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South Asian Economic Constitutionalism: A Path to Constitutional Order

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Abstract

South Asia is a region of diverse post-colonial countries that are undergoing significant constitutional and socioeconomic change. Constitutional law scholars have taken an interest in South Asian constitutionalism and how the region is addressing its unstable democratic systems. In recent years, South Asian states have amended or replaced their constitutions and forms of governance. Two recent crises, the 2021 Taliban offensive in Afghanistan and the 2022 Sri Lankan political crisis, highlight the importance of economic governance and the role of accountable government in the market. Despite constitutional structures for economic governance and the establishment of government institutions, South Asian states are witnessing the weakening of institutional mechanisms and the delegitimization of the rule of law. This paper argues that South Asian states need to develop practices that focus on accountable constitutional governance of the economy and strengthening financial institutions. While South Asian constitutions have traditionally kept economic actions by the state outside the purview of judicial and public scrutiny, the lack of accountability and the cynical manipulation of economic institutions by authoritarian leaders raises questions about the constitutional limits of the power of elected leaders. The paper explores how strengthening the pillars of economic constitutionalism can lead to the creation of a stable constitutional order in South Asia.

Keywords: Democracy, Constitutional Order, Constitutional Crisis, Economic Constitutionalism, South Asia

Introduction

Comparative constitutional law is a field of study that examines the patterns and institutions of democracy. Scholars in this field are transforming comparative constitutional law by analyzing how constitutional courts have engaged with issues concerning the structure of democratic institutions and processes. In South Asia, the study of comparative constitutional law is not limited to analyzing the interpretations and decisions of courts. It also involves studying societies, public institutions, the rule of law, and people-government relations. However, the role of courts has been pivotal in this discourse (Javed, 2010). Constitutional courts have played a very important role in protecting and developing the foundations of democratic politics and institutions in South Asia.

Scholars argue that constitutional courts have a social responsibility to invalidate legislative acts that seek to undermine the structural foundations of meaningful democratic self-governance and political competition. The role of courts and public institutions has been crucial, considering how political actors, often democratically elected, have regularly attempted to exceed the boundaries of constitutions. Democratically elected leaders in the region have repeatedly mismanaged economic structures and financial institutions, reflecting a lack of an effective constitutional design for strengthening constitutional designs. The overpowering of constitutional structures by political actors is not unique to South Asia (Chowdhury, 2023). Political actors have abused constitutional structures and public institutions all over the world (. While constitutions often represent an aspiration of society to protect the constitutional order, the rise of authoritarianism also means the rise of abusive constitutionalism.

As David Landau writes, abusive constitutionalism is "the use of mechanisms of constitutional change in order to make a state significantly less democratic than it was before." In referring to maneuvers that "make a regime significantly less democratic," he conceptualized the norms of democracy on a spectrum that includes "various kinds of hybrid or competitive authoritarian regimes between full authoritarianism and full democracy." This calls for constitutionally fragile states to bring in substantive limitations on the constitutional amendment power. While the larger issue is to strengthen the nature and quality of politics and political actors, this is beyond the capacity of legal regulations (Abdelghaffar et al., 2022).

This paper examines the role of constitutional courts in protecting and developing the foundations of democratic politics and institutions in South Asia. It also discusses the challenges of abusive constitutionalism and the need for substantive limitations on the constitutional amendment power in constitutionally fragile states.

The Role of India's Constitutionalism in its Socio-Political Context

Indian constitutionalism has played a significant role in shaping constitutional understanding in South Asia (Chowdhury et al., 2022). It has influenced other South Asian states to make changes to their constitutional structures to control political authority. While India is facing challenges such as corruption, religious tensions, and low levels of development, it has also made successful experiments in building constitutional substructures such as the "basic structure" and "constitutional morality." Courts play a crucial role in striking down unconstitutional amendments and strengthening the implied limits on constitutional change, thereby ensuring constitutional accountability. However, the powers of courts vary across South Asian countries. One of the most fundamental doctrines in Indian constitutionalism is the "unconstitutional constitutional amendments doctrine," which can be used to limit authoritarian powers and promote the evolution of democracy and constitutional order. The Indian Supreme Court began to engage actively with political institutions and processes after the imposition of the Emergency in 1975. This was likely an attempt to regain the trust of the Indian people after the Court's controversial decision in *ADM Jabalpur v. Shivkant Shukla* (Acemoglu et al., 2014). The Supreme Court has also witnessed the collapse of public institutions to abusive power politics, which has sent a strong signal to the courts that they must play a larger role in the Indian political context.

In recent years, South Asia has been at the center of discussions about the undemocratic control of public institutions (Chowdhury & Chowdhury, 2022). This has led to some advancements in the way South Asia is studied from a lens of comparative constitutional law. The narrative of constitutional law in South Asia is often one of crisis. In India, for example, the focus may be on how constitutional systems are responding to the protection of civil liberties or democratic values. In Pakistan, the focus may be on the judicialization of politics and the militarization of governance. In Nepal, the focus may be on the politics behind constitution-making (AfDB et al., 2013).

This article discusses two important events that marked a fundamental shift in the reading of constitutional law and democracy in South Asia: the 2021 Taliban offensive in Afghanistan and the 2022 Sri Lankan political crisis. It also explores three important themes:

1. How political actors use democracy to enforce their undemocratic objectives.
2. The idea of economic constitutionalism.
3. The role of courts in strengthening the constitutional order in South Asia.
4. South Asian Economic Constitutionalism and Constitutional Order

Constitutional economics is a subfield of economics that examines the relationship between economic and political institutions. It is based on the idea that the constitution is a social contract between individuals who agree to give up some of their freedom in exchange for the benefits of living in a society with laws and institutions (Chowdhury & Begum, 2012). In South Asia, the lack of economic constitutionalism has contributed to constitutional crises. This is because political actors have been able to use their power to manipulate economic institutions and markets for their own benefit. This has led to a loss of trust in government institutions and a sense of alienation among the people. Popular mandates are not sufficient to call a political system democratic. The process of elections can be manipulated to create undemocratic power structures. Constitutionalism is about creating a political framework for a rule-oriented society, but elections can also be used to legitimize undemocratic decisions.

South Asia has seen several examples of this in its postcolonial history. The success of any society in this respect will depend on how effective its constitutional designs are in managing extra-constitutional powers. In other words, constitutional economics is important for South Asia because it can help to create a more stable and democratic constitutional order. By ensuring that economic institutions are accountable to the people and that political actors cannot manipulate them for their own benefit, constitutional economics can help to build trust in government and promote economic prosperity.

The Taliban's Unwritten Constitution: A threat to Democratic Values

The Taliban's takeover of Afghanistan in 2021 marked the collapse of the country's legal and political order, which had been based on the 2004 Constitution. The Taliban replaced the legal order with an alternative based on the Hanafi school of Islamic law (Jeanneney & Kpodar, 2011). This new unwritten constitutional order can be termed "Taliban constitutionalism" or a form of "militant democracy." Militant democracy is a type of democracy that is willing to adopt pre-

emptive measures to prevent those who are trying to subvert democracy from destroying it. The Taliban has said that it will implement the 1964 Constitution of Afghanistan as an interim charter, but it has also suggested that it rejects the values and rules enshrined in both the 1964 and 2004 constitutions (Chowdhury et al., 2019). The Taliban has re-established the unitary, highly centralized, autocratic Islamic Emirate and has revived a number of laws it adopted in the mid-1990s.

The Taliban's new unwritten constitutional order is based on Hanafi fiqh, which is a school of Islamic law. This marks a significant departure from the Afghan constitutional tradition, as previous Afghan constitutions required that state law must not be repugnant to the "basics of Islam" but did not require that it be consistent with the rulings of the Hanafi fiqh.

One of the most important reasons that facilitated the Taliban's takeover of the constitutional government was the fact that public institutions failed to create a stable society (Klapper et al., 2016). The constitutional institutions played along with the uprising and acted as a support system to facilitate a smooth takeover by militant groups. The Afghanistan crisis shows that if constitutional bodies fail to work towards progressive development, then the society may show collective support even to a militant government if it offers an alternative form of governance.

Sri Lanka's 2022 Constitutional Crisis and Economic Breakdown: A Case Study

Protests and changes in the political order are not new to Sri Lanka. On March 31, 2022, demonstrators stormed the President's private residence in the capital, leading to mass resignations. The government tried to quell the protests, but the people's movement was unstoppable. Even appeasement measures such as the resignations of the Central Bank Governor and Treasury Secretary failed. While this led to the fall of the elected government, the underlying reason was economic mismanagement. The government failed to meet the demands and aspirations of the people who elected them. The collapse of the government also marked some changes in the constitutional order of Sri Lanka (Chowdhury & Reza, 2014).

Despite their different circumstances, the 2021 Taliban coup in Afghanistan and the 2022 Sri Lankan people's coup share some commonalities. Both states had governments with unlimited sovereignty. Both events involved the failure of elected governments to hold public institutions and political actors accountable. A lack of a strong constitutional order that defines the limits of government power led to the breakdown of the state machinery. These events mark the beginning of a new phase of constitutional governance that South Asia aspires for. There is a need to build strong independent financial institutions and hold the political actors who manage them within constitutional limits (Kuri & Laha, 2011).

Challenges to the Judiciary in Protecting Constitutional Rights in South Asia

Constitutional scholars have long studied democracy, but the tensions in South Asia are distinct from those in Western constitutional democracies. In South Asia, the fundamentals of democracy and constitutional institutions are declining. Stability in South Asia requires ensuring constitutional compliance, human rights, and democracy. However, the region faces four major challenges: dysfunctional politics, lack of constitutional order, low levels of development, and susceptibility to panics and populist pressures.

The judiciary plays a crucial role in addressing these challenges. Its most powerful weapon is judicial review, which is the power to strike down laws that violate the constitution (Chowdhury et al., 2020). Although this power is not explicitly mentioned in South Asian constitutions, it is generally accepted. For example, Article 13 of the Indian Constitution prohibits the state from making "any law which takes away or abridges the rights conferred by part III" and any law made against this "to the extent of such contravention is void." This gives the Indian Supreme Court the power to exercise judicial review (Biswargery, 2017). Similar patterns are visible in other South Asian constitutions.

South Asian courts have used a variety of common law doctrines to review administrative actions. Considering the region's challenges, the role of constitutional courts becomes even more crucial in dealing with issues related to the review of constitutional amendments, adjudication of disputes relating to elections, and dissolution of political parties. However, constitutional courts often succumb to pressure from political actors who use popular support to dictate extra-constitutional norms. In this context, the Indian Constitution and its unwritten elements have been an important model for constitutional development in the region.

The success of the Indian political structure is based on the values of social democracy, which recognizes liberty, equality, and fraternity as the principles of life. These principles are inseparable, and without any one of them, the others cannot be sustained. Jamal Greene and Madhav Khosla argue that the reasons for India's influence may partly be its political authority within South Asia, but it may also be a function of similar circumstances, such as political corruption, widespread illiteracy, and low education levels coupled with the presence of civil society activism and non-governmental organizations (Chowdhury, 2012).

Another reason for the influence of Indian constitutional ideas, according to Greene and Khosla, is the perception that the Indian experiment has been successful and that the tools it has developed may be seen as worthy of replication, to the extent that India remains, in whatever imperfect form, a functioning constitutional democracy. However, scholars have pointed out that "as established democracies such as Poland, Hungary, Turkey, Brazil, South Africa, and Israel witness democratic deconsolidation, the world's largest democracy has sadly not been an exception." Indian constitutional interpretations and the ideas of the basic structure doctrine can influence its neighboring states to regulate their political actors through comparative constitutional engagement.

The Nexus Between South Asian Regionalism and Constitutional Rights

The political instability in South Asia can have a ripple effect on its neighbors. To address this, the region needs to cooperate on political solutions. Regionalism in constitutional studies is the process of building cooperative relations between countries in a region. This includes building economic ties and a shared regional identity. South Asian countries have many things in common, such as history, culture, and values (Biswas, 2018). This could be used to create a sense of regional identity. However, South Asia is also a divided region, with tensions and mistrust between countries. This has made it difficult to develop a sense of regional identity. The economies of South Asian countries are also facing internal crises due to political problems. This makes it even more important to explore how regionalism can bring stability to the region. Regionalism is about

understanding the role of geography, identity, culture, institutions, and actors in a region. It requires harmony, interdependence, and identity. However, the lack of harmony in the region has led to the failure of regional organizations like the South Asian Association for Regional Cooperation (SAARC) in addressing constitutional breakdowns (Hamid et al., 2019).

Regionalism can be a way to build a stable social order in regions with commonalities. However, it is important to understand that regions are socially constructed and politically contested. The way political actors perceive and interpret the idea of a region and notions of "regionness" is crucial to understanding the region. Transnational economic relations in the region can be strengthened if constitutional designs are strengthened. Countries in the region need to cooperate and respond to institutional irregularities. Nation-building in South Asia will not happen unless political, social, and economic conditions are stabilized. Issues related to dysfunctional politics and lack of constitutional order need to be prioritized. This requires strengthening the institutions of democracy. Countries like India can play a proactive role in regional constitutional dynamics in South Asia and beyond (Pandey, 2021).

Concluding Remark

South Asia has a long history of social disorder and violations of the rule of law. Many countries in the region, such as Afghanistan, have not yet established transitional justice mechanisms to promote political stability. There is also a power imbalance between the branches of government and extra-constitutional actors, such as the military. In Sri Lanka, the government needs to build stronger financial institutions and maintain the rule of law, good governance, and political order within the legal system. Strong constitutional designs can protect society from the arbitrary use of power by democratically elected leaders. Democracy in South Asia has suffered due to military interference in the politicization of the constitutional order and the use of intimidation. Most importantly, the region has seen political executives undermine the pillars of democratic constitutionalism. The fundamental challenge is to position economic constitutionalism as a way to protect the independence of constitutional designs. This means developing strong constitutional norms, empowering judicial review, and promoting unwritten constitutional norms such as the basic structure doctrine to review arbitrary actions by administrative actors. Economic constitutionalism is a way of holding political actors accountable in their dealings with financial institutions. Judicial review, respect for the rule of law, democratic accountability, and economic justice are the pillars of South Asian economic constitutionalism. Achieving this would require South Asian states to adopt fundamental changes in their constitutional designs. Courts also need to engage in key litigation in constitutional courts by adopting principles such as the basic structure doctrine and constitutional morality. In other words, the author is arguing that South Asian countries need to strengthen their constitutional institutions and norms in order to protect democracy and promote economic justice. This includes empowering the judiciary to review the actions of the political executive and holding the executive accountable for its dealings with financial institutions.

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