Comparative study of the Constitutionalism and State Capacity

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Abstract
Modern constitutional theory typically emphasizes controlling the exercise of public power, especially by examining how courts can check government excesses. However, an underexplored yet essential aspect of constitutionalism is the government's capacity to effectively implement its decisions and serve public needs. This article examines the role of courts in addressing state capacity and how effectively a government can function through various international case studies. These include litigation over life-saving medication in Brazil, judicial interventions in South Africa, and Pakistan's biometric identification system and pretrial detention issues. The authors argue that state capacity is critical to shaping constitutional doctrine and that courts can actively support capacity building. They do so by incentivizing capacity improvements, guiding state action, and compensating for government weaknesses.
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i. Introduction

Constitutionalism when ascribed within context of state capacity serves as a foundational tool not only ensuring effective governance but also bolstering resilience by embedding structures that adapt to and support evolving state functions. Ascribing constitutionalism to state capacity underscores its role in empowering state authority, framing governance principles that not only facilitate effective policy implementation but also strengthen regulatory frameworks amidst contemporary challenges .The

leaders in the field of constitutional law and politics ,highlights essential role of effective government in sustaining democratic constitutionalism "You must first enable the government to control the governed; and In the next place oblige it to control itself." So wrote James Madison in Federalist No. 51. Modern constitutional theory deals almost exclusively with the "next place" mechanisms for controlling the exercise of public power. There is little point in worrying about the excesses of government power when the Government lacks the capacity to get things done in the first place. In this article, we examine relations between the courts, constitutionalism, and state capacity other than limiting state power. That courts can and often do control the exercise of state power is widely known. It is a key reason for why we have them. However, the role that courts might play in building the state has been relatively less studied. Through a series of case studies, we suggest several ways in which courts confront the problem of state building, sometimes explicitly but more often implicitly, and how the question of state capacity shapes and informs constitutional doctrine. State capacity is a crucial variable in the development of constitutional doctrine and in the process of engaging with the issue of state capacity, courts often Play a role in facilitating its expansion. The question of state capacity has invited remarkably little attention within constitutional law. On occasion, scholarship in comparative constitutional law addresses questions of state capacity; when Scholars examine how "well" different forms of governance do along specified dimensions and find that one form does better than another along some dimension, they are implicitly concluding that the "better" form has more capacity to perform the specified function. These evaluations, though, tend to be "in gross," focusing on forms of government described in quite general terms, as when scholars contrast presidential and parliamentary systems or democratic and authoritarian ones. This is a mistake. As Samuel Huntington observed, "[t]he most Important political distinction among countries concerns not their form of government but their degree of government." He continued by noting that many countries in Asia, Africa, and Latin America were at the time ones "where the political community is fragmented against itself and where political institutions have little power, less majesty, and no resiliency where, in many cases, governments simply do not Govern. Huntington was not alone. His emphasis on state capacity on the ability of political institutions to negotiate and enable socio-economic change has been a central feature in the study of politics for several decades. Political scientists have considered how state capacity can be defined and measured, as well as how it emerges and evolves. Among other things, scholars have emphasized the importance of state building to democracy and development; have attended to factors, such as public goods, that can contribute to better capacity; have studied the impact of state capacity on welfare outcomes.

ii. Significance of the Study:

The article contributes to constitutional theory by integrating the concept of state capacity into discussions on constitutional doctrine. Highlighting the positive role of courts, it addresses gaps in the field's focus on controlling government power and enriches understanding of courts in state-building roles. Comparative insights shed light on how courts in weaker governance contexts may act as facilitators of capacity expansion, a perspective relevant to developing constitutional frameworks globally.

iii. Research Methodology

The article employs a qualitative case study methodology. This approach focuses on detailed examination and analysis of specific cases from Brazil, South Africa, and Pakistan. By exploring these instances of judicial intervention, the study seeks to understand how courts contribute to state capacity-building in different governance contexts. The qualitative nature of the research allows for in-depth insight into the mechanisms by which courts can enhance state capacity, rather than merely controlling government overreach.

a. Brazil State Capacity

Brazil's 1988 Constitution, like many post-1945 constitutions, contains a right to "health." The nation's healthcare system is extremely complex. Healthcare is available to all. City, state, and national governments administer the delivery of healthcare, both by operating facilities themselves and by contracting with private providers for that delivery. The Ministry of Health maintains a list of medications that will be provided to Brazilians who demonstrate a need for them. The list, periodically updated, includes many medications, but not those that the ministry regards as experimental or whose benefits, the ministry determines, have not yet been adequately established. A Brazilian whose request for a specific medication has been denied can seek judicial review of the denial. Administrative and constitutional law provide the basis for such a review. The complainant can argue, for example, that the ministry mistakenly defined the medication as experimental, or that its identification of the permitted dosage of an approved medication is inconsistent with sound medical judgment. Or, in a constitutional register, the complainant can assert that the medication, though experimental, is necessary to protect the patient's constitutional right to health: the patient's life is at risk, all approved medications have failed to treat the patient's condition, and there is some reason to believe that the medication might cure or at least alleviate the medical condition. Similar claims have been brought in other jurisdictions. The most well-known instance is South Africa's Soobramoney case. There a patient with severe ("terminal," as it was referred to in the litigation) Heart and vascular disease sought an order directing that he should receive renal dialysis pending a kidney transplant. The public hospital that Soobramoney visited had

developed criteria for eligibility for those treatments at public cost. The hospital's guidelines aimed at providing the services to those who would receive the most benefit from them, and Soobramoney's condition meant that he would receive far less benefit a quite short prolongation of his life at most than others. The Constitutional Court of South Africa recognized the emotional pull of Soobramoney's claim but rejected it. Some method of allocating the limited resources available for transplants was necessary, and the medical judgments underlying the ministry's priority list were reasonable. The South African Court's evaluation of the priority list's reasonableness reflected its understanding that granting Soobramoney's plea would have precedential effects throughout the transplant system: the ministry would have to adjust its priority list According to whatever principle the courts developed to explain why Soobramoney had a constitutional right to jump the queue. Confronting the structurally similar claims for medications that held out the prospect of saving a life, the Brazilian courts responded differently. One after another they granted the patients' pleas, finding that denying the medication would violate the constitutional right to health. Scholars who have discussed these cases have suggested that Brazilian judges were unable to resist the emotional tug given their sympathies by seeing an actual dying patient before them. Yet, the fact that South Africa resisted that tug suggests that something more was involved the difference between the South African and Brazilian responses to the problem of prioritization in determining access to potentially life-saving medical treatments may arise in part from the fact that the latter is a civil law system without a well-developed account of precedent. Not only is there no concept of horizontal precedent or even Influence by one trial-level judge's decisions on another's, but there is also an extremely weak practice of vertical precedent, according to which Only a quite limited number of decisions by even the nation's highest Constitutional court bind lower courts. Further, Brazil's legal culture encourages a "formalist" or "syllogistic" mode of legal reasoning that minimizes the legal relevance of a decision's consequences. In Brazil, lower court judges often ruled in favor of patients seeking lifesaving but unapproved medications, resulting in substantial health ministry expenses and budget reallocation. In response, the Brazilian Supreme Federal Court in 2009 issued guidelines to distinguish cases based on whether a medication was considered by the government. The court's decision prompted the health ministry to update approved medication lists and negotiate discounts. Similarly, structural injunctions, such as those in Colombia, address bureaucratic capacity by ordering data collection to guide policy. Yet, interventions face challenges due to inefficiencies, with limited success in overcoming systemic incompetence or corruption. We noted in the Introduction, when courts intervene in complex policy domains, whatever success that occurs often has concurrent sources, and interventions that provide incentives to increase state capacity are no different from other

remedial interventions in that regard. Judicial decisions that give bureaucracies incentives to improve capacity are not a magic bullet. Hoffmann and Bentes have observed, for example, that the "one stop" shopping mechanism basically failed because the "stocking with medicines was delayed and insufficient." Where capacity is absent because of incompetence or corruption, judicial remedies of any sort are likely to fail, and remedies that shift responsibility from incompetent or corrupt institutions to others might be more promising. However, where capacity is absent because of bureaucratic inertia, a smallish coercive shove may well help to improve outcomes.

b. South Africa State Capacity

The 1996 South African Constitution's recognition of socioeconomic rights signaled a major moment in modern constitutionalism. Over the past two decades, the South African experience has played a central role in the broader theoretical and comparative debate over socioeconomic rights. Socioeconomic rights have long invited controversy, and the controversy has typically centered on two themes. The first concern has been democratic legitimacy. That is, whether it is appropriate for unelected judges—rather than elected representatives—to adjudicate matters relating to social and economic welfare that might, for example, implicate budgetary allocations. The second concern has been institutional capacity. Here, the question has been whether courts possess the necessary tools to make fair and efficient determinations on socioeconomic matters. At the heart of the inquiry has been the question of whether courts should intervene in what Lon L. Fuller once termed "polycentric" questions. In recent years, scholars have addressed these traditional concerns in a variety of ways. Much literature has addressed the artificiality of the conventional distinction between civil-political and socioeconomic rights and has focused on the conceptual underpinnings of the resistance toward socioeconomic rights. Even though the philosophical interventions in the debate over socioeconomic rights have been of much significance, an important feature of the response to traditional concerns has been the real and lived experience of socioeconomic rights enforcement. Here, the South African effort with socioeconomic rights over the past two decades has provided scholars with considerable material to evaluate and affirm the possibilities of socioeconomic rights adjudication. The early years of scholarship on socioeconomic rights in South Africa was primarily focused on three cases: Subramani, Grootboom, and Treatment Action Campaign. These cases were seen by global commentators as offering a new model of judicial review—a Model that was distinct from the standard form of judicial review that was usually adopted in rights-based cases. Unlike the typical approach toward constitutional rights, where rights have a minimum core and individualized remedies are provided, the South African judiciary had demonstrated the prospect of "weak form" judicial

review. This prospect would allow courts to play some role in the adjudication and enforcement of socioeconomic rights, while being sensitive to some of the concerns relating to judicial review. This approach had been made possible by the text of the South African Constitution. Section 26, for example, which provided for "the right to have access to adequate housing," stated that the "state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right." Similarly, Section 27, which provided for a right of access to healthcare, water, and the like, spoke. The identical language of "reasonable legislative and other measures," Of "available resources," and of "progressive realization." The new model of rights-based enforcement that emerged in South Africa held the promise of moving beyond the all-or-nothing orientation that has characterized the contest over rights and review for decades. But the conventional reading of these cases may in fact have missed one of their facets, namely the relationship between state capacity and constitutionalism, and the role of courts in addressing that relationship.

c. India State Capacity

The criminal justice system is a domain where weak state capacity is often most powerfully revealed. We might contrast what we can call deliberate constitutional violations, such as unlawful searches or the use of coercion in police interrogations, with large-scale failures to provide basic security against criminals because the state does not employ enough police officers or unreasonably long pretrial detentions hat occur because there are not enough judges to process cases, the latter being a problem of state capacity. The various facets of the criminal justice system from investigative agencies and prosecutors to trials and prisons are sites where the strengths and weaknesses of the state are brought into sharp focus. Pakistan is no exception to this. With its reality of weak governance, legal reform measures in the domain of criminal justice cannot escape the problem of state capacity. Here we focus on one specific and unique feature of the Pakistani criminal justice system: its provision for anticipatory bail. Under the scheme of anticipatory bail, an individual can be granted bail before he or she is arrested, based on a worry about being arrested, and then released now of arrest. To compensate for gaps in state capacity, Pakistani courts have generously interpreted the anticipatory bail mechanism, allowing them to act quickly even when facing a large caseload, and have thereby sought to absorb the problem of weak capacity. To better understand the idea of a pre-arrest bail mechanism where courts review claims from both parties, one must turn to the Forty-First Report of the Law

Commission of Pakistan (1969). The Report focused on a colonial-era legislation, the Code of Criminal Procedure, 1898 and offered a comprehensive assessment of Pakistan's criminal procedure framework. The study ranged from the scope of the criminal procedure code to the structure

of the criminal justice apparatus to the nature of substantive principles and rules. Chapter Thirty-Nine of the Report addressed provisions relating to bail. There was broad consensus, the Report noted, that there existed no power under Pakistan's criminal procedure code for anticipatory bail to be granted. The Report called for this gap to be filled. "The necessity for granting anticipatory bail," it observed, "arises mainly because sometimes influential persons try to implicate their rivals in false causes for the purpose of disgracing them or for other purposes by getting them detained in jail for some days." The Report proceeded to observe that false cases of this kind had only increased with greater political competition. Moreover, there was an additional reason for anticipatory bail outside of false cases:

Where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems to be no justification to require him to first submit to custody, remain in prison for some days and then apply for bail The Report recommended adopting a new provision that would allow persons who had "a reasonable apprehension" of being arrested to apply to a court, which "may, in its discretion, direct that in the event of his arrest, he shall be released on bail." Four years later, this recommendation was accepted and acquired statutory force when Pakistan enacted a new code of criminal procedure. Section 438 of the Code of Criminal Procedure, 1973, was titled "Direction for grant of Bail to person apprehending arrest.". In addition to providing for such a direction, it listed factors that might be considered in determining whether a direction should be issued as well as conditions that might be specified in case a direction was issued. The Forty-Eighth law Commission Report, which appeared just prior to the new Code of Criminal Procedure, endorsed a draft version of Section 438, noting however that "it is in very exceptional cases that such a power should be exercised."

d. Pakistani State Capacity

The digital identification systems of India and Pakistan Aadhaar and NADRA, respectively showcase distinct approaches to state capacity and citizen verification within a constitutional framework. This is especially pertinent in the realm of Pakistan's constitutionalism.In India, Aadhaar is established as a fundamental identification system, intended primarily to function as a civil registry instead of a national identity.It provides each registrant with a distinctive 12-digit number derived from their biometric data.Nevertheless, Aadhaar does not inherently grant rights or services; rather, it serves as a versatile platform that can be utilized by different governmental organizations and businesses to provide advantages. The Aadhaar number serves as a tool for connecting services, yet it is important to note that the system itself is separate from Indian citizenship. Even individuals who are not Indian nationals can easily acquire an Aadhaar ID, indicating that it serves more as a tool for administrative ease rather than a

definitive indicator of nationality or civic standing. In contrast, Pakistan's NADRA system operates as a comprehensive national identity framework. Launched in 2000, NADRA has registered 120 million Pakistanis about two-thirds of the population offering them a formal recognition as citizens. This system directly integrates with civic rights and responsibilities, acting as a prerequisite for voting, opening bank accounts, and accessing key services. NADRA symbolizes a centralized state mechanism that tightly links identity with citizenship. This reflects a system in which the state bears the duty of granting and confirming civic membership. It is essential to Pakistan's social contract and functions as a tool of governance to guarantee access to rights and engagement in civic life. From a constitutional perspective, NADRA is a symbol of the state's capabilities in Pakistan. The state's capacity to manage an extensive national database, crucial for citizens' ability to assert their rights, strengthens the significance of constitutionalism in upholding the acknowledgment of identity and availability of civic services. Unlike Aadhaar, which functions as a civil registry with indirect ties to services, NADRA is integrated into Pakistan's dedication to state driven verification and identification, establishing a direct link between the individual and the state's constitutional responsibilities for representation, services, and governance. This comparative analysis unveils that NADRA closely aligns with a constitutional model highlighting the authoritative role and responsibility of the central state. On the other hand, Aadhaar showcases a decentralized framework, where the state facilitates rather than ensures direct access to services. Both systems reflect the unique constitutional needs and administrative capacities of each country, showcasing how state capacity is fundamental in shaping citizen state relationships within a constitutional framework.

iv. Conclusion

Modern constitutional theory has traditionally focused on limiting state power, with courts enforcing these constraints. However, in many countries, the pressing issue is not limiting but creating effective state power due to weak state capacity, a reality often overlooked in constitutional scholarship. This Article examines Brazil, South Africa, and Pakistan, where courts play a unique role in addressing state capacity challenges. By adopting weak-form, dialogic, and experimentalist approaches, courts can address governance issues in contexts of limited capacity, sometimes even enhancing institutional effectiveness.

The case studies suggest that understanding how courts negotiate state capacity is crucial to grasping constitutionalism in developing countries. In weak states, courts not only limit power but, at times, contribute to its constructive expansion, providing a nuanced role in governance. Recognizing this dual role enriches our understanding of constitutionalism's challenges in both creating and restraining state power in diverse contexts.

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3 Bradley, C. A. (2022). Constitutionalism and a Right to Effective Government? Cambridge University Press. Published online 20 October 2022.
4 For our definition of "state capacity," see infra text following note 11.
5.Id. At 127 (referring to the "Consenso, or list of approved medications and Procedures").
6. Id. 31 ("One cannot but have sympathy for the appellant and his family, who face the cruel dilemma of having to impoverish themselves in order to secure the Treatment that the appellant seeks in order to prolong his life.").
22. Id. 29 ("A court will be slow to interfere with rational decisions taken in Good faith by the political organs and medical authorities whose responsibility it is toDeal with such matters."
7 Id. 29 ("A court will be slow to interfere with rational decisions taken in Good faith by the political organs and medical authorities whose responsibility it is to Deal with such matters.")
8 Id. 28 ("The appellant's case must be seen in the context of the needs which the health services have to meet, for if treatment has to be provided to the appellant it Would also have to be provided to all other persons similarly placed.").
9.See, e.g., Hoffman & Bentes, supra note 16, at 132 (referring to "[u]ninformed Judges facing inadequate prescriptions couched in the rhetoric of a life and death Emergency").
10. The impressive work Octávio Luiz Motta Ferraz, Health as a Human Right: The Politics and Judicialization of Health in Brazil (2020), provides an up-to-date Review of the literature and offers an appropriately tempered judgment about the Brazilian story.
11 Hoffman & Bentes, supra note 16, at 105 (referring to Brazil's "formalist traditional"); Mota Prado, supra note 24, at 130 (referring to "syllogistic reasoning")
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13 Hoffman & Bentes, supra note 16, at 131.
14 S61. Id. § 27

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