CHAPTER 2
INTERNATIONAL PERSPECTIVE AND RULE OF LAW

2.1 Introduction

Democracy is a subspecies of a broader concept: the accountability of state to society. This political accountability is about those with authority being answerable for their actions to the citizens, whether directly or indirectly. Thus a polity is democratic to the extent that there exist institutionalized mechanisms through which the mass of the population exercises control over the political elite in an organized fashion\(^\text{160}\).

The rule of law is an unsettled matter, both intellectually and practically. While constitutional reform to provide a framework for law-based governance under emergency conditions may be required, it is unlikely to occur. Analysis should consider how to improve the design and operation of microstructures within the executive branch\(^\text{161}\).

In practice, administrative systems are not tightly controlled rule-based hierarchies, but complicated and more or less closely integrated networks; nor are states any longer externally and internally sovereign. Moreover, the basic accountability mechanism assumes that politicians make decisions up front, and that bureaucrats loyally implement them. In practice it is often difficult or impossible to separate policy making and implementation. Many important policy decisions are actually made by officials and other stakeholders during implementation. It is, furthermore, unrealistic to assume that policy decisions are made in agreement and with full operational knowledge about means-ends links\(^\text{162}\).


\(^\text{162}\) Supra note160.
On the contrary, there are frequent political conflicts about ends, and uncertainty about means. Finally, the accountability problem is complicated by deficiencies in the political process itself. Civil servants may have legitimate reasons to override the decisions of their opportunistic, self-serving and irresponsible political masters.\textsuperscript{163}

The Indian constitution is first and foremost a social document. The majority of its provisions are either aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement\textsuperscript{164}. According to T.H. Green\textsuperscript{165}:

[I]t is the business of the state …to maintain the conditions without which a free exercise of the human faculties is impossible\textsuperscript{166}.

Dicey’s ‘administrative law’ was a translation of the French Droit administratif, and it was this, rather than any British conception, that Dicey denounced. He regarded it as a prime virtue of the rule of law that all cases came before the ordinary courts, and that the same general rules applied to an action against a government officials as applied to an action against a private individual. Under the French system, with its special administrative courts, actions against officials or the state are in many cases subject to a separate system of judicature.\textsuperscript{167}

What Dicey meant by ‘administrative law’ was a special system of courts for administrative cases. Even in Dicey’s generation this was an unusual sense of the expression. But once that sense is appreciated, the paradox disappears.\textsuperscript{168}

Dicey’s denunciation of the French system was based on his mistaken conclusion that the administrative courts of France, culminating in the conseil d’Etat, must exist for the purpose of giving to officials ‘a whole body of special rights, privileges, or prerogative as against private citizens’, so as to make them a law up

\textsuperscript{163} Ibid.
\textsuperscript{164} Granville Austn, The Indian Constitution, 50 (2010).
\textsuperscript{165} Ibid
\textsuperscript{166} Ibid
\textsuperscript{168} Ibid.
to themselves. It has long been realized that this picture was wrong, but it has become a traditional caricature\(^{169}\).

Even today English judges can speak as if \textit{droit administratif} was a system putting the executive above the law. But in fact the French administrative law has a system of compensation for the acts of public officers which is in some respect more generous than that of English law. The reality is that the French \textit{conseil d’Etat} is widely admired and has served as a model for the countries\(^{170}\).

At the time when English administrative law was in a state of relapse there were those who advocated importing the French system in Britain. Undoubtedly the French administrative courts have succeeded in imposing a genuinely judicial control over upon the executive and in raising the standard of administration. They are impartial and objective courts of law in the fullest sense. Many of the legal doctrines which they have developed have their counterparts in English law, since the demands of fair and lawful administration are similar in both countries\(^{171}\).

Thus an institution is necessary which has the authority to make decisions in this respect. If it follows the principle of the rule of law, the monopoly on the legitimate use of physical force will lie with the state and the state will act in accordance with transparent criteria and control mechanisms. This includes, as part of the separation of powers, an independent, impartial judiciary. Thus, state structures which are able to act efficiently and implement sanctions are a necessity. In the context of decentralization one can ask: when are decentralized state structures efficient\(^{172}\).

Rules and the sanctioning of breaches of rules are not enough on their own. The principle of the rule of law includes the obligation of law to create justice and protect human dignity, individual rights and freedoms. The idea of

\(^{169}\) Ibid.
\(^{170}\) Ibid.
\(^{171}\) Ibid.
justice forms and underpins all law. It binds and leads to compliance with all rules by those subject to them\textsuperscript{173}.

In this light the principle of the rule of law is open to taking the history, culture, needs and wishes of the peoples in the countries as a starting point.

2.2 Historical Background for Rule of Law

Article 39, Magna Carta (1215) lays down\textsuperscript{174}.

No freemen shall be taken or imprisoned or disseised or exiled or in any Way destroyed, nor will we go upon him nor send upon him, except by the Lawful judgment of his peers or by the law of the land.

In 1215, King John of England signed the Magna Carta (or Great Charter). A group of barons, powerful noblemen who supported the king in exchange for estates of land, demanded that the king sign the charter to recognize their Rights. Article 39 of the Magna Carta was written to ensure that the life, liberty, or property of free subjects of the king could not be arbitrarily taken away. Instead, the lawful judgment of the subject’s peers or the law of the land had to be followed. Magna Carta planted the seeds for the concept of due process as it developed first in England, and then in the United States. Due process means that everyone is entitled to a fair and impartial hearing to determine their legal rights\textsuperscript{175}.

Martin Luther King, Jr., lays down that-

I submit that an individual who breaks a law that Conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in Reality expressing the highest respect for law\textsuperscript{176}.

\textsuperscript{174} Available at, \url{http://legal-dictionary.thefreedictionary.com/Rule+of+law}, accessed on June 12 2013.
\textsuperscript{175} “What is the Rule of Law”, available at \url{https://www.americanbar.org/content/dam/aba/migrated/publiced/features/Part1DialogueROL.authcheckdam.pdf}, accessed on 14 September 2014.
\textsuperscript{176} Ibid.
U.S. Court of Appeals Judge Diane Wood,

[N]either laws nor the procedures used to create or Implement them should be secret; and . . . the laws must not be arbitrary\textsuperscript{177}.

U.S. Supreme Court Justice Felix Frankfurter, lays down that-

There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny\textsuperscript{178}.

Justice Hugo Black, Gideon v. Wainwright,

[F]rom the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him\textsuperscript{179}

U.S. Supreme Court Justice Anthony Kennedy,

[W]hen we [Americans] talk about the rule of law, we assume that we’re talking about a law that promotes freedom that promotes justice that promotes equality\textsuperscript{180}.

2.2.1 Greek Thoughts for Rule of Law

Many accounts of the rule of law identify its origins in classical Greek thought, quoting passages from Plato and Aristotle. Though this is not incorrect, a caveat must be kept in mind. For half of a millennium, known as the Dark Ages, Greek thought was almost entirely lost to the West, until rediscovered and given new life in the high Middle Ages by religious scholars. The rule of law as a continuous tradition took root more than a thousand years after the heyday of Athens. Greek

\textsuperscript{177} Ibid.
\textsuperscript{178} Ibid.
\textsuperscript{179} Ibid.
\textsuperscript{180} Ibid.
ideas with respect to the rule of law are therefore best understood as exemplary models, inspiration, and authority for later periods. Many of the problems the Greeks, Plato and Aristotle in particular, grappled with so insightfully are timeless problems; hence their timeless relevance and appeal\textsuperscript{181}. Their view was that the best government was the rule by the best man, not rule by law, for law does not speak to all situations, and cannot contemplate all eventualities in advance. “Indeed,” observed Plato,

[W]here the good king rules, law is a hindrance standing in the way of justice like ‘an obstinate and ignorant man’\textsuperscript{182}. The rule under law that they advocated was a second-best solution, necessitated by human weakness. Plato bid the law rule in \textit{The Laws} as a more realistic alternative to the benevolent (philosophically educated and virtuous) Guardians he proposed to rule in \textit{The Republic}. Aristotle advocated rule under law owing to the risk of corruption and abuse that exists when power is concentrated in single hands\textsuperscript{183}. At the height of Athenian governance under the law, citizens had equality before the law; the laws were framed in general terms, not against any individual; the Council, magistrates, and legislative assemblies were bound by the law; and citizens were free to operate as they pleased outside what the law prohibited. Athenians thus achieved a form of liberty under the law\textsuperscript{184}.

\textbf{2.2.2 Roman thought for Rule of Law}

The Roman contribution to the rule of law tradition was negative as well as positive, with the negative being of much greater consequence. Cicero was the source of the positive. Cicero’s \textit{The Laws} contains the following passage on the rule of law\textsuperscript{185}:

You appreciate, then, that a magistrate’s function is to take charge and to issue directives which are right, beneficial, and in accordance with the

\textsuperscript{182} \textit{Ibid.}
\textsuperscript{183} \textit{Id.}, at 10.
\textsuperscript{184} \textit{Ibid.}
\textsuperscript{185} \textit{Id.}, at 11.
laws. As magistrates are subject to the laws, the people are subject to the
magistrates. In fact it is true to say that a magistrate is a speaking law,
and law a silent magistrate.
It is the law that rules, he emphasized, not the individual who happens to be the
magistrate. Cicero pointedly contrasted rule under a king with living under “a
body of law for a free community.”
For Cicero the Supreme status of laws hinged upon their consistency with
natural law. He believed that natural law was the rule of reason. According to the
rule of reason, law should be for the good of the community, should be just, and
should preserve the happiness and safety of its citizens. This natural law of reason
stands over positive law, indeed over all human conduct, according to Cicero.

[T]herefore law means drawing a distinction between just and unjust,
formulated in accordance with that most ancient and most important of
all things – nature.
Harmful or unjust rules did not qualify as “law,” and hence were not supreme.
Cicero did not, however, support disobedience of unjust laws. He placed a
premium on order. Moreover, he believed that only the wise could recognize the
true law in accordance with reason. Cicero did not advocate popular democracy,
preferring instead a mixed constitution, with power divided among royalty,
leading citizens, and to a much lesser extent the masses. To the best, citizens, the
most educated and the wise should be allocated the greater power to rule, as they
are the ones with the capacity to discern the requirements of the natural law that
should govern society.

The negative Roman contributions to the rule of law are to be found in the
Lex Regia. A bit of historical background is necessary. The Roman Republic,
governed by an aristocratic assembly, had existed since the fifth century BC, until
it fell under the rule of emperors, beginning with Augustus, who reigned from 27
BC until 14 AD. In the following several centuries the Roman Empire extended

\[186\] Ibid.
\[187\] Ibid.
\[188\] Ibid.
its reach over the entire Mediterranean and much of Europe. Now to the Lex Regia. The shift from Republican rule to rule by emperors was in need of legitimation. The Lex Regia provided this service. According to the Lex Regia, which purported to be an account of this transformation in rule, the Roman people expressly granted absolute authority to the emperor for the preservation of the state\textsuperscript{189}.

2.2.3 Middle ages: The Magna Carta

No discussion of the medieval origins of the rule of law would be complete without a mention of the Magna carta, signed in 1215, ten years before the birth of Aquinas. Although it stands on its own as a historical event with reverberating consequences in the rule of law tradition, the Magna Carta also epitomized a third medieval root of the rule of the law, the effort of nobles to use law to restrain kings. There is no disputing the historical significance of this mentioned document, but historians are split over when it acquired this significance and whether it was deserved. Far from embodying the notion of liberty for all for which it has become renowned, the document was the product of concessions forced upon King John by rebellious barons interested in protecting themselves from onerous exaction by the King to finance his losing war effort in France. The document is occupied with details about the privileges of substantial land-holders. Detractors assert, further, that the significance of the document was relatively minor until given a glorified mischaracterization in the seventeenth century by Coke “and made into the symbol of the struggle against arbitrary power”\textsuperscript{190}

Supporters contend, in response, that the Magna Carta had contemporary and ongoing significance, considering that, notwithstanding almost immediate repudiation by King John, it was confirmed by later monarchs and parliaments numerous times, and was referred to in public discourse over the course of centuries on multiple occasions. Moreover, supporters assert, while

\textsuperscript{189} Ibid.
\textsuperscript{190} Ibid.
acknowledging that the immediate participants were the King and barons, the latter represented the interests of all free men, as stated in the document itself191.

In addition to subordinating the king to law, the Magna Carta has been credited with promoting the notion of the due process of law, which is significant in US constitutional analysis. Although these words are not actually used in clause 39, the phrase “due process of law” was used in a statute in 1354, and came to be identified with the phrase “the law of the land.” Over time it acquired the connotation that at least a minimal degree of legal procedures – those that insure a fair hearing, especially the opportunity to be heard before a neutral decision-maker – must be accorded in the context of the judicial process192.

Finally, the Magna Carta has also been identified as the source of constitutionalism – the structuring of the fundamental relationship between a government and its people in legal terms. The English long held a myth about an ancient unwritten constitution based upon customary law and understandings. The Magna Carta added a foundational written piece (which some thought detracted from the ancient one). In the UK, where the notion of parliamentary sovereignty prevails, the Magna Carta does not officially possess a higher legal status, and its terms have been superseded several times by ordinary statute. Still, in a popular sense it is thought of as a higher form of law, certainly at least clause 39, which is nigh untouchable and it has been referred to in such terms on many occasions over the centuries. Much of the Magna Carta’s actual influence on the rule of law tradition, it should be emphasized, came after the medieval period. But it did stand for the rule of law during this period. “Repeated confirmations of Magna Carta, when demanded by the community and granted by the monarchs, reiterated the idea that the king, like his subjects, was under the law.” Equally important, it added a concrete institutionalized component within the positive law system – an

191 Ibid.
192 Id., at 26
ordinary court and jury of peers – to the earlier mentioned abstract declarations about natural law and customary law.\(^{193}\)

2.2.4 Rule of Law under United Kingdom

The rule of law has a comforting ring to it. If we are concerned about restraining government then the idea of government by laws rather than men seems to be helpful, until we realize that laws are made by men and women. We may break down the idea of the Rule of Law into two aspects:\(^{194}\):

1. Legality
   Principle has also been applied by the courts where statute confers discretionary power, which gives a minister or an official freedom to decide how to act. The common law principle of judicial review of administrative action deal with the limits of the powers which legislation or prerogative confer.\(^{195}\)

2. Political doctrine
   The rule of law as a political doctrine is somewhat wider than the principle of legality. It connotes a preference for order and, as articulated by some legal theorists, requirements of a legal system. According to Raz, the basic idea of the rule of law is that not only should law be obeyed but the law should be such that people will be able to be guided by it.\(^{196}\)

   In UK, the rule of law is not a robust check upon government. There is government according to law but the law can indemnify past illegalities and take retrospective effect. There are not everyday occurrences but they show that whatever is the check upon government it is not law.\(^{197}\)

2.2.5 Rule of Law as Free access to information: The Swedish precedent

Open government and free access to public documents are no doubt crucial in avoiding wrongful behavior by high officials. Within the European Union, Sweden is a champion of open government. The country got its first constitutional statute on the freedom of the press already in 1766, during the period of the

\(^{193}\) Id., at 27
\(^{194}\) Brian Thompson, Constitutional and Administrative Law, 57(1995).
\(^{195}\) Ibid.
\(^{196}\) Ibid.
\(^{197}\) Id., at 58.
Enlightenment, including a constitutional right for citizens to access and to copy official documents\(^\text{198}\). Today the Freedom of the Press Act of 1949 and the Freedom of Expression Act of 1991 form part of the Swedish Constitution. The former protects freedom of expression and of information in the printed media, the latter protects most other mass media, e.g. radio and TV\(^\text{199}\).

As a rule the public authority concerned is not allowed to ask for the identity of the person who makes the request for access, or to ask for the purpose of the request. Moreover public officials, among others, are free to supply information about the contents of official documents (as opposed to supplying the actual documents) to the press, referred to as the *freedom of the informant*, which includes secret documents. Furthermore, a person involved in the production or publication of printed matter shall not disclose the identity of a person having provided information for publication. To be sure, no causal link can be proven to exist between open government and the prevention of scandals, but it will be difficult to deny that there is no such link at all\(^\text{200}\).

The new architectures of governance that have emerged as a result of these efforts to promote democratization has given rise to a complex new landscape for citizen participation. New forms of public engagement are redefining citizenship and creating new political identities through which people come to participate. New forms of connectedness traverse national boundaries and create complex linkages between the global and the local, recasting citizen engagement beyond the nation-state, as well as in multiple new locales within its boundaries. These new meanings and practices of citizenship suggest a radical reconfiguration of relationships and responsibilities, one that extends beyond citizen-state interactions to encompass an expanded vision of democratic engagement. This has implications for basic conceptualizations of democratic citizenship\(^\text{201}\).


\(^{199}\) *Ibid*

\(^{200}\) *Ibid*

2.3 The International Rule of law

The Donoughmore Committee stated that\(^\text{202}\)-

[T]he … rule of law… is a recognized principle of the English Constitution, a conventional obligation. But it is a terms open to a wide variety of interpretations.\(^\text{203}\)

A widely held view in the legal profession and elsewhere would lean towards the red light perspective, namely, that the rule of law at its broadest is framework that constrains arbitrary use of power. And for this reason, it is frequently linked to the separation of powers and the idea that such power, where exercised, should always be subject to the principle of accountability before the law. That is, it is a set of rules within which, for example private citizens should be allowed to lead their lives without undue interference from the state and its representatives. But when the intervention of the state becomes inevitable or desirable, then responsibility for actions taken should always follow\(^\text{204}\).

The idea of the rule of law comes under particular straw when there is a clash between different legal regimes, in particular between international and domestic law. International law as such is not automatically part of UK law, which has adopted a 'dualist' approach. An international treaty if it is to alter domestic land; must first be incorporated by statute into UK law\(^\text{205}\).

However; customary international law is recognized by common law, albeit not invariably so. A rule of customary law might be rejected if it is incompatible with basic domestic principles. In particular, international law cannot create a criminal offence without the endorsement of Parliament since this is regarded as a matter appropriate only to a democratic body\(^\text{206}\).

\(^{202}\) Peter Leyland & Terry Woods, Administrative Law, 21(2003)
\(^{203}\) Ibid.
\(^{204}\) Ibid.
\(^{205}\) Ibid.
\(^{206}\) Ibid.
The Constitutionalism means limited government and includes the ideas of the rule of law and the separation of powers as a means of restricting and controlling government. The rule of law is an umbrella for assorted ideas about the virtues of law mainly from a liberal perspective. They center upon law as reason and law as a means of control\textsuperscript{207}.

The rule of law represents one of the most challenging concepts of the constitution. The rule of law is a concept which is capable of different interpretations by different people, and it is this feature which renders an understanding of the doctrine elusive. Of all constitutional concepts, the rule of law is also the most subjective and value laden. The apparent uncertainties in the rule of law and its variable nature should not cause concern, although, inevitably, it will cause some insecurity. In the study of the rule of law, it is more important to recognize and appreciate the many rich and varied interpretations which have been given to it, and to recognize the potential of the rule of law for ensuring limited governmental power and the protection of individual rights, than to be able to offer an authoritative, definitive explanation of the concept\textsuperscript{208}.

\textbf{2.3.1 Contrasting Attitude to the Rule of law}

The rule of law, as understood in liberal democracies, also has little relevance in a totalitarian state. While it is true that such a state will be closely, regulated by law, there will not be government under the law- as adjudicated upon by an independent judiciary- which is insisted upon under the liberal tradition\textsuperscript{209}.

\textbf{2.3.2 Uncertainty in the western Rule of law}

An understanding and appreciation of the rule of law is both politically and culturally dependent. Moreover, it is also clear that the rule of law has more than one meaning, even within the Western liberal tradition. To some theorists, the rule of law represents an aspirational philosophy; to others, no more than a device

\textsuperscript{207} Ibid.
\textsuperscript{209} Id., at 74.
under which compliance with law—good or bad in content—is secured. It has been remarked that: It would not be very difficult to show that the phrase ‘the rule of law’ has become meaningless thanks to ideological abuse and general over-use210.

Partly as a result of such ‘over-use’, some writers have refuted the claim that the rule of law represents anything other than a purely procedural or formalistic device. By way of example, Raz writes that the rule of law211:

[S]ays nothing about how the law is to be made: by tyrants, democratic, majorities, or any other way. It says nothing about fundamental rights, about equality, or justice212.

Professor Joseph Raz (1979) approaches the rule of law from a morally neutral but conceptual standpoint, and asserts that213:

[T]he rule of law is a political ideal which a legal system may lack or may possess to a greater or lesser degree. That much is common ground. It is also to be insisted that the rule of law is just one of the virtues which is a legal system many possess and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man. A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies214.

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210 Ibid.
211 Ibid.
212 Ibid.
213 Id., at 83.
214 Ibid.
Hayek describes the rule of law in the following manner\textsuperscript{215}:

[S]tripped of all technicalities this means that government in all its action is bound by rules fixed and announced before hand- rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge\textsuperscript{216}.

\subsection*{2.3.3 The Rule of Law at International Dimension}

The Universal Declaration of Human Rights of the United Nations, published in 1948, declares that\textsuperscript{217}.

It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law\textsuperscript{218}.

The European Convention also recognizes the concept of the rule of law. The preamble states that\textsuperscript{219}:

[T]he governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law … have agreed as follows….\textsuperscript{220}

On an international level, the rule of law is also advanced by the International Commission of Jurists, which strives to uphold and improve the rule of law within the legal systems of its members. The Declaration of Delhi, issued under auspices of the International Commission of Jurists, affirm the rule of law and its value in promoting the protection of civil and political rights and linked such rights with the development and protection of social and economic rights. The Congress of the International Commission of Jurists met in 1959 in order to ‘clarify and

\textsuperscript{215} Id., at 85.
\textsuperscript{216} Ibid.
\textsuperscript{217} Id., at102.
\textsuperscript{218} Ibid.
\textsuperscript{219} Ibid.
\textsuperscript{220} Ibid.
formulate a supranational concept of the rule of law. Accordingly, clause I of the report of the committee, stipulates that:

[T]he function of the legislature in a free society under the rule of law is to create and maintain the conditions which will uphold the dignity of man as an individual. This dignity requires not only the recognition of his civil and political rights but also the establishment of the social, economic, educational and cultural conditions which are essential to the full development of his personality.

Such aspirational statements recognize the need for the economic foundations to be such that the dignity of man can be a reality in society. It is meaningless to speak of the rule of law as insisting on decent, or even minimal, standards of living within the context of poverty and disease. In order to secure any such standards, a sufficient level of economic wealth must be achieved. Even where such standards do exist, there will remain resistances to any formulation of social and economic rights as enforceable positive legal rights, for such governments may be willing—indeed obliged—to respect civil and political rights in a democracy, the protection of such rights generally will be effected without significant national resource implications. The protection of freedoms, such as freedom of speech and association, requires no more than a restraint on government. The protection of social and economic rights requires positive action, at a high cost.

2.4 Historical Background of Concept Accountability at International Level

2.4.1 Concept of check and balance.

There are mechanism for keeping the executive in check. These include controls imposed by the executive upon itself, such as code of conduct issued and enforced by a prime minister to regulate the behavior of his or her ministers. Other forms of accountability include laws such as the freedom of information.

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221 Ibid.
222 Ibid.
223 Ibid.
224 Ibid.
Act, 1982, as well as the scrutiny provided by the officers appointed under statute such as the Ombudsman (Ombudsman Act 1976) and Auditor-General (Auditor-General Act 1997), and by bodies like the Human Rights And Equal Opportunity Commission Act 1986. Decision-making by ministers and their departments is also subject to its review, whether it be by tribunal (particularly under the Administrative Appeals Tribunal Act 1975) or by a court (particularly under the Administrative Decisions (Judicial Review) Act 1977), but also under the common law, as in the Tampa case above, or by the High Court through the “constitutional writs” guaranteed by s 75(v) of the Constitution. Parliament also has a key role in holding the executive to account under the conventions of responsible government.

According to Stanley Pargellis:

[S]o famous is the political theory of checks and balances, so well-known to Americans, that he is a bold man who tries to say new things about it.

The history of the concept of “checks and balances.” The phrase is widely used in contemporary discussions of power and its regulation, and it is precisely because it has become so commonplace that historians and theorists have found it entirely unproblematic, treating it as if it were not at technical Language (with all that implies in the way of intellectual precondition and hidden presuppositions) but a mere manner of expression. For Garry Wills, for example, it is, when used by the Founding Fathers, simply “an old concept borrowed from mixed government theory.” There is a marked contrast here with the idea of the separation of powers, whose history has been carefully and intelligently studied.

There are some straightforward distinctions—

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225 Supra note 44.
227 Id., at 211.
First, there is the history of the phrase itself, first used by Hugh Blair in a sermon published in 1777:

[I]t is wisely ordered in our present state, that joy and fear, hope and grief, should act alternately, as checks and balances upon each other, in order to prevent an excess in any of them\textsuperscript{228}.

2.4.2 Due process of law as the basis of judicial review

The basis of the Fifth Amendment of the Constitution, the scope of judicial review has become very vast. In one of its clauses, it has become laid down that “the Government cannot deprive anyone of life, liberty or property without due process of law.” The term “Due Process of Law” means that the life, liberty or property of the people cannot be subjected to arbitrary and unfair limitations by the law or the executive or even by the judges in the process of awarding punishments. In simple words, it stands for free and fair trial for meeting the ends of justice. The Supreme Court has used this principle to determine the validity of laws. The Supreme Court while conducting judicial review, tests\textsuperscript{229}:

(1) As to whether the law has been made strictly in accordance with the provisions of the Constitution or not; and\textsuperscript{230}

(2) As to whether the law satisfies the ends of justice and meets ‘due process of law’ i.e. whether it is fair and just or not\textsuperscript{231}.

The law is declared invalid if it fails to satisfy either of these two tests.

2.4.3 Concept of Responsible Government

The system of responsible government requires that, except in the exercise of their reserve powers, the Queen’s representatives- the Governor in each State and the Governor-General - act on the advice of their ministers. In tum, the ministers

\textsuperscript{228} Ibid.
\textsuperscript{230} Ibid.
\textsuperscript{231} Ibid.
must be members of parliament and therefore accountable to it (and ultimately to the people at the ballot box).232

This use of the term “constitution” may have been new in 1610, but the idea it conveys is in reality one of the oldest, if not the very oldest, in the whole history of constitutionalism. Whitelocke’s phrase which author have just given-

[T]he natural frame and constitution of the policy [i.e., polity] of this Kingdom, which is jus publicum regni”- in reality includes two conceptions of a constitution closely connected and at times combined, but nevertheless distinct in character.

Cicero says-

[T]his constitution (haec constitutio) has a great measure of equability without which men can hardly remain free for any length of time.233

Further on Cicero says-

[N]ow that opinion of Cato becomes more certain, that the constitution of the republic (constitutionem rei publicae) is the work of no single time or of no single man.”234

The most fundamental problem of government is “how a Common-wealth comes to be an Empire of Lawes, and not of Men.”’ And no aspect of that problem has so vexed nation-builders throughout history as the question of how to ensure that even the extraordinary executive power, whether wielded by a Prince or a President, is itself governed by and answerable to the law—that is, how to ensure that “the sword that executeth the Law is in it, and not above it.”235

The Great Charter is King John’s written promise to respect certain rights and feudal privileges of his barons—but a promise, especially a unilateral one, is in practice no more binding than its enforcement mechanism. And the enforcement process set forth in Magna Carta is astonishing- a bizarre amalgam of a Hobbesian state of nature and an administrative procedure act.236

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232 Supra note 44.
233 Charles Howard Mcllwain, Constitutionalism: Ancient and Modern, 17 (1975)
234 Id., at 24-25.
236 Ibid.
2.4.4 The Bill of Rights

The federal judiciary settled, as of around 1890, on the most logical remaining candidate the Fourteenth Amendment’s command that no state deprive “any person of life, liberty, or property, without due process of law.”\(^{237}\)

For protecting various substantive liberties (such as liberty of contract, not found in the Bill of Rights, or ‘liberties of speech ’ obviously found in the Bill) was the distinctly procedural and religion, cast of the clause’s language. The text suggests a guarantee that, whatever the substance of the rules of conduct government promulgates rules may not be brought to bear on any person so as to deprive that person of life, Liberty, or property without fair procedures—such as a hearing before a neutral decision make\(^{238}\)

2.4.5 Doctrine of due process

John Hart Ely has colorfully described the supposed oxymoron at the heart of the substantive due process doctrine:

[T]here is simply no avoiding the fact that the word that follows ‘due’ is ‘process’…‘[S]ubstantive due process is a contradiction in terms—sort of like ‘green pastel redness.’\(^{239}\)

By 1885, in any event, the Supreme Court was describe due process as “a restrain on the legislative as well as on the executive and judicial power of the government, [that] cannot be so construed as to leave congress free to make any process ‘ due process of law’, by its mere will.”

Indeed, in 1884, perhaps reflecting the understanding not only of that time but of the time the Fourteenth Amendment was ratified, the Court analogized due process to Magna Carta’s “guaranties against the oppressions and usurpations” of government power, and elaborated:\(^{240}\)

Law is something more than mere will exerted as an act of power, . . .

[Law thus excludes] as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation and other similar special, partial

\(^{237}\) Id., at 1332.
\(^{238}\) Ibid.
\(^{239}\) Id., at 1333.
\(^{240}\) Id., at 1334.
and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude.\textsuperscript{241}

This is done in such that the principle that ‘all governmental authority derives from the people is realized. The idea of government by law requires the state apparatus to be organized in such a way that any use of publicly authorized power must be legitimated in terms of duly enacted law. Legitimate law is generated from communicative power, and the latter in turn is converted into administrative power via legitimately enacted law. Popular sovereignty expressed in forms of ‘communication circulating through forums and legislative bodies, thus binds the administrative power of the state apparatus to the will of the citizens. Formation of political will aims at legislation or at least two reasons.\textsuperscript{242}

1) The system of rights that citizens have mutually accorded one another can be interpreted and developed only through laws.\textsuperscript{243}

2) The administration that has to act as a part for the whole can be programmed and controlled only through laws.

The scheme of separation of powers within a constitutional state has the purpose of binding the use of administrative power to democratically enacted law in such a way that administrative power regenerates itself solely from the communicative power that citizens engender in common.\textsuperscript{244}

Laws also bind the judiciary. In terms of the relation of the legislative branch to the executive branch, the requirement of statutory authorization has the effect of nullifying regulations and ordinances that contradict a legal statute.\textsuperscript{245}

The regional and functional division of administrative power in a federally structured administration or subdivision, of the administrative branch follows the pattern of ‘checks and balances’- the splitting and spreading of administrative

\textsuperscript{241} Ibid.
\textsuperscript{242} Sarbani Sen, The constitution of India, 10-11 (2011).
\textsuperscript{243} Ibid.
\textsuperscript{244} Ibid.
\textsuperscript{245} Ibid.
powers through official channels. This internal decentralization of the administrative apparatus has delaying, blocking, and moderating effects that open the administration as a whole to external controls.

2.4.6 International concept of independent Judiciary

An independent judiciary is an essential component of the American conception of separation of powers. Not surprisingly, the framers who drafted the judicial article of the U.S. Constitution during the summer of 1787 were influenced, both positively and negatively, by the state practices of the day: they embraced some practices and rejected others. The result was a federal judiciary that forms a separate branch of the national government, judges who enjoy tenure during good behavior, and salaries that cannot be diminished while in office.

New York, among the most significant of the original thirteen states, was prominent on the question of judicial independence. After its own constitution was enacted in 1777 and at a different level of government.

2.4.7 Charter of Freedoms and Exemptions of 1629

What the framers of the U.S. Constitution would come to regard as constitutional government was subordinated throughout the administration of New Netherland to the commercial interests of the Dutch West India Company. Nonetheless, modest gestures were made in the direction of constitutionalism. Two of these merit brief mention. One occurred in 1657 when the burgomasters of New Amsterdam (today, New York City) established separate meeting days for their judicial and legislative responsibilities and also requested permission from Director-General Stuyvesant that these two powers of government be exercised by two separate sets of men. Although Stuyvesant denied the request and the court of schout, burgomasters, and schepens continued as a mixed tribunal until the end of Dutch control of New Netherland, the request itself represented an important step in the constitutional development of New York’s judiciary.

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246 Id., at 11.
248 Ibid.
249 Id., at 183.
2.4.8 The Royal Period, 1685-1776

The Duke of York signed the Charter of Liberties and Privileges on October 4, 1684. He never returned it to New York. On February 6, 1684/85, King Charles II died, and the duke became King James II. As king, James re-embraced his earlier view that parliamentary bodies were an "inconvenient adjunct of government” that interfered with the exercise of the royal prerogative. He therefore vetoed the charter on March 3, 1685/86. New York was now a royal colony, rather than a proprietary one, and the government soon "reverted to a hierarchical pattern” of the governor and his council administering the executive, legislative, and judicial affairs of the colony, subject to the king's approval.” On April 7, 1688, New York, along with New Jersey, was annexed by royal decree to the Dominion of New England, a "mega colony" created by James II two years before. Edmund Andros served as governor of the mega colony.

2.4.9 Parliamentary Government in the British State

The settlement forged in 1688 led to a Whig supremacy in government for the following eighty years. During this period the main conventional practices of modern parliamentary government were shaped, and these ensured that the king’s government was exercised through parliament. This was also a period in which not only was England able to institutionalize its dominance over the British isles by forming the kingdom of Great Britain,” but Britain itself was transformed from an insular society with a largely agricultural economy into an industrial and commercial nation underpinned by a fiscal-military state of considerable imperial might.

This growth in the modern ‘system of parliamentary government has been accompanied by a steady attrition in any clear sense of constituent power in British constitutional discourse. Late seventeenth century radical Whig thought rested on the beliefs that there can be but one supreme governmental power in a community and that is the legislative, that this power is held in trust to act for the good of the people, and that the people therefore retain a supreme constituent power.

250 Id., at 188.
power not only to remove the legislative power but to also to change the constitutional Framework of government.” During the course of governmental development over the last 350 years, the more radical aspects of each of these claims have been eroded. This has been achieved mainly through the suppression of any militant sense of the people as the originating power of government, which has been replaced by a more aristocratic conviction that governors should act for the benefit of, and be responsive to the concerns of, the people\textsuperscript{252}.

This adjustment has been made in conjunction with the tendency to conflate the constituent power of the people with that of the constituted authority of the commons; while the idea of ‘the people‘ must always be ‘re-presented’ in political discourse, there has been an unusually strong proclivity to confer on the commons the monopoly of speaking as the vox populi\textsuperscript{253}.

The concept of constituent power provides the key to unlock the mysteries of modern constitutional arrangements in Britain. Although the concept received its first clear expression by the Levelers in the 1640s, their claims raised a series of fundamental questions that those seeking to manage the unfolding English revolution felt it necessary to repress. Thereafter, with the subsequent failure of the English revolution and the restoration of the old order, even the more elementary precepts of constitutional ordering based on the principle of popular sovereignty came to be obfuscated. The basic message the Levelers advanced—that the power vested in the people as equal rights bearing citizens can be ceded to governmental authorities only for limited purposes and only within the terms of formally adopted compact\textsuperscript{254}.

2.5 Equal protection under Rule of Law

2.5.1 Equal protection in United States –

Unprecedented expansion in the reach of the constitution’s guarantee to equal protection of the laws was clearly among the most significant and controversial developments of the warren Court era. The court’s decision in Brown v. Board of
Education\textsuperscript{255}, and related cases outlawing racial segregation in the public schools and other fields of national life are only the most obvious examples. Drawing on dicta in pre-warren cases, the court concluding that discriminatory action was based on “suspect” classifications on interfered with “fundamental rights” was to be subjected to “strict scrutiny” and upheld only if found necessary to further a compelling governmental interest\textsuperscript{256}. The Supreme Court held that public schools segregated racially by law stigmatize minority children, adversely affecting their ability to learn. Such education, the justices unanimously declared, is “inherently” unequal and thus violative of the constitution’s guarantee to equal protection of the laws\textsuperscript{257}.

2.5.2 Equal protection in India.

If the state action is arbitrary or irrational, it would be treated as bein against Article 14. An arbitrary act cannot be valid on the ground of reasonable classification. Article 14 is primarily a guarantee against arbitrariness against state action and the doctrine of reasonable classification has been evolved only as a subsidiary rule for testing whether a particular action is arbitrary or not. Right to equality affords protection not only against discriminatory laws passed by the legislature but also prevents arbitrary discretion be vested in the executive. Often administrative authorities are given by discretionary power. In such condition the statute which confers such discretionary power on the administrative authorities should lay down some guidelines or principles according to which the administrative authority are to exercise them. The statute should contain clear legislative policy for which the discretion is to be exercised. If the statute does not contain a clear legislature policy or guideline for the exercise of the discretion conferred by it on the government or the administrative authorities, the statute itself will be discriminatory and, therefore, against Article 14 and the way in which it is applied will not be material. Equality is antithetic arbitrariness\textsuperscript{258}.

\textsuperscript{255} 347 U.S. 483 (1954); 349 U.S. 294 (1955).
\textsuperscript{256} Tinsley E. Yarbrough, The Rehnquist Court and The Constitution , 243( 2000)
\textsuperscript{257} Id., at 250-251.
\textsuperscript{258} Kailash Rai, Administrative Law, 38 (2011).
Justice as fairness is an egalitarian view, but in what say? There are many kinds of equality and many reasons for being concerned with it. So let us review several of the reasons for regulating social inequalities.

2.6 Citizens Charter

For trust in government now even government’s accountability syndrome has been changing. Today we talk about citizen’s Charter introduced for the first time by the British Government in year 1991. The key aspects of the charter are the requirements that public agencies publish commitments to standards of service, that there be independent monitoring and publication of standards achieved, and that mechanism be established through which the ‘customer’, can achieve satisfaction when standards are not met. It included various forms of compensation and alternative arrangements for service provision where agencies do not live up to their promises.

In India, the then Prime Minister, had inaugurated a conference of Chief Secretaries in 1996, called to develop “An Agenda for an Effective and Responsive Administration” to make the public services more efficient, clean, transparent, accountable and citizen friendly. The conference recommended that accountability should be interpreted in a larger sense in relation to public satisfaction and responsive delivery of services, and a phased introduction of Citizen’s Charter for as many service institutions as possible. Later on the Department of Administrative Reforms and Public Services in 1997 evolved an “Action Plan on Effective and Responsive Administration”, based on the responses and reactions received from officials, experts, voluntary agencies, citizen’s groups, media etc. The three main areas of Action Plan that were discussed in the Conference of Chief Ministers on May 24, 1997 were:

1. Making administration accountable and citizen-friendly,
2. Ensuring transparency and right to information, and

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261 Ibid.
3. Taking measures to cleanse and motivate civil services.

The State Governments and the Ministries / Departments at the Centre are all involved, in some manner or the other, in providing public services. Government of India has directed them and other agencies with public interface to formulate a citizen’s charter, lay down time-limits and standards for services, avenues of grievance redresses and put in place monitoring systems and independent scrutiny to ensure implementation of the charter.\(^{262}\)

2.7 Concept of Social audit in India

In recent months, public discourse in India has been dominated by a heated debate on how to address the endemic corruption in India’s public institutions. The agitation for the Lok Pal bill and the ensuing discussions has brought the role of anti-corruption institutions and accountability mechanisms to the heart of this debate. As potential solutions begin to emerge, it is important to reflect on current experience and take stock of lessons learned from India’s on-going efforts to build accountability systems and to address corruption. The key to designing an effective solution will lie in understanding the conditions under which solutions can work as well and the challenges they are likely to face.\(^{263}\)

A social audit is a process by which citizens’ review and monitor government actions on the ground and uses the findings from the review to place accountability demands on the government through the mechanism of a public hearing. In 2005, the Indian Parliament passed the National Rural Employment Guarantee Act (since renamed the Mahatma Gandhi National Rural Employment Guarantee Act or MGNREGA) and included within it a mandatory provision for conducting social audits in the gram sabha at least once every six months. Social audits in MGNREGA are rooted in the MKSS experience and conceptualized as a ‘continuous process through which potential beneficiaries and other stakeholders of an activity or project are involved at every stage: from planning to the

\(^{262}\) Ibid.

implementation, monitoring and evaluation.’ Social audits in this definition are seen as a means of promoting transparency, participation, consultation, accountability and redressed.\textsuperscript{264}

2.8 Conclusion.

The rule of law, in its most basic form, is the principle that no one is above the law. However, as most American are watching the news or reading newspaper and magazines, we are bombarded with information regarding politicians with the law\textsuperscript{265}.

It seems that people with “People, Wealth and Fame” (referred as PWFs) can bend the laws around them. So is there, in fact, two rules of law\textsuperscript{266}:

One rule of law applies to the average. While the other applies to rich and famous. If the U.S Constitution is the foundation of the rule of law, is it being interpreted differently for different people? It seems that the PWFs believe that they are above the constitution; that they can do whatever they want. It also appears that they have no fear of the United States court system\textsuperscript{267}.

US Constitution is the foundation of the rule of law- it has all the ingredients to make a nation with equality and freedoms for its people\textsuperscript{268}.

Andre Beteille stated that:

[A] Constitution may indicate the direction in which we are to move but the social structure will decide how far we are able to move and at what place.


\textsuperscript{266} Ibid.

\textsuperscript{267} Ibid.

\textsuperscript{268} Ibid.