CHAPTER 4
HISTORICAL PERSPECTIVE OF PUBLIC ACCOUNTABILITY.

Machiavelli stated that: Set up eyes and ears in your kingdom that pick up weak signals before your enemies.

4.1 Introduction

In this chapter, researcher tried to focus on the concept of Good Governance which existed during Ancient times and how it was relevant during those days in proper administration and management of policy. For this purpose, ancient period is studied under three heads namely-Vedic period, Mauryan period and Gupta period. Special emphasise in this chapter is made towards Mauryan period which was regarded as a period of good governance, as the structure of administration was so well established and governed which became model for lot of empires world wide. A reading in Chanakya's Arthashastra which was written in 4th century BC is worth mentioning here as it gives guidelines on administration practices which were to be followed in order to achieve the social welfare objectives. Study of Ancient system of good Governance throws some light on the evolution of the present Governance as well as accountability of public servants. No doubt its concept of accountability has been evolved by the judiciary but this system of Governance and Accountability has been borrowed from the ancient system and its relevance can be even seen in present time.

4.1.1 Historical background of concept accountability in ancient India.

British Rule in India resulted in two important changes. Firstly, it started changing the mindset of Indians by destroying various texts and scriptures on which our history stood. Secondly, it tried to impart western thinking on Indians through changes in education policy. Some Indian Politicians also danced to their tunes and they shifted the focus from our rich traditional values and ethos to western

ideas and thinking. In this process, our ancient texts lost its sanctity and more and more people started propounding western ideas in every walk of life. But, there were small group of thinkers, especially those who practiced yoga, ayurveda and other forms of ancients system some how got interested in revisiting our ancient texts for effective administration and decision making. This resulted in successful revealing of lot of secrets about the ancient practices which are even relevant today.⁵⁰⁷

⁵⁰⁷ Id., at 45.

⁵⁰⁸ Supra note 505.
From the above image researcher’s find Vedic period as establishment of Vedic civilization on Indo-Gangetic plains and mauryan & Gupta periods includes the rise and fall of the mauryan and the Gupta dynasty. During period of medieval and post medieval there was invasion by Arabs, Turks etc. and rule by Mughal Empire. There is another period, when India was colony of Britishers and the recent period is Independent India, which is called as Democratic Republic of India\(^{509}\).

King should observe the highest ethical standards and be a perfect human being. To ensure that the king lives up to these standards, Kautilya prescribes rigorous moral training and self-discipline for him. It is only to such a king as is duty-conscious that Kautilya offers his techniques of statecraft. To be sure, in the Arthasasistra, the king is the repository of all formal powers and plays the central role in the political system. But he is not conceived as an arbitrary ruler\(^{510}\).

Like Hindu law the fundamental concept under Muslim law was that the authority of King was subordinate to that of law. Every Muslim ruler was required to rule in conformity with the tenets of sacred law of Quran, which laid down the broad principle governing the social life of the Muslims. The Imam or Caliph, to whom every Muslim was required to owe allegiance, was required to rule in accordance with the tenets of a Quran, having a divine origin. The Muslim polity was based on the conception of the supremacy of Shar or Islamic law before whom the ruler and the ruled were equal\(^{511}\).

Judicial system by giving equal importance to Muslim Law and Hindu Law and used to hold an open court to attend to the petitions of his Subjects. He encouraged just complaints against the Crown's servants and issued various proclamations to this effect. He officers of the State were made accountable for the wrongs committed by them in the course of their employment\(^{512}\).

\(^{509}\) Ibid

\(^{510}\) M.M. Sankhdher, Gurdeep kaur, Politics in ancient India, Politics of Change and Politics Thought, Politics in Modern India at 18, available at, https://books.google.co.in/books , accessed on september20, 2015.


\(^{512}\) Ibid.
4.1.1.1 Vedic period

Vedic Aryans who occupied the lands of five rivers were mainly tribal and they elected one person who was called as Leader. Usually, the person with strong personality who used to protect them from eventualities was elected as the leader. There existed a simple set up of administration namely, the King and the general assemblies of people called as Samithi and Sabha. These are also called as another external check on the supreme authority of the king.

The Sabha was a permanent body of select people like the Brahmins and other rich patrons, while the Samiti was a body of common people, irrespective of class or wealth, equivalent to our modern Lower House or the Lok Sabha. Matters of importance were always discussed with people through these public forums, providing citizens with an opportunity to participate in governance. It is truly remarkable that these provisions existed 3,500 years ago.

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513 Supra note 505.
514 Supra note 510.
515 Supra note 511.
Vedic King who was head of the state was charged with the maintenance of law and order. He used to employ the agency of spies in discharging his duties more effectively and efficiently. The administration was based largely on the household system. King used to collect necessary information for decision making from the Chief Priest and he used to involve all his reporting at time of taking vital decisions\textsuperscript{516}.

This period was characterized by very good Centralized Administration under the leadership of the King. The king enjoyed supreme executive, judicial and military authority over the kingdom. Raja Dharma was to protect the people and kingdom from enemies. It was during the Vedic period that many invasions took place due to which there was destabilization of power to some extent in Northern India\textsuperscript{517}.

The current concept of accountability originated more than 3,500 years ago. Ancient Indian texts like the Ramayana and the Mahabharata alluded to the idea of accountability and the need to check even the actions of the Kings, with the help of political and administrative regulations. The Mahabharata even approved a protest against a King who failed to perform his duty to protect his subjects. Another ancient Indian treatise, the Arthashastra, elaborated a system of vigilance and penalties designed to ensure that appointed officials perform their duties effectively\textsuperscript{518}.

The Vedic civilization laid down the foundations of Hinduism as well as the associated literature, which outlined the norms of social, political and religious life. Ancient Hindu scriptures illustrated the importance of duty and responsibility towards the family and society. Rulers were guided by this principle of duty towards the people. This responsibility was deemed so important that sometimes even ‘questionable actions’ were justified in the name of duty. The Mahabharata provides examples where decisions were taken for the sake of duty, ignoring the

\textsuperscript{516} \textit{Id.}, at 47
\textsuperscript{517} \textit{Ibid.}
\textsuperscript{518} \textit{Supra} note 510.
morality of those actions. The Vedic era thus allowed for a flexible approach to accomplishing one's duty.\textsuperscript{519}

This era also saw the introduction of accountability checks on the administration. The king was the ultimate authority, in charge of the management of the kingdoms and the administration of justice. There were provisions, however, to depose the king if he did not perform his duties appropriately, and for the election of the king by the general public. In practice, elections were a rare occurrence and dynastic rule was common. For instance, the Vedic period witnessed over four generations of rule by the Purus and 10 generations of rule by the Srnjayas.\textsuperscript{520}

4.1.1.2 The Mauryan and Gupta period (500 BC to AD 500)

In the beginning of this era, the Persians and Greeks invaded India, but their impact was marginal since they ruled for a brief period of time. They were defeated by the Mauryans, who went on to conquer and consolidate the entire subcontinent. Monarchy continued in this era; the king was the supreme ruler, the head of the army and the chief justice of the kingdom. As the kingdom grew, administration was decentralized to facilitate effective functioning and provide better supervision. The administrative machinery of the state developed, with numerous departments regulating and controlling state activities, with expanding kingdoms and decentralized functioning of the government, it became increasingly difficult to organize Sabhas and Samitis.\textsuperscript{521}

These were eventually discontinued, and so the opportunity for the common man to participate in the governance process diminished. During this period, the Arthashastra, a comprehensive treatise on statecraft, economic policy and military strategy, was written by Kautilya, chief mentor of the emperor Chandragupta Maurya.\textsuperscript{522}

\textsuperscript{519} Ibid.  
\textsuperscript{520} Ibid  
\textsuperscript{521} Supra note 510.  
\textsuperscript{522} Ibid.
The Mauryan period is regarded as the period of good governance. It was one of the largest empires in Ancient India and its administration was considered as one of the best administration over the entire world. The Mauryan King was the head of the state administration holding legislative, executive and judicial powers. Judicial system was well organized and there was continues supervision and inspection process which was installed in every walk of administration. Secret services played a major role in maintenance of law and order in the kingdom. Local authority was controlled by Parishad who in turn used to report to king. As the Mauryan Empire extended almost whole of India, it became very difficult for king to have proper control\textsuperscript{523}.

Above all these it was Chanakya's Arthashastra, written during the period of Chandra Gupta Maurya which made Mauryan Empire stronger in terms of administration. Arthashastra contains 6000 sutras divided in to 15 chapters and 18 sub chapters’ instructions about administration, management, law and justice, economy, foreign policy etc., King is the central point in Kautilya's Arthashastra. It is mentioned in the Arthashastra that "In the happiness of the subject lies the benefit of the king and in what is beneficial to the subjects is his own benefit". According to Chanakya, good governance should avoid extreme decisions and extreme actions. He suggests to take Soft action (Sam, Dam) and also harsh action (Dhand, Bhed) whenever there is a wrongful act. He goes on to explain the selection process to be followed to select right person for right jobs. According to Chanakya, King should appoint trusted people for administration purpose, while selecting the people he should be very cautious and should see in them qualities of high birth, wisdom, heroism and loyalty. He propounded few tests for selection and tests were conducted in areas of judiciary, wealth, pleasure and fear\textsuperscript{524}.

In the Arthasistra, he is given only quasi-legislative functions in order to fill the gaps in the existing and universally accepted principles of governance. In any case, the king administers law and dispenses justice not arbitrarily but in accordance with the rules of dharma which decide his responsibilities, chief

\textsuperscript{523} \textit{Supra} note 505 at 46.

\textsuperscript{524} \textit{Id.}, at 47.
among which are defence of the state and promotion of the moral and material welfare of the people\textsuperscript{525}.

Even King was regarded as servant and also he received salaries just like others. It was council which has powers to decide upon salary structure and salaries for all including King's family members\textsuperscript{526}.

According to Arthashastra, king should act according to Dharma and should stick on to the ethics and principles of what is told to him. Chanakya was very much against corruption and he is of the opinion that corruption will destabilize the king and country and as such the person who is involved in any act of corruption should be penalized severely. He insisted on accountability, sharing of work and delegation as the key mantra for good governance\textsuperscript{527}.

The administrative structure under Mauryan Empire was assigned in such a way that each of them had clear cut duty assigned and also the accountability and responsibility was clearly fixed\textsuperscript{528}.

Megasthanese who visited during rule of Chandragupta Maurya in his Indika had mentioned and praised the administration set up during Mauryan Empire. Special reference was also made of Arthashastra and it is believed that even some western countries developed interest in the philosophy of Chanakya and they copied some of the styles of Mauryan administration\textsuperscript{529}.

The Arthashastra was adopted as the de facto guide to state administration and accountability in the Mauryan age. It emphasized the importance of institutional mechanisms, assuming that people behaved appropriately, only with the judicious application of restraint, punishment and incentives. The Arthashastra also suggested built-in checks and balances to contain malpractices. Emphasis was placed on a network of spies and informers, who functioned as the surveillance arm of the king. These spies reported the malpractices and misconduct that officials engaged in. In the larger interest of expanding or protecting the State, however, rulers were allowed to compromise on morality and

\textsuperscript{525} Supra note 511.
\textsuperscript{526} Ibid
\textsuperscript{527} Ibid
\textsuperscript{528} Ibid
\textsuperscript{529} Supra note 507 at 48.
ethics. Since the welfare and development of the State were the main objectives of
the king, it was justifiable to defeat an enemy using bribery or fraud as long as the
kingdom benefited from it. Yet again in India's history, it appears that it was
acceptable for morality to be sacrificed on the altar of duty\textsuperscript{530}.

4.1.1.3 Gupta period

During Gupta period, Urban and Rural administration were more
decentralized compared to Mauryan Empire. So, each of them understood their
responsibility and they worked towards achievement of welfare objectives. There
was lot of integration among different levels of administration and all were clear
about their duties and thrived to work for the wellbeing of the people and king\textsuperscript{531}.
Gupta period had good contact with outside world, they had good communication
system and also well-developed foreign policy. Fa-Hein, a Chinese traveler who
visited the court of Chandragupta II has praised the administration system and
governance of Gupta period\textsuperscript{532}.

4.1.1.4 fourth century BC

Traditionally the king was responsible for the security and well-being of
the people and thus the idea of governmental accountability existed, the king was
not accountable to any individual, but he had to bow to tradition and dharma. In
addition, while fulfilling his responsibilities, he had to guard against provoking
the people unnecessarily and had to take public opinion into account\textsuperscript{533}.

As noted above, the king, wielder of the rod, was himself restrained by the
power of \textit{danda}. Should he neglect his duties and go against the precepts of
dharma, he would be struck down by \textit{danda}\textsuperscript{534}.

Though there is no constitutional restraint on him, the dharmic code itself
serves as a powerful check on his conduct in office. He rules but only in
accordance with the sacred laws and tradition. The ruler is obligated to respect
and encourage the various customs and rules of family, caste and association if
they are consistent with the dharmic code. In the \textit{Arthasīstra}, the main duties of

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\item\textsuperscript{530} \textit{Supra} note 510.
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\item\textsuperscript{532} \textit{Ibid.}
\item\textsuperscript{533} \textit{Supra} note 510.
\item\textsuperscript{534} \textit{Ibid.}
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the king are the protection and welfare of the citizens; therefore, his happiness lies in the happiness and prosperity of his subjects.535

A king deserves his high office only if he observes rajdharna. In case he is incompetent or arbitrary or fails to fulfil his duties, he loses the right to rule and his subjects are entitled to repudiate his authority.536

A Study of Kautilya’s Arthasastra master. But, to be fair to the king, the ancient Indian writers, including Kautilya, allow him discretionary powers and the right to depart from the law in order to preserve it. In this sense, the ancient Indian political theory neither views the king as a divine being to be worshipped like a god nor a hostile force to be opposed. He is taken as at custodian of social interest and is to be opposed only when he does not fulfil his duty.537

Accordingly, the state is not looked upon as a necessary evil to be endured in the absence of a better alternative. Kautilya does not speak of the rights of the people against the king, but he does regard the king as the servant of the people. The relationship of the king with his subjects is patemalistic. The characterization of the ancient Hindu state as paternalistic has been criticized on the ground that it implies that the people are unable to manage their own affairs. But the ancient theorists conceive the king as a father-figure to underline the benevolent aspect of kingship and the obligation of the king to act like a father for the well-being of his people. This is why it is repeatedly emphasized that the happiness of the king lies in the happiness of his people and that he has to be an example of the dlmrmic way of life for others to follow.538

Kautilya's Arthasastra is, of course, the first major document which deals with the character of State formation in considerable detail, ascribing features as essential to its existence.539

535 Id., at 19.
536 Ibid.
537 Ibid.
538 Id., at 20.
539 Lakshmeshwar Dyal, State and kingship in ancient India, 45, available at, https://books.google.co.in/books, accessed on 20 September 2015
Again, the king's ownership of all land is sometimes assumed to be one of the factors contributing to his absolute power. The doctrine of royal ownership of land in India has, however, been questionable, in view of adequate evidence of the tiller's security over his land, both in the ancient and the medieval periods.

According to A.L. Basham,

[M]ost of the villagers were free peasants, and their land was to all intents and purposes their own, though the king claimed its ultimate ownership.\textsuperscript{541}

Kantilya excels himself when he gives the minutest details of administration and unravels the complex web of relationships in the administrative system. It is

\textsuperscript{540} \textit{Ibid}
\textsuperscript{541} \textit{Id.}, at 47.
remarkable that more than two thousand years ago he should be able to suggest administrative techniques which still are of great value. He compiles a full catalogue of instructions in respect of all important elements of society such as the ministers, the officials, the subjects, etc. His basic tenets of administration are vigilance, supervision and testing of the character of administrative personnel.

Consequently, the role of spies, the trustworthiness of ministers and officials, and the role of planning are the main pillars of his statecraft. In addition, he is the first to separate personal morality from administration and put the latter on rational footing. A keen observer of human nature as he is, he is aware of man’s tendency for corruption and proposes to check it through constant vigilance and use of force. To ensure efficient administration, he legitimises the use of force for political ends, although this does not mean that he gives the king a licence to assume dictatorial powers. The use of unscrupulous means is permitted to the extent it advances the happiness and welfare of the people. Thus, separation of morality and administration does not mean an advocacy of immorality but only unfettering the king to do social good.

In order that the king has a firm grip over administration, Kautilya suggests a wide network of spies. In fact, in the Mauryas state, these agents were so many that Megasthenes thought they constituted a separate class. These spies reported everything that transpired in the cities, the army and the countryside, to the king or the magistrate. Even prostitutes were often employed as spies. The attention Kautilya pays to intelligence reflects the importance the Mauryan state attached to spying. In fact, the spying and the army may be said to have been the pillars of Mauryan power. They made it possible for the king to administer his vast empire efficiently in a period when the modes of transport and communication were still primitive. Apart from deploying secret agents, Kautilya wants the king to analyses and understand the motives of civil servants, employees, tax-collectors and tax payers. He believes in the theory of reward and punishment and wants it to be put into practice in a subtle and sophisticated manner. He gives an account of his deep knowledge of human psychology when

\[542\text{ Supra note 510 at 20}\]
he probes into the state employees’ tendency for corruption, especially those in the revenue the finance departments. He knows that men are fickle, corruptible and unpredictable; therefore, he suggests preventive measures to keep employees on the path of honesty and loyalty to the king. And, to ensure the loyalty of government servants, he assigns a significant role to the bureau of espionage, for the bureau can instil in them the fear of detection and consequent punishment.

Kautilya prescribes techniques to ensure the integrity and loyalty of administrative services. The king is advised to be extremely generous to those officials who prove to be above temptation and ruthlessly severe to those who misuse powers, misappropriate funds or betray responsibilities. In the interest of efficient and good government, Kautilya does not want the king to be swayed by personal considerations of emotion and recommends that he should act without any mental reservation in the case of an erring official. As regards the administrative structure, Kautilya lays down an elaborate one, with well-defined duties and responsibilities qualities and qualifications, code of conduct, division of labour, supervision and control, checks and balances, promotions and demotions, scales and remunerations, hierarchy of officials, agencies and departments, and nomis of administration. The structure shows that Kautilya is fully aware of the practical problems of public administration and is alive to the needs of the people. He feels that such a well-knit and cohesive administrative structure as he gives is a precondition for the effective implementation of state policies.

According to Kautilya, the king cannot be an autocrat because, apart from the restraint of dharma on him, he suffers from human limitations like any other mortal. However accomplished and competent he is, it is physically impossible for him to assume all duties and rule by himself. He has to rely on his ministers and other government functionaries for administration.

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543 *Ibid*
544 *Supra* note 6, at 21.
545 *Ibid*
King enjoys supreme powers, he also holds himself responsible for the administration of the country. For satisfactory administration, Kautilya provides for a council to aid and advice the king\textsuperscript{546}.

This council is, in fact, split into two-one inner and one outer bodies. The former is informal in nature and is concerned with deliberation and formulation of policies, and the second is responsible for the implementation of policies. In the absence of a constitutional check on the king, a rigorous training of the crown-prince to develop his moral character and self-discipline is imperative. This is the only way to prevent the growth of propensities for despotism in him when he assumes the office of king a check from within is the best guarantee that he would remain benevolent\textsuperscript{547}.

4.1.1.5 Kings power belongs to people.

Limits to King's Power: The Contractual State The denial of any personal royal authority to the ruler is vividly brought out in several mantras in Yajurveda where the king is being consecrated by the people, it is stated in yajurveda\textsuperscript{548}:

\begin{quote}
In us may there br your power, in us your valour, your wisdom, in us be your mental splendour\textsuperscript{549}
\end{quote}

4.1.1.6 Medival Period and post medieval India, AD 500 to AD 1800.

4.1.1.6.1 Foundation of Mughal period

Shershah paid special attention to the administration of justice believing in the dictum that justice is the most sacred of all religious rites. He took personal interest in the dispensation of justice, held the court every Wednesday and dealt even handed justice, to government officials or private individuals. Akbar the great, reorganised the prevailing\textsuperscript{550}

4.1.1.6.2 Governance in Mughal Period

Poor governance, unfortunately, was one of the greatest weaknesses in the Mughal Empire's armory. The King appointed and promoted civil and military

\begin{flushleft}
\textsuperscript{546} Ibid.  \\
\textsuperscript{547} Ibid.  \\
\textsuperscript{548} Supra note 505 at 48.  \\
\textsuperscript{549} Ibid.  \\
\textsuperscript{550} Supra note 510.  
\end{flushleft}
officials based on references, introducing subjectivity and favouritism into the process.\textsuperscript{551}

Administrative graft was rampant in the bureaucracy, as bribes became a common and acceptable practice to get work done. The judicial system too was plagued by mal-practices, as the kazis (judges) accepted bribes and amassed large fortunes as a result. For example, the chief kazi during Aurangzeb’s reign amassed millions of rupees, jewellery, and other valuables. The level of misgovernance increased in spite of the practice of using spies and agents to gather intelligence and report these malpractices\textsuperscript{552}.

The Mughal era also saw religious tolerance being reduced as most of the rulers discriminated against practitioners of other religions. The Emperor Akbar, though, tried to propagate religious harmony through initiatives like abolishing the discriminatory taxes levied on Hindus and including non-Muslims in his group of advisors\textsuperscript{553}.

4.1.1.6.3 Instances of medieval period for state liability

Vicarious liability of the State during medieval period, e.g., in Widow v. King Ghyas, the King negligently hurt the son of a widow, who made a complaint against him in the court of the Kazi. The Kazi summoned the King and after hearing both the parties held the King guilty and asked him to pay damages. Again in Shiqahdar v. King, a police officer was personally held responsible for the arrest of a citizen in a wrongful manner and was asked to pay compensation to the victim. In another instance\textsuperscript{554} the State had to pay damages to the heirs of the deceased, when he was wrongly ordered to be hanged by the Governor Khan Jahan.

These stray examples, though do not lay down any specific rule or general principles of State liability, but do point out that the State was gradually moving

\textsuperscript{551} Ibid.
\textsuperscript{552} Ibid.
\textsuperscript{553} Ibid.
\textsuperscript{554} Supra note 511 at 132.
towards State responsibility. Although it cannot be denied that the subject's right depended on the sweet will of the King rather than on any rule of law.\(^{555}\)

**4.1.1.7 Colonial India—AD 1800 to AD 1947**

The British government, consequent to the Government of India Act 1858, assumed the task of directly administering India. A formal administrative and governance infrastructure was gradually established.\(^{556}\)

The blueprint of India's government and bureaucratic architecture was influenced by this British model of governance. A Legislative Council was responsible for enacting laws, while an Executive Council managed the government departments.\(^{557}\) The head of the administration (Governor—General or Viceroy) was assisted by the Legislative and the Executive Councils. For the first time, an organized system of justice was also created.\(^{558}\)

The foundation of a formal framework of accountability was also established during this era. The British set out policies to control the functioning of public officials and to curb misappropriation.\(^{559}\)

Another important development was the growing role of citizens and the media in demanding accountability from outside the government. A number of citizens’ movements were held to highlight unfair government practices and injustices.\(^{560}\)

**4.1.1.7.1 The East India Company**

The history of British authority in India may roughly be divided into three periods. “The first period, generally named as the trading period or the Charter period, ranged from 1600 to 1764; the second period usually called the double government period, range from 1765 to 1857 and the third period captioned as British Crown period begins from 1858 and lasts till 1946.\(^{561}\)

During the trading period, which begins with the charter of Elizabeth in 1600, the East India Company was primarily engaged in mercantile activities. The Company enjoyed mercantile privileges and important trading rights. For the

\(^{555}\) Ibid.
\(^{556}\) Supra note 510.
\(^{557}\) Ibid.
\(^{558}\) Ibid.
\(^{559}\) Ibid.
\(^{560}\) Ibid
\(^{561}\) Supra note 511 at 133.
purposes of their trade, they built various factories at Surat, Madras, Bombay and Calcutta. But “they have not yet assumed the responsibilities of territorial sovereignty.” This was the period of Charters\textsuperscript{562}.

During the second period of double government, i.e., the government by the Court of Directors and of the East India Company and by the Crown, the East India Company were territorial sovereign sharing their sovereignty in diminishing proportions with the Crown and gradually losing their mercantile privilege and functions\textsuperscript{563}.

During this period we find increasing interference and control by British Parliament through various enactments. It is marked by Acts of Parliament concurring with one exception at regular intervals of twenty years, i.e., North's Regulating Act of 1773, the exceptional Pitts Act of 1784, followed by Charter Acts of 1793, 1813, 1833, and 1853\textsuperscript{564}.

The third period begins with the Government of India Act, 1858, which declared that India was to be governed by and in the name of Her Majesty and transferred the remaining powers of the East India Company to the Crown. The change was announced in India by the Queen’s Proclamation of Nov. 1, 1858. The East India Company was dissolved formally in 1874\textsuperscript{565}.

There was also a darker side to the British Raj. Several provisions to curb transparency and public representation in government functioning were introduced. The Official Secrets Act 1923 was drafted to serve the interests of the colonial government and to control the flow of information on matters of public interest. This created a culture of secrecy and information hoarding. Another provision introduced by the British in 1926 was called Contempt of Court\textsuperscript{566}.

The courts were considered to be representatives of the monarch, so any disregard shown for a court order, interference with administration of justice or

\textsuperscript{562} Ibid.
\textsuperscript{563} Ibid.
\textsuperscript{564} Ibid.
\textsuperscript{565} Ibid.
\textsuperscript{566} Supra note 510.
insult to a court was a punishable offence. Citizens feared challenging the conduct of the Judiciary in case they invoked the contempt of court provision.  

4.1.1.8 Independent India—AD 1947 to AD 2010

As India took its first giant step towards freedom and democracy, the Constitution granted all citizens certain fundamental rights: equality, freedom of speech, and recourse to constitutional remedies for the enforcement of these rights.

In the early post-independence years, the government established governance institutions like the Central Vigilance Commission and the Central Bureau of Investigation. With the passage of time, several mechanisms like the Public Interest Litigation (1980), Lokayukta (1984), Prevention of Corruption Act (1988) and, more recently, the Right to Information Act (2005), were also introduced to enforce accountability and allow citizens to proactively participate in the process of governance.

The relative timing of the introduction of these accountability mechanisms broadly mirrors the pattern seen in developed democracies like the US and the UK. India was not unduly late in introducing most key accountability mechanisms.

4.2 Relevance of Ancient Governance in Present Scenario

According to Chanakya "The Kingdom should be enjoyed by all". The delegation of authority and span of control discussed in Maurya and Gupta period is what it is propounded today in business. Today's Management Principles focuses mainly on delegation of authority, responsibility and span of control as the main principles for better performance of duties. Discharge of duties according to professional and business ethics which is much talked about today can be traced back to Ancient period.

According to Arthashastra, the king should discharge his duties in the best manner keeping in mind his responsibilities and ethics and he should not do...
anything for his own welfare. This shows that he is bound by his duties and ethics which is driving force today to run the business effectively and efficiently\(^{572}\).

One important thing about good governance in Mauryan Empire was the appointment of spy's to monitor and control illegal activities and corruption in the administration\(^{573}\).

Governance module under the above periods can come as a big relief and can help in providing solutions to some of the problems faced today in governance. The key areas where we can use the ancient period governance in present day situation are\(^{574}\):

1. Learning on Leadership qualities and skills\(^{575}\)
2. Selection or right person for right job (Chanakya's Arthashastra gives lot of information on process of selection\(^{576}\))
3. Accountability and Delegation of Authorities\(^{577}\)
4. System of Spy and Intelligence agency to control corruption and monitoring of work\(^{578}\).
5. Social welfare ideas of king and his team which can be linked to present days Corporate Social Responsibility\(^{579}\)

Governance module is not new to our country. Our ancient literature like Vedas, Manu Smruthi, Somadeva neeti stuti, Baharspatya Neeti stuti, Arthashastra etc gives more information of the type of governance which existed during ancient period. Even though some of the areas which were suitable during those days like caste and class system are not relevant today, it is wrong to say that the entire ancient texts are irrelevant today. With some modification according to present day requirement one can definitely make use of what is said

\(^{572}\) Id., at 49.  
\(^{573}\) Ibid.  
\(^{574}\) Id., at 49-50.  
\(^{575}\) Ibid.  
\(^{576}\) Ibid.  
\(^{577}\) Ibid.  
\(^{578}\) Ibid.  
\(^{579}\) Ibid.
in our ancient text and can apply those things in the governance module\textsuperscript{580}. The principles were by no means egalitarian but they still represented an advanced approach to the theory of kingship by giving it a contractual responsibility. "The contract theory of the origin of the state."

RS. Sharma said:

[S]hould be regarded as an original contribution of ancient Indian thinkers to political thought.\textsuperscript{581}

4.2.1 Historical Background of Concept of Accountability at International Level

4.2.1.1 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 (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 Act, 1982, as well as the scrutiny provided by the officers scrutiny provided by 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 Opportunities Commission (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\textsuperscript{582}

\textsuperscript{580} Ibid.
\textsuperscript{581} Supra note 505 at 48.
\textsuperscript{582} Tony blackshield & George Williams, Australian constitutional law and theory (commentary and materials), 562-563 (2006).
4.2.1.2 **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 been 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 (1) as to whether the law has been made strictly in accordance with the provisions of the Constitution or not; and (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. The law is declared invalid if it fails to satisfy either of these two tests.

4.2.1.3 **Limitations on the Supreme Court in respect of Judicial Review**

1) The Court does not conduct judicial review over political issues.

2) While declaring a law unconstitutional the Court has to assign reasons and specify the provisions of the Constitution that it violates.

3) The Supreme Court conducts judicial review only in cases actually brought before it. It cannot initiate the process of its own.

4) The law declared invalid ceases to operate for the future. The work already done on its basis continues to be valid.

5) The Court has to demonstrate clearly the unconstitutionality of the law which is sought to be declared invalid\(^{583}\).

Stanley Pargellis observed that\(^{584}\)

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[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.

### 4.2.1.4 Mechanical system

The history of the concept of “checks and balances.” There is a marked contrast here with the idea of the separation of powers, whose history has been carefully and intelligently studied\(^{585}\)

Any study of the concept of checks and balances needs to include a wider family of words (such as “control”, “clog,” “counterpoise,” and “equilibrium”) which were often used to discuss the same or similar ideas. Here all these words take the idea that a political system can be usefully compared to a machine. This new mechanical world picture provided in its turn a series of metaphors for talking about political constitutions\(^{586}\).

### 4.2.1.5 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 must be members of parliament and therefore accountable to it.\(^{587}\)

In 1914 a short-lived review was founded to voice these points of view, *The Candid Quarterly Review*. Its first number contains some remarkable statements whose gist may probably be best gathered from an extract But the modern doctrine is that they have been somehow transferred from the King to the Minister; that they exist now only in the Minister. The Minister has become the King with all the Kingly attributes, the King has become the Minister with only the Ministerial duties\(^{588}\).

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\(^{585}\) *Id.*, at 211.

\(^{586}\) *Ibid.*

\(^{587}\) *Supra* note 539.

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.\textsuperscript{589}

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.”\textsuperscript{590}

The first significant attempt in the Anglo—Saxon legal tradition to bring the hand that holds the sword under the rule of law was of course the \textit{Magna Carta} that the disgruntled barons of England extracted from King John, under threat of military force, in the meadow at Runnymede in 1215. 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 \textit{Magna Carta} is astonishing—a bizarre amalgam of a Hobbesian state of nature and an administrative procedure act.\textsuperscript{591}

Once the King had relented and provided redress for his violation of \textit{Magna Carta}, the barons were required “to resume their old relations" as the King’s loyal vassals.\textsuperscript{592}

Thus, for all that we justly celebrate \textit{Magna Carta} as the well-spring of the rule of law, its carefully wrought mechanism for legally restraining abuse of royal power was nothing more than institutionalized civil war. Nothing could more strikingly illustrate the theoretical and practical difficulty of reining in the power of him who reigns.\textsuperscript{593}

\textsuperscript{589} Id., at 24-25.
\textsuperscript{591} Ibid.
\textsuperscript{592} Id., at 631.
\textsuperscript{593} Ibid.
The challenge of accommodating a vigorous executive power within the framework of the rule of law remains formidable even eight centuries later. Consequently, whether it is seen as ‘imperial or simply magisterial – or as “close to the people” as ambition and the media can make it – the American Presidency will never be easy to locate within our constitutional framework. Although the most recent major collisions between the Chief Executive.594

To be reminded that it was not meant to be so that the Framers mindful of the excesses of the English crown, envisioned a vastly mom, modest chief magistrate-is only to recall that, had the design been rigid and incapable of adaptation beyond the Framers’ necessarily time-bound vision, the nation could not have endured and indeed prevailed through two centuries of turmoil. As the Supreme Court and Congress are preeminent in constitutional theory, so the President is preeminent in constitutional fact.595

4.2.1.6 Position in the United States.
The Bill of Rights itself had since 1833 been held inapplicable to the states and their subdivisions, and the Supreme Court in the rendered the Fourteenth Amendment’s Privileges or Immunities Clause essentially meaningless and suggested that the Equal Protection Clause would have little applicability outside the context of racial discrimination. Thus, 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.”596

The principal obstacle to interpreting the Due Process Clauses in the manner required to make the Fourteenth Amendment’s Due process clauses in the manner required to make the fourteenth Amendments Due Process Clause a vehicle. 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

594 Ibid.
595 Ibid.
596 Id., at 1332.
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 maker.\textsuperscript{597}

\subsection*{4.2.1.7 Doctrine of due process}

Modern critics of substantive due process—concerned not simply with the contractual liberty cases of Model II, but also with more recent reliance on substantive due process to protect other types of individual liberties—have taken to task the very concept of using the Due Process Clause as a basis for reviewing the substance of legislation. 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. Substantive due process is a contradiction in terms—sort of like ‘green pastel redness.’\textsuperscript{598}

By 1885, in any event, the Supreme Court was treating as implicit in the due process clause of the 5\textsuperscript{th} amendment the requirement that, to qualify “law”, an enactment would have to meet substantive requirements of rationality, non-oppressiveness and even ended ness.

In Murray’s lessee. Hoboken lend and improvement co., the court 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.\textsuperscript{599}

And when the court, in dred Scott we. Stand for, treated the fit amendment’s due process clause as imposing substantive limits on congressional legislation, even if the court was departing from the understanding of 1791, it was building on a considerable body of judicial and other Writing that treated the requirement of due process of law as mandating not only fair procedure in the application of legal rules, but also acceptable substance in their content.

\textsuperscript{597} Ibid
\textsuperscript{598} Id., at 1333.
\textsuperscript{599} Ibid.
Certainly, the Fourteenth Amendment’s overruling of the most infamous aspects of Dred Scott—principally, its holding that slaves, former slaves, and their descendants could not be citizens for federal purposes—need not be seen as a rejection of Dred Scott’s more innocuous premise that not every formally proper legislative enactment meets the constitutional definition of “law.”

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\textsuperscript{600}:

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 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{601}.

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 organised 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{602}.

First, the system of rights that citizens have mutually accorded one another can be interpreted and developed only through laws\textsuperscript{603}.

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

\textsuperscript{600} Id., at 1334.
\textsuperscript{601} Ibid.
\textsuperscript{602} Sarbani Sen, \textit{The constitution of India}, 10-11 (2011).
\textsuperscript{603} Ibid.
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. 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. 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 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.604

4.2.1.8 Judiciary and Accountability
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 office605.

New York, among the most significant of the original thirteen states, was prominent on the question of judicial independence. This essay explores the constitutional development of the judicial branch in New York and assesses the influence of New York's judiciary on the federal constitution that followed? As will be seen, New York provides a vivid case study of a state "groping" toward a new ideal that became a reality a decade after its own constitution was enacted in 1777 and at a different level of government606

604 Id., at 11.
606 Ibid..
4.2.1.9 Charter of Freedoms and Exemptions of 1629

The assembly of XIX issued a Charter of Freedoms and Exemptions on June 7, 1629, to speed the settlement of New Netherland. This charter awarded special privileges and powers to “patroons” (rough translation: patrons or participants) willing to relocate there. (The plan resembled that of the English commercial colonizers.) Any patroon who brought to New Netherland during a four-year period fifty or more adults was given a twenty-five kilometer riverfront plot, exclusive hunting and fishing privileges within his estate, and judicial and administrative authority over it (subject, of course, to review by the Dutch government and the company).

The charter mentioned "Courts of the patroons," but historians have concluded that it is doubtful they took the form of feudal courts baron and leet (manorial courts that date from the early Middle Ages). Instead, disputes between a patroon and persons living on his estate were likely resolved by the previously described courts. Moreover, only one of the patroonships, that of the Van Rensselaers, was successful.

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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607 Ibid.
608 Ibid.
609 Ibid.
610 Id., at 183.
4.2.1.10 Position in the United Kingdom

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.  

4.2.1.11 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

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611 Id., at 188.
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 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{613}

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 \textit{vox populi}.\textsuperscript{614}

There has also been an almost deliberate fudging of the issue of who holds
the Supreme legislative power. It is not held strictly by the people’s
representatives in the commons, as expressed by Henry Parker in the 1640s.
Rather, it rests in the king, lords, and commons representing the three estates and
acting as the crown-in-parliament.\textsuperscript{615}

The basic adjustment is signaled by Sir William Blackstone, the first
lawyer to elaborate the basic precepts of British constitutional law and from
whose authority the modern treatment of the subject flows. Blackstone’s
Commentaries on the \textit{Law of England} is an institutional work that claimed that
the common law was uniquely English, that it formed a system of national law,
and was superior to all other systems of law (notably canon law and civil law). At
the heart of Blackstone’s scheme was a doctrine of parliamentary sovereignty
that was unitary, absolute and based on divine authority. In place of the earlier
Whig constitutional rhetoric of checks and balances.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{613} Ibid
\item \textsuperscript{614} Ibid
\item \textsuperscript{615} \textit{Id.}, at 43.
\end{itemize}
\end{footnotesize}
C.D. Clark argues that:

[Blackstone candidly emphasized sovereignty, the unity of King, Lords and Commons in parliament’. By conceiving law to be a species of command rather than custom, Blackstone was able to cut off any appeal to the ‘Fundamental liberties of the freeborn Englishman within the discourse of the ancient constitution’616.

Having apparently recognized that the convention came into being because of the dissolution of government, Blackstone-ostensibly choosing to consider this great political measure, upon the footing of authority, than to reason in its favour from its justice, reason and moderation’ then explains that the convention actually found no dissolution, and simply filled a vacancy617.

He thus manages to retain intact the tripartite scheme of sovereign authority, to maintain that the edicts of the sovereign are omnipotent and may not be questioned, to defend the revolution as one which restored the checks of the ancient constitution arrangements and, having fulfilled his duty as ‘an expounder of this constitution’, to assert ‘the duty of every good Englishman to understand, to revere, to defend it’618.

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.

As a consequence, all the most basic constitutional ideas—such as sovereignty (does it vest in the commons, or in the crown- in-parliament), the people (do they speak through their local communities, or the several nations, or is this purely as an abstraction), or rights (are these a set of fundamental’ claims...
or simply concessions conferred by law) - has remained in a state of irresolution. 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--was thus bequeathed mainly to their American compatriots during the course of the following century.\footnote{Id., at 48}

4.3 **Evolution of new view of law**

That the establishment of an ordered administration and the rule of law by the British was an important advance in the development of the Indian political system was a profound belief of the Moderates which they were not willing to endanger by resorting to revolutionary activities. With the location of political authority in the people, the Extremists developed an entirely new view of law and the people’s right to exercise direct political authority.\footnote{Id., at 59.}

[T]he law and the constitution were not the same.... So long as a particular law was not in conformity with justice and morality...it might be legal but it was not constitutional.’ A just or moral law had to have its basis in popular authority and would have a binding force which cannot be ignored except under extreme necessity. But a law imposed from outside has no such moral sanction; its claim to obedience must rest on coercive force. It may become a duty to disobey it and endure the punishment which the law has provided for its violation. ‘…if laws should be passed with the object of...check our self-development or unduly Lmiting our rights as men, we must be prepared to break the law and endure the penalty imposed...with the object of making it unworkable.\footnote{Ibid.}

To the lok sabha, kumara Mangalam explained:

[W]e will take the forward-looking judge and not the backward-looking judge.’ He enumerated his five criteria for the selection of the Chief Justice in a democracy. He rejected as requirements both seniority and

\footnote{Id., at 48} \footnote{Id., at 59.} \footnote{Ibid.}
‘innocence of political views and conviction’ he favoured discretionary appointment of the person the government found most suitable an individual who should have knowledge of the larger things that move the minds and passions of millions and who would give the Court its most important attribute: certainty and stability in relation to the major and vital questions of law.

Many would ask if A. N. Ray met these criteria. When the Law Minister spoke, he explained that the supersession was not intended to affect the independence of the judiciary. To say that judges ‘have to have a special social philosophy’ is nothing new.

The government also supported its case by referring to the Law Commission’s Fourteenth report. This, it may be recalled from chapter 5, recommended that the appointment of the Chief Justice of India ‘should not be made merely on the basis of seniority’ but must be the ‘most suitable person’ from the court, the bar, or the high courts. Again, others would ask if the Justice Ray met the law commission’s requirements.622

4.3.1 Rule of Law as Grundnorm for accountability

The concept of Rule of Law has had an abiding impact on the evolution of Administrative law in the common-Law world. Dicey expounded the concept of Rule of Law in relation to the British Constitutional Law. “Rule of Law”, said Dicey in 1885, means “the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes then existence of arbitrariness of prerogative, or even wide discretionary authority on the part of the government.

Dicey claimed that the Englishmen were ruled by law and law alone; he denied that in Britain the Government was based on exercise by persons in authority of wide, arbitrary or discretionary powers. While in many countries the executive exercised wide discretionary power and authority, it was not so in

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Britain. Dicey asserted that wherever there was discretion there was room for arbitrariness which led to insecurity of legal freedom of the citizens.\(^{623}\)

Another significance which Dicey attributed to the concept of Rule of Law was “equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts.\(^{624}\)

In Britain, he maintained, no man was above law; every person whatever be his rank or condition, was subject to ordinary law and amenable to the jurisdiction of the ordinary courts. Dicey vehemently criticised the system of *droit administratif* prevailing in France where there were separate administrative tribunals for deciding cases between the Government and the citizens, and the officials, in their official capacity, were protected from the ordinary law of the land and from the jurisdiction of the ordinary courts, and were subject to official law administered by official bodies. He went on to assert that in Britain there was no Administrative Law.\(^{625}\)

This thesis of Dicey has had a tremendous impact on the growth of Administrative Law in Britain where people were not ready till very recently to accept that anything like Administrative Law had come into being there. He said that even in 1885, Dicey’s was factually wrong in his analysis of the position in England as he ignored the privileges and immunities enjoyed by the Crown (and, thus, the whole government) under the cover of the constitutional maxim that the king can do no wrong, and also ignored the many statutes which conferred discretionary powers on the executive which could not be called into question in ordinary courts. He also ignored the growth of administrative tribunals, quite a few of which had come into existence by 1885. Also, he misunderstood and miscomprehended the real nature of the French *Droit Administratif*.\(^{626}\)

Dicey was wrong in asserting that England had no Administrative Law. It is interesting to note that while Dicey was denying the existence of Administrative Law in Britain, his more perspective contemporary. Maitland, was

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\(^{624}\) *Id.*, at 19.
\(^{625}\) *Ibid*.
already emphasizing at that very time that administrative law had emerged in England. But even then, Dicey asserted, that so long as the courts dealt with a breach of law by an official, there could be no droit administratif Britain and the rule of law would be preserved.

Dicey’s concept of Rule of Law has had its advantages and disadvantages. Although, complete absence of discretionary powers, or absence of inequality are not possible in this administrative age, yet the concept of the rule of law has been used to spell out many propositions and deductions to restrain an undue increase in administrative powers and to create controls over it. The rule of law has given to the countries following the common law system, a philosophy to curb the government’s power and to keep it within bounds: it has provided a sort of touchstone or standard to judge and test Administrative Law prevailing in the country at a given time627.

Traditionally, rule of law denotes absence of arbitrary powers, and therefore. One can denounce the increase of arbitrary or discretionary powers of the Administration and advocate controlling it through procedures and other means628.

Similarly, Rule of law is also associated with the supremacy of courts. Therefore, in the ultimate analysis, courts should have the power to control administrative action and any overt diminution of that power is to be criticised. Judicial control of administrative action is the pivot of Administrative Law in Britain even to-day629.

The principle implicit in the rule of law that the executive must act under the law and not by its own decree is still a cardinal principle of the common law System630. All democratic countries of today. It also serves as the basis of judicial review of administrative action for the judiciary sees to it that the executive keeps' itself within the limits of law and does not overstep the same. But there has been a

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627 Supra note 623 at 20.
628 Ibid.
629 Ibid.
630 Ibid.
negative side of the concept of rule of law as well. For long Dicey's thesis generated a sense of complacency in the British people so that they failed to see the emergence of Administrative Law as such till they were widely shaken by some powerful voices. The result of this has been that Administrative Law as a subject of study came on the scene quite late in the day. A grave defect in Dicey’s analysis is his insistence on the absence not only of “arbitrary” but even of “wide discretionary powers. The needs of the modern Government make wide discretionary power inescapable. Perhaps the greatest defect of the concept has been its misplaced trust in the efficacy of judicial control as a panacea for all evils and somewhat irrational attitude generated towards the French system.\(^{631}\)

People still believe that so long as courts are there they can control the Administration in all its actions. As the later discussion will show, this is not a correct assessment of the situation. Faith in the courts has stood in the way of adopting other more efficacious means of controlling the Administration outside the judiciary.\(^{632}\)

On the whole, therefore, one can say that while, on the one hand the concept of rule of law helped in safeguarding and preserving traditions of basic freedoms of the people and the independence of the judiciary.\(^{633}\)

On the other hand, it generated an irrational mental attitude insofar as people did not want to face the realities of the situation and find correctives to the problems in the area of Administrative Law if that involved an overt departure from the Dicean tradition. The result of this has been that the Administrative Law did not develop into a neat and satisfactory system in the common law countries. But this phase has now passed out and efforts are being made to improve the system.\(^{634}\)

### 4.3.1.2 Developments in Britain

This Act has been characterised as purporting to enact a “comprehensive procedural code for the making of subordinate legislation.” It formulates rules for

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\(^{631}\) Ibid.

\(^{632}\) Ibid.

\(^{633}\) Ibid.

\(^{634}\) Ibid.
publication obi; statutory instruments and also regulates the laying procedure before Parliament\textsuperscript{635}.

In 1947, Parliament enacted the Crown proceedings Act to liberalize the law relating to civil proceedings against the Crown. The report of the Donoughmore Committee represents the first attempt made in Britain at systematisation of Administrative Law. After a careful study of the French system, many scholars have that there the executive is controlled much more effectively than in Britain and that a better safeguard against the excesses of the Administration can be found in adopting some kind of an administrative court on the lines of the French model. In this respect two proposals were placed before the Franks Committee\textsuperscript{636}:

(I) Establishment of a general administrative appeal tribunal to hear appeals from tribunals and quasi-judicial bodies as well as against harsh or unfair administrative decisions\textsuperscript{637}.

(II) Establishment of a new division of the High Court called the Administrative Division to have general appellate jurisdiction\textsuperscript{638}.

The Franks Committee rejected both these proposals. The committee concluded that in general the appropriate appeal structure is a general appeal from a tribunal of first instance to an appellate tribunal followed by an appeal to the courts on points of law. The Report issued by Justice in 1961 suggested the setting up of a general administrative tribunal to hear appeals on merits from such discretionary decisions for which no appeal existed.\textsuperscript{639}

Till 1958 the areas of delegated legislation and administrative adjudication had been investigated and some reforms introduced therein but the area of the other administrative powers had not been touched so far. This task was performed by Justice the English wing of the International Commission of Jurists which published a report in 1961 suggesting the appointment of an Ombudsman in Britain. In 1967, Britain adopted the Ombudsman system as it was felt that the

\textsuperscript{635} M P Jain & S N Jain, Principles of Administrative Law, 16(2007)
\textsuperscript{636} Id., 17.
\textsuperscript{637} Ibid.
\textsuperscript{638} Ibid.
\textsuperscript{639} Ibid.
judicial control of administrative powers was not adequate and that it needed to be supplemented by other institutional arrangements. Again, Justice released in 1971 suggested the setting tip of an administrative division in the High Court.\textsuperscript{640}

Even with these developments the feeling persists that the development of Administrative Law in Britain has been piecemeal and unsystematic and that there is need to reform the law further. It is felt that Britain needs a comprehensive and coherent system of Administrative Law.\textsuperscript{641}

\textbf{4.3.1.3 Position in New Zealand}

A number of steps have been taken to reform Administrative Law in New Zealand, a country with the common law system. A number of procedural and institutional improvements have been made. New Zealand is the first common law country to have adopted the Scandinavian system of ombudsman as early as 1962 and this has had tremendous impact in other common law countries in making the institution acceptable.\textsuperscript{642}

Another significant innovation has been to institute an administrative division in the Supreme Court to deal with the problems of Administrative Law. It is hoped that the judges assigned to this Division will in course of time mature into experts in Administrative Law. If problems pertaining to Administrative Law are dealt ‘with by the same judges over and over again they will develop an expertise and specialisation to effectively deal with problems of Administrative Law.\textsuperscript{643}

New Zealand opted for this innovation in spite of the fact that it had been rejected by the Franks Committee in Britain. This Division now hears appeals from a large number of tribunals in law, fact and discretion and is able to bring greater consistency coherence and authority” in administrative decisions.\textsuperscript{644}

\begin{itemize}
\item \textsuperscript{640} \textit{Ibid}
\item \textsuperscript{641} \textit{Ibid.}
\item \textsuperscript{642} \textit{Id.}, at 19.
\item \textsuperscript{643} \textit{Ibid.}
\item \textsuperscript{644} \textit{Ibid.}
\end{itemize}
Many other reforms are on the anvil. New Zealand has a counterpart of the Council on Tribunals in the Public and Administrative Reform Committee which suggest reforms in Administrative Law from time to time.\textsuperscript{645}

4.3.1.4 Problems Relating to the Rules Made by the Administration\textsuperscript{646}

The first problem presented by the existence of such rules is that their promulgation by the Executive, together with the relevant interest group, may by pass the legislature and foreclose the possibility of parliamentary scrutiny. As Stewart states:\textsuperscript{647}

\begin{quote}
[T]he ultimate problem is to control and validate the exercise of essentially legislative powers that do not enjoy the formal legitimation of one-person one-vote election.\textsuperscript{648}
\end{quote}

A second problem follows from the first, in that particular pressure groups may exercise excessive influence over the rules that emerge. The ability of the public more generally to have some input into the proposed rule may be absent, or vary in degree from area to area.\textsuperscript{649}

A third cause for concern centres upon the rule of law in the following sense. Many of the rules under consideration are unpublished or not readily accessible. The intended and actual legal status of others is unclear. Yet other rules fit poorly with the relevant parent legislation and appear to countenance action inconsistent with the enabling statute.\textsuperscript{650}

Finally, such rules have been used on issues of considerable political contention, thereby rendering the law “most vague at the points where it should be most clear”.\textsuperscript{651}

4.3.1.5 Legislative Specification of Standards

Parliament in its initial grant of authority could specify the standards it wishes the public body to apply. It could, alternatively, empower the relevant Minister to

\begin{footnotes}
\item\textsuperscript{645} Ibid.
\item\textsuperscript{646} P.P Craig, Administrative Law 400(2003).
\item\textsuperscript{647} Ibid
\item\textsuperscript{648} Ibid
\item\textsuperscript{649} Ibid
\item\textsuperscript{650} Ibid
\item\textsuperscript{651} Ibid
\end{footnotes}
supply guidelines or directions to the body in the course of its operations. This is a device that has been used in relation to nationalized industries and other agencies. There is no doubt that it could be used to a greater extent and more effectively than at present.

Legislative specification of standards may, however, be of limited utility for novel problems where the precise interests to be weighed are unclear at the outset. This problem can be partially circumvented by granting power to the Minister to give directions after consultation with the public body. This is in itself constrained by the type of public institution in question. If it is one which warrants a high degree of autonomy from party political pressures then ministerial directives will be inappropriate.  

4.3.1.6 Judicial Control vis-à-vis Constitutional Rights

There is clearly an overlap between judicial control and Constitutional rights, since it is the judiciary who will interpret or develop such rights. However, the judiciary have a role to play in this area independent of the issue of consultation. The role of the courts can be presented as follows.  

First, the court will decide whether the code or circular is susceptible to judicial review at all. For example, in the *Gillick case* Lord Bridge stated that the general rule was that the reasonableness of advice contained in non-statutory guidance could not be subject to judicial review, but that there was an exception to this general rule. If a government department promulgated advice in a public document that was erroneous in law the court could correct this. Secondly, in so far as codes, circulars, etc., are given certain evidentiary or substantive force within legal proceedings, it is the judiciary who will interpret the meaning they should bear. They will also review the interpretation of such a code where it has been applied by an administrative agency.” The intensity of any

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652 Id., at 401.
653 Ibid
654 *Gillick v. West Norfolk and Wisbech Area Health Authority* [1986]A.C. 112
655 Id., at 404
such review may vary from area to area, and courts may disagree upon the appropriate intensity of review within a particular area\(^656\).

Thirdly, the existence of an agency rule will generate an obligation of consistency in relation to the application of the rule, and may lead to enforceable legitimate expectations\(^657\).

Finally, the courts can apply the tests of purpose, relevancy, reasonableness and fettering of discretion to determine whether a particular rule, etc., is within the ambit of the relevant empowering legislation, or whether undue weight had been given to one circular and another had been ignored. These tests are normally applied to the individual exercise of discretionary decision making. It is, however, clear on principle that agency choices should not be immune from such oversight merely because they assume the form of a rule. The courts’ willingness to invalidate a particular rule on the grounds of, for example, unreasonableness may well differ from area to area. It appears that the courts are more willing to consider this where the rule is made in the context of a relatively clear statutory framework, against which its \textit{vires} and reasonableness can be judged. Where this is so the court will pronounce upon the legality of the rule, even if it is non-statutory\(^658\).

4.3.1.7 Concept of Quasi-legislation

Quasi-legislation has been present for a considerable time. The term was already current in the nineteenth century, and concern over its existence was expressed over 50 years ago. Renewed interest in the topic is timely and reflects the importance of the issue addressed. No single, simple solution is likely to be forthcoming. There is a range of options, none of which is free from difficulty. At the very least quasi-legislation should be published and rendered accessible to those affected by it\(^659\).

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\(^656\) \textit{Ibid}
\(^657\) \textit{Ibid}
\(^658\) \textit{Id.}, at 405
\(^659\) \textit{Ibid.}
In *Government of Andhara Pradesh v. P. Laxmi Devi*\(^{660}\) the Supreme Court observed that there is always likelihood of abuse of discretionary power conferred under statute, reiterated, does not render the statutory provision unconstitutional. There is always a difference between a statute and the action taken under a statute. The statute may be valid and constitutional, but the action taken under it may not be valid. On the other hand, democracy is not hurt but strengthened whenever courts protected the individual freedoms which alone make the democratic process meaningful and valid. For the substance of decisions to be truly democratic, the process by which they are reached must give as much free play as possible for the transmutation of present minorities into future majorities by the unencumbered operation of freedom of thought, communication, and discussion. Free speech may best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, even stirs people to anger\(^{661}\).

In *Terminiello v. Chicago*\(^{662}\), from this point of view, reasonably equal access to the political processes and reasonably uninhibited freedom to argue and discuss (limited only by imminently impending danger to the State itself) is in fact an integral part of, although antecedent to, the formal legislative processes of democracy. Hence to uphold the restrictions on freedom of thought and communication and access to the political processes which may be placed in effect by a temporary majority would be actually to reduce the integrity of the processes of transforming that transient majority into a minority—a process essential to the very concept of democracy. Justices who tended to uphold wide legislative control over business were often the very same men who tended to invalidate wide legislative control over discussion. These Justices know that statutes, to be sound and effective, must be preceded by abundant printed and oral controversy. Discussion is really legislation in the soft. Drastic restrictions on free discussion are similar to rigid constitutional limits on law-making\(^{663}\).

\(^{660}\) (2008) 4 SCC 720.

\(^{661}\) Id., at 722.

\(^{662}\) 93 L Ed II:31 : 337 US l ( 1949)

4.4 Courts power to declare an Act of the legislature to be invalid 664

Theoretical reasoning for this view can be derived from the theory in jurisprudence of the eminent Jurist Kelsen (The Pure Theory of Law).

According to Kelsen:

[I]n every country there is a hierarchy of legal norms, headed by what he calls as the “grundnorm” (the basic norm).

If a legal norm in a higher layer of this hierarchy conflicts with a legal norm in a lower layer the former will prevail.

In India the grundnorm is the Indian Constitution, and the hierarchy as follows 665:

(I) The Constitution of India 666;

(ii) Statutory law, which maybe either law made by parliament or by the State Legislature 667;

(iii) Delegated legislation, which may be in the form of rules made under the statute, regulations made under the statute, etc 668.

(iv) Purely executive orders not made under any statute.

If a law (norm) in a higher layer in the above hierarchy clashes with a law in a lower layer, the former will prevail. Hence a constitutional provision will prevail over all other laws, whether in a statute or in delegated legislation or in an executive order.

The Constitution is the highest law of the land, and no law which is in conflict with it can survive. Since the law made by the legislature is in the second layer of the hierarchy, obviously it will be invalid if it is in conflict with a provision in the Constitution (except the directive principles which, by Article 37, have been expressly made non-enforceable) 669.

664 Id., 737
665 Id., 738
666 Ibid.
667 Ibid
668 Ibid
669 Ibid
4.5 Conclusion

On this researcher, accountability mechanisms and institutions have strengthened the capacity of citizens to register complaints and seek accountability for the conduct and performance of public officials.\textsuperscript{670}

In practice, a lot more work is required. A large number of Civil Society Organizations (CSOs) have also emerged in India, in the interests of the common good.\textsuperscript{671}

They include organizations like NGOs, community groups, professional associations, parts of the media and Academia.

More recently, citizens, CSOs and the media have played a catalyzing role in increasing accountability in India by exposing acts of the corrupt and advocating more transparent policies in the interests of society.\textsuperscript{672}

This brief study of the evolution of accountability in India partly explains the origin of our angst with the present. We are now better prepared to embark on the next phase of our Journey to witness the current deficit in accountability.\textsuperscript{673}

\textsuperscript{670} Ibid.
\textsuperscript{671} Supra note 510.
\textsuperscript{672} Ibid.
\textsuperscript{673} Ibid.