police and the judiciary. Family life is considered private and sacred beyond the control of the state, which is another cause of women's vulnerability to violence (Rahman & Farhat, 2014). In modern nations, there may be many levels or discrete groups in societies, each with their own legal system. Comparing legal systems then depends on the characteristics of different societies and their sub-groups (Clark, 2012). The effectiveness of the law and the legal system depends upon the attitude and mindset of the people in a certain society. This social change can be brought about through education, a transformation of family values, and active media participation (Lawson, 2015).

There is currently no unified legal system in Afghanistan but a mixed legal system of civil, customary, and Islamic (sharia) law. Serious human misconduct continues to happen on a regular basis, and many criminals remain out of reach of the transitional government of Afghanistan. Afghanistan remains to be seen as a fragile state whose central government does not have a monopoly on the use of force. For all practical purposes, the government is facing difficulties in addressing the issue of fundamental human rights. Authority from the central government does not go far beyond Kabul. Thus, an important ingredient for establishing the rule of law and a legal system capable of enforcing basic rights is not currently available (Lau, 2003).

The Constitution, the supreme law of the land, also binds a state to discourage and eliminate VAW as it is a violation of fundamental rights. The constitutions of both states have several provisions to combat the issue, as it needs both national and international action (Sen & Mukherjee, 2014). All the three constitutions of 1956, 1962, and 1973 Pakistan have significant women's rights content. For example, articles 3 and 4 of the introductory part of the constitution of 1973 state that the state shall eliminate all forms of exploitation and ensure the rule of law,

respectively. Article 8 provides the doctrine of ultra vires, meaning that any law or practise inconsistent with or in derogation of the Fundamental Rights shall be void. Articles 25, 26 and 27 talk about the fundamental rights of women. Moreover, articles 32, 34, 35, and 37 are the directives to the state institutions to work to raise the standard of life of women. Chaudhary, 2010). Articles 51 and 106 provide representation for women in the national and provincial legislatures. Afghanistan is one of the most insecure place for women (EUROPOL, 2012), where women are disproportionately affected by violence, which includes rape, domestic violence, honour killing, kidnapping, and many more (Afghan Women Network, 2009:3). A survey conducted by Global Rights found that over 87% of women experienced violence, which may be physical, sexual, or psychological (Global Rights, 2008:1). According to the Gender Inequality Index (UNDP, 2018), Afghanistan is among the lowest ranked countries in the world, yet important achievements have been made in the fields of civil and political rights of women like education, health, and the participation of women in national life in Afghanistan. Yet the intrinsic cultural, social, and religious issues are the impediments in the way of realising their freedom in many parts of the country. Among many issues, violence against women, is one of the most serious judicial, executive, and legal issue. Several enactments have been made nationally, and international instruments on human rights have been adopted to combat the issue of violence against women (Manjoo, 2014). In 2006, the special rapporteur recommended reasonable steps, which included contending women's violence, punishment of the offender, and compensation of victims (Erturk, 2006). Another report provides guidelines on the issue (Manjoo, 2011).

According to Article 7 of the Constitution of Afghanistan (2004), the Afghan government is constitutionally bound to follow the international human rights instruments, treaties, and conventions to which Afghanistan is a signatory. Some of these instruments are the UN charter, the universal declaration of human rights, the Covenant on economic, social, and cultural rights, the convention on the elimination of all forms of discrimination against women, and the declaration of the elimination of violence against women (Constitution of Afghanistan, 2004).

Conclusion

The status of women is a complicated phenomenon in Pakistan and Afghanistan because of its intricate intrinsic and extrinsic societal, cultural, and religious nature. The Constitution is the supreme law of the land in both countries and guarantees fundamental rights to its citizens. Besides fundamental rights, legal rights are also provided by different parliamentary enactments. To ensure equality and justice and to combat violence against women, several pro-women laws and institutions have been established in Pakistan and Afghanistan since their inception. It is always the undeniable duty of the state to ensure the protection of every single soul, recognise the status of both men and women as equal, and make laws for the protection of women and children in particular. It would be germane to have a glance over the existing laws relating to women, as well as their rights, status, and positions from a constitutional and legal perspective.

The rule of law in Afghanistan faces serious obstacles. It is clear that the instability and insecurity caused by international and non-international armed conflicts and drug terrorism continue to pose a threat to the existence of the Afghan state. One such problem is normative pluralism, the existence of a diverse set of sources of

overlapping and sometimes conflicting norms, rules, regulations, and laws, which are only partially related to ongoing conflict and corruption. This pluralism is well documented and is the source of much speculation and often dread for the development of the community (Rahbari, 2018).

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