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## PARLIAMENTARY OVERSIGHT IN NEPAL: THE SCIENCE OF LEGISLATION (THE RIGHT OF CHILDREN - A CASE IN POINT)

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# PARLIAMENTARY OVERSIGHT IN NEPAL: THE SCIENCE OF LEGISLATION (THE RIGHTS OF CHILDREN—A CASE IN POINT)

- Surendra Bhandari<sup>1</sup>

Article 2 of the CRC: (1). States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. (2). States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

## ***Abstract***

This paper is divided into five sections. It examines parliamentary oversight as one of the key democratic functions. Parliamentary oversight and judicial review are two key counter-hegemonic tools in the hands of public institutions that make the state/government responsible and accountable to the rule of law. For any democratic state, bringing and managing power within the framework of the rule of law has consistently been a daunting challenge and the mission. This paper examines factors that have posed limitations on the successful accomplishment of parliamentary oversight and also discusses on the solutions. Sections 1 and 2 describe the problematic aspects; whereas, sections 3 and 4 offer solutions. Section 5 concludes the paper with summarizing its main arguments.

## **1. Parliamentary Oversight in Nepal**

Parliamentary committees are key to institutionalize democracy. They can play important roles in realizing the idea of constitutional supremacy, ensuring a limited government, making effective and efficient laws, and empowering the people, among others. Theoretically, every parliament through parliamentary oversight engages in these activities. However, the point is: what ensures the success of parliamentary oversight? In other words, what can impel the parliamentary oversight escaping

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from and rising above the typical conventionalism and be the spot-on forum for core democratic functions? In this short paper, answers to these theoretical questions will be sought based on the Nepalese experience of parliamentary oversight.

The Nepalese parliament (legislative parliament) through its Legislative Committee, 11 different Subject-matter Committees, and Special Committee on Parliamentary Hearing (Hearing Committee) exercises authority over the executive body in making the government responsible for the effective implementation of the laws enacted by the parliament. With all distinctions, a parliamentary oversight requires the government for respecting the constitution and implementing the laws, devising good laws and formulating effective policies and programs compatible with the constitution and laws, maintaining financial and operational integrity of all branches of government and actors, and submitting performance reports annually or periodically. Besides these four requirements related to parliamentary oversight, the parliamentary committees, if needed, also give instructions or advice to the government in fulfilling its responsibilities, and ensuring effective and good governance. Against this background, this paper underscores parliamentary oversight into three realms: enacting good laws, making sure that the best persons are placed to the right official position, and ensuring that the executive body is responsible and accountable to the parliament.

In the post-1990 democratic era of Nepal, parliamentary oversight has been institutionalized as one of the core democratic functions of the state. Understandably, we don't have a long history of parliamentary oversight and we are in the phase of learning. Nevertheless, the social expectations are exceedingly high that do not allow much time for us to take the learning phase for granted. At the same time, dissatisfactions and critical outlook toward the functions of parliamentary oversight have already been widespread. Any inability in removing the dissatisfactions will gradually relegate its spirit. Moreover, it has consistently persisted the heavy demands of political allegiances. Despite the elevated theoretical significance the practice has been episodically depreciated. Also, much cannot be derived based on scientific data, since hardly any scientific research has been carried out on the issues of parliamentary oversight in Nepal. Despite its immense significance, parliamentary oversight has often been neglected by almost all sections of society.

### ***1.1 The Parliamentary Committees***

The parliament has formed a Legislative Committee<sup>2</sup> 11 Subject-matter Committees<sup>3</sup> and Parliamentary Hearing Special Committee.<sup>4</sup> Each of these committees has important role to play. The Hearing Committee administers hearing of all those persons recommended for the Supreme Court judges, the nominees for the office of different constitutional bodies, and the nominee ambassadors. Typically, the Hearing Committee's operating modality is guided by a negative voting system, i.e., unless a nominee is rejected by two-thirds votes of the total members of the committee, the recommended nominee is considered being approved by the Hearing Committee.<sup>5</sup> With this

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2. See Rule 109 of the Legislative-Parliament of the Constituent Assembly Rules, 2013.

3. *Id.* Rule 110.

4. *Id.* Rule 118.

5. *Id.* Rule 119.5.

negative voting system in place, hardly any person has ever been rejected from the parliamentary hearing process.

Moreover, the Hearing Committee does not have any specific procedure or methodology on administering the hearing systematically and effectively. To put it more clearly—what evidence should it collect, how should it collect the evidence, how should it process the evidence, what questions should it ask, what formality and propriety should it maintain, and whether and how the hearing reports be produced—are all important issues but not specified in the Parliamentary Rules and thus not clear for the public. The Nepalese experience, especially in the post-2006 period demonstrates that when the nominees are decided on the grounds of vested political interests and party's quota or allocation, the parliamentary hearing often turns out to be a mere formality. The main purpose of parliamentary hearing therefore gets abrogated and deflected from its main purpose of democratic checks and balances. When the whole country is run on the political quota system, the quest for system building gets bitterly defeated. In this context, not only the system of parliamentary hearing has been victim of this excessive politicization of the country, but also the Legislative Committee and Subject-matter Committees have fallen prey to this intolerantly rising anti-democratic political culture. When fairness is undermined, justice is denied, and the rule of law is relegated, the parliamentary oversight has a role to play, but due to the stronghold political allegiances and pervasive whip system, it has been intensely handicapped. John Rawls argues that when decisions are taken on personal or group interests, it starkly dismisses fairness.<sup>6</sup> Democracy without fairness is indeed a farce and less distinctive from illiberal or authoritarian practices, which we suffer today. That is why Karl Popper named such habits as dangerous prophecies that deny human reason and allow the enemies of democracy come from within.<sup>7</sup>

The Legislative Committee is one of the most important committees empowered with the main function of detailed discussion and submission of a report on Bills tabled before the parliament.<sup>8</sup> With this function, the Legislative Committee can play a profoundly important role in ensuring good laws. However, in the name of good laws, the Legislative Committee cannot undermine or ignore the constitutional premise. In this context, the footprints of constitution making process and the provisions of the constitution not only shape the operational modality of the Legislative Committee, but also determine its authority. For example, the Legislative Committee cannot authorize a mother to pass down citizenship to her children independently of the status of her husband if the Constitution denies the same right to a mother. Against this background, to examine the parliamentary oversight alone would be incomplete without putting into perspectives the constitution making process and the constitution.

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6. See JOHN RAWLS, A THEORY OF JUSTICE 42 (Harvard University Press, 1999). Rawls writes, “. . . All these judgments are likely to be erroneous or to be influenced by an excessive attention to our own interests. Considered judgments are simply those rendered under conditions favorable to the exercise of the sense of justice, and therefore in circumstances where the more common excuses and explanations for making a mistake do not obtain. The person making the judgment is presumed, then, to have the ability, the opportunity, and the desire to reach a correct decision (or at least, not the desire not to). Moreover, the criteria that identify these judgments are not arbitrary.”

7. See KARL POPPER, THE OPEN SOCIETY AND ITS ENEMIES, Kindle Location 88 (Routledge, 2011).

8. See Rule 109.3 of the Legislative-Parliament of the Constituent Assembly Rules, 2013.

The Hearing Committee can make sure that the best person is placed in the right position. The Legislative Committee can ensure that good laws have been enacted. Similarly, the Subject-matter Committees can make the government responsible and accountable to the parliament and instruct the government on the evaluation and monitoring of the acts of the government. With these three activities of enacting good laws, making government responsible and accountable, and placing the best person in the right position, the parliamentary oversight accomplishes one of the key democratic functions or the counter-hegemonic role.

The state of pandemic corruption, the scale of politics being a lucrative business, the tendency of monopolizing state apparatuses and offices in the name of political quotas, the abuses of political power against the backdrop of party position, recruitment of political loyalists in all organs of the state, and the prevalence of discriminatory and derogatory laws and policies are only a few examples that demonstrate how ineffective and inefficient is parliamentary oversight in Nepal. The questions are: why is it so? How could it be effective in serving the core democratic or counter-hegemonic functions?

### ***1.2 The Issues and Analytical Tools***

Time and again, the members of the parliamentary committees have failed to accomplish their function independently of the interests and instructions of their political leaders. At the same time, they have also been tempted by the power and position in the government. The nexus of interests, instructions, and temptation has relegated the possibility of the key democratic functions expected from the parliamentary oversight. The post-2006 Nepalese experience shows that the problem gets rather worst when there is a hung parliament, the country is in transition, and power sharing becomes the game of national consensus.

Among others, this paper presupposes following cognitive limitations as serious obstacles to the successful application of the methodology of WG and the rules based proposition that are critical for championing the cause of parliamentary oversight in Nepal. They are: (Note: The following points will be developed with the feedback from the program)

- Erosion in Democratic Practices
- A Skinny Distance between the Parliament, Representation, and Political Parties
- Mounting Whip and Sinking Autonomy
- Desiderata of Actors and their Quality
- Interests, Instructions, and Temptation for Power

The solution is theoretically simple and clear, i.e. the members of the parliament should act autonomously, take decision on the merits of a case, assess issues objectively, and have loyalties only to the constitution and the laws of the country. Perhaps, no one disagrees with them, even practically doing the opposite. Therefore, the solutions seem practically difficult, if not impossible. Loyalties are divided on political lines. Autonomy comes into sight only when the nexus of interest, instruction, and temptation does not serve the expectations. Taking decision on merits and objectivity are always difficult because they require integrity, dedication, deep study, robust analysis,



and an unflinching sense of fairness. Moreover, loyalty, autonomy, merit, and objectivity are closely connected with making a fine balance between categorical and hypothetical imperatives; willingness in adopting the methodologies of welfare-grundnorm and rules based proposition; and a commitment for the system of positivity.

These issues and their solutions are briefly examined in the following sections. Section two examines three cases: citizenship, education, and child welfare. Section three discusses on the science of legislation and its importance in legislative oversight. Section four explains the methodology of welfare-grundnorm and the role of positivity for the just and fair operation of institutions. Section five concludes the paper with a summarization of the main propositions of this paper.

## **2. The Metaphysics of Oversight: The Question of Reasoning**

The method of reasoning adopted by parliamentary oversight analytically describes the quality and veracity of the process and its outcomes. In other words, how to make a correct decision? To analyze this question of making a correct decision, let us take three issues: the case of citizenship, the case of education, and the case of child welfare.

### ***2.1 The Case of Citizenship***

Among many other issues related to citizenship, let us take the most debatable or the so-called controversial issue that whether a mother should be recognized by the constitution as able to pass citizenship down to her children without being dependent on husband or influenced by his status. At least two schools of thought have so far appeared in dealing with this issue: liberal or progressive, and illiberal or conservative. The conservative school considers that the demand for autonomous status of a mother, including on the issue of citizenship is an idea influenced by the Western culture. They claim, “Whether we accept it or not the Eastern culture and practices recognize women being completely dependent on men. Despite it being discriminatory, the society is managed along the same line.”<sup>9</sup> Therefore, some claim that arguing and demanding citizenship from the status of a mother will not promote the long-term interest of the country. Instead, such demands will not be sustainable on the grounds of the geo-political situation and open border of the country. Further, such demands will jeopardize dignity, independence, and sovereignty of the country.<sup>10</sup> The most cynical views argue that the provision on ‘father and mother’ in regard to imparting citizenship is the optimum way of dealing with citizenship. Indeed, considering the geo-political situation of Nepal, we should adopt a very strict citizenship policy. On managing the citizenship issue, it is not enough to require both parents as to be the Nepali citizens, but also both should be the Nepali citizens on descent. If it is not possible, at least, the father should be the Nepali citizen on descent. Whereas, in the case of a father being a foreign national and the mother being a Nepali citizen on descent, subject to our national condition, we should permit discrimination by not permitting the right of Nepalese citizenship to their children.<sup>11</sup>

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9. See Vidya Bhandari, *Women's Rights Activists under the Influence of Western Culture*, July 23, 2015.

10. See Bhim Rawal, *Citizenship: Why and How?* KANTIPUR DAILY, July 11, 2015.

11. See Mohan Bikram Singh, *To What Extent is it Positive and Controversial?*, KANTIPUR DAILY, July 24, 2015.

The liberal or progressive school considers the illiberal and conventional views not only faulty, but also harmful for nation building and securing basic human rights in the country. Their main arguments can be summarized in six different points (Tuladhar, 2015; Upreti and Pradhan, 2015).<sup>12</sup> First, the conventional approach denies the autonomy of women as a mother. Second, perpetuation of patriarchy erodes the nation building process since nation is equally composed of both men and women. Third, requiring a mother to be dependent on her husband in imparting citizenry rights to her children denies the equality between men and women and consequently it fetters women. Fourth, subsequently it has compelled a number of children to be stateless and deprived them of various opportunities in society. Fifth, denial of the autonomy of a mother and perpetuating discrimination against women is against the basic standards of international human rights rules. Sixth, the right to citizenship is not merely the right of parents or one of the parents, but it is the right of a child to be entitled with the citizenry right. In this context, a child has right to choose citizenship either through the lineage of one of the parents (*jus sanguinis*) or through the fact of birth.<sup>13</sup>

The challenges to a decision maker (parliamentary committee, constituent assembly, or any decision maker) persist on knowing and choosing the right decision. How do they know? What is the basis of its epistemology? In our above example, how to choose a right policy and make a decision between the two contesting schools of thought? How should the decision maker know which school of thought is correct?

There is an unambiguous methodological distinction between other social sciences and law in answering these questions. Until there exists a positive rule, legal science offers and opts no choices. To put it simply, legal science (jurisprudence) looks at the positive rules and answers all questions on the rules based propositions. However, when there is no positive rule or the existing positive rules provide only a basic framework, then legal science invites other social sciences in searching a correct answer to these or many other questions. Since, in most of the cases, the act of parliamentary oversight depends on the existing body of positive rules, the methodological guidance comes from the rules based proposition. In a situation such as the making of a constitution or making of a new law that derives only a basic framework from the constitution, the application of a methodology from other social sciences becomes unavoidable.

Let us examine, whether and how rules based propositions or a social science methodology should be derived on settling the issue of citizenship rights in the new constitution of Nepal. The emergence of the idea of global constitutionalism has demanded harmony and unity between domestic and international laws, and acknowledged the supremacy of international laws over domestic laws (Bhandari, 2014).<sup>14</sup> As a result of the institutionalization of global constitutionalism, international laws demand harmony of domestic laws and policies with them. Either way, whether it is a soft or a compulsory harmonization, it perforates national borders calling for new forms of checks and balances. Certainly, sovereign states are not as free as they were in the classical historical

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12. See Indu Tuladhar, *Citizenship Issue in the Draft Constitution*, Nagarik Daily, July.. 2015; see also Sapana Pradhan Malla & Dr. Aruna Upreti, *A Letter to Mr. Rawal*, Kantipur Daily, July 17, 2015.

13. See Surendra Bhandari, *Issue of Citizenship in the Constitution*, July 1, 2015.

14. See Surendra Bhandari, *Global Constitutionalism and the Constitutionalization of International Relations: A Reflection of Asian Approaches to International Law*, 12 RITSUMEIKAN ANNUAL REVIEW OF INTERNATIONAL STUDIES 1-53 (2014).

sense.<sup>15</sup> At the same time, the process of harmonization is also empowering nations and people in both forms and effects. In much the same way, states have been empowered with the right of international market access, the possibility of wider global peace and cooperation and working toward global welfare. Moreover, individuals are empowered with rights enshrined under international laws, such as human rights instruments, requiring the state parties to protect and promote human rights at the domestic level. If the real sovereigns are the people, in terms of wider possibility of rights and global access, people have been empowered by the system of global constitutionalism. In this sense, the perforation of national borders has been transmuted in creating a new setting and possibility beyond borders.<sup>16</sup>

In democracy, laws govern a country, including all human and institutional relationships. The law alone should rule the country, not the agencies such as political parties, government, or any organized groups or powerful individuals beyond the premise of law. These agencies bear an unwavering responsibility of respecting and implementing the laws. At its core, the rule of law is the governing idea of any democratic society, buttressed by the concept of the supremacy of law over human agencies. In other words, the concept ‘no one is above the law’ vividly elucidates the idea of the rule of law, which succinctly offers the *raison d’être* of a parliamentary oversight.

Since a constitution is the supreme law of a country, in a more precise way, the idea of the rule of law could be expressed in terms of governance compatible with the constitution. The idea of constitutional supremacy, built on the concept of the hierarchy of law, upholds that all laws enacted by the parliament (statutes), promulgated by the government (rules and regulations), or made by individuals (contracts) should be compatible with the constitution. This very idea also intrigues some issues with respect to identifying the proper role and space of international law, especially in the making of a constitution. When the constitution and international laws are compatible with each other, there seems to be no problem. Alternatively, along with the incompatibility between these two bodies of law (constitution and international law), with the emergence of global constitutionalism, domestic constitutions follow the prescriptions of international law. This very methodology of rules based proposition can thus address the problem of citizenship in the making of a new constitution in Nepal.

Among others, this proposition can be logically explicated on two grounds: first, in reference to the provisions of the Vienna Convention on the Law of Treaties, 1969 (VCLT); and second, on the

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15. See THE COMMISSION ON GLOBAL GOVERNANCE, *OUR GLOBAL NEIGHBORHOOD* 304-305 (Oxford University Press, 1995). The Commission on Global Governance observes that, “Although states are sovereign, they are not free individually to do whatever they want. Just as local norms and customs (often embedded in national constitutions) mean that a state cannot do whatever it wishes within its own borders, so the global rules of custom constrain the freedoms of sovereign states . . . International standards are usually self-enforced, with states, international institutions, and civil society organizations applying a general social pressure for compliance. Many international regimes include reporting requirements and systems of oversight and control. States and individual officials value a reputation for respecting legal commitments. In many states, national law and national courts help promote compliance with international standards.”

16. See SURENDRA BHANDARI, *GLOBAL CONSTITUTIONALISM AND THE FUTURE OF INTERNATIONAL LAW*, Forthcoming 2016.

grounds of international practices and decisions. The rule of *pacta sunt servanda* incorporated in Article 26 of the VCLT requires the contracting parties to be bound by every treaty in force and implement them in good faith. Article 27 of the VCLT does not allow the contracting parties to invoke internal law (domestic law) as justification for its failure to perform a treaty obligation, unless there is a manifest violation of the law of fundamental importance. Countries have never invoked this exception. Instead, the UN Security Council by its Resolution 554 of August 17, 1984, declared the South African Constitution of 1983 null and void,<sup>17</sup> it was a unique experience not only in the history of the UN, but also in the progression of international law. With this assertiveness, international law practically claimed its supremacy over domestic laws.<sup>18</sup> Similarly, while dealing the issue of the harmony of domestic legal measures with international law, the U.S. Supreme Court in 2006 declared the inconsistency of the executive order of the U.S. President on establishing a military tribunal to try Guantanamo Bay detainees. The U.S. Supreme Court ruled that the military commission lacked the power to try a case because its structure and procedures violated the common Article 3 of the Geneva Convention of 1949.<sup>19</sup>

These progressions and rules of the VCLT should be understood in the practical context of settling citizenship issue in Nepal. For example, if there is a boundary dispute between two countries and they accept the jurisdiction of the International Court of Justice (ICJ), the decision handed down by the ICJ cannot be ignored on the grounds that the domestic laws, including the Constitution, do not allow implementation of the decision.<sup>20</sup> Similarly, countries cannot deny the jurisdiction and decisions of the International Criminal Court on the grounds that the decision or jurisdiction violates their domestic laws or the constitution. More examples can be taken from the practices of the World Trade Organization (WTO). The decisions of the WTO Dispute Settlement Body cannot

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17. UN GA Res. 395(V) of Dec. 2, 1950, denounced the policy of apartheid; UN SC Res. 134 of April 1, 1960, called upon the South African government to abandon the policies of apartheid; UN SC Res. 181 of Nov. 4, 1963, called upon all States to cease the sale and shipment of arms, which was turned into the arms embargo on Nov. 4, 1977; UN GA Res. 1899(XVIII) imposed oil sanctions against South Africa; UN GA on Dec. 2, 1968, requested all States to suspend cultural and educational exchanges; UN GA Res. 3068(XXVIII) approved the International Convention on the Suppression and Punishment of the Crime of Apartheid, which came into force on July 18, 1976; UN SC Res. 554 of AugU.S.t 17, 1984, remarkably declared the South African Constitution of 1983 as racist and thus, null and void; UN GA on Dec. 14, 1989, adopted a resolution calling for negotiations to end apartheid and establish a non-racial democracy in South Africa through its Res. A/RES/S16/1; UN GA Res. 48/1 of Oct. 8, 1993, requested States to terminate the embargo and restore economic relations with South Africa.

18. The SC Resolution 554 of AugU.S.t 17, 1984, declaring the 1983 Constitution of South Africa null and void said, “Declares that the so-called ‘new constitution’ is contrary to the principles of the Charter of the United Nations, that the results of the referendum of 2 November 1983 are of no validity whatsoever and that the enforcement of the ‘new constitution’ will further aggravate the already explosive situation prevailing inside apartheid South Africa. *Strongly rejects and declares* as null and void the so-called ‘new constitution’ and the ‘elections’ . . . as well as all insidious maneuvers by the racist minority regime of South Africa further to entrench white minority rule and *apartheid*.”

19. See *Salim Ahmed Hamdan v. Donald H. Rumsfeld, Secretary of Defense*, 548 U.S. 557 (2006).

20 For example, *Botswana v. Namibia*, 1999 ICJ Reports 1045. In this case, Botswana and Namibia had a dispute over the Kasikili/Sedudu Island. The ICJ established the island as a part of the territory of Botswana. Namibia did not dispute the decision on the grounds of the violation of any of its domestic laws.

be overlooked on the grounds that the decision is not compatible with the domestic laws and the constitution. In fact, in most cases, the WTO decisions require the parties of the dispute to change their domestic laws and policies to align them with the WTO rules.

The concept of the rule of law has occupied an important place in the realm of both international law and domestic law. The United Nations defines the rule of law as a principle of governance. It provides that, “. . . the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”<sup>21</sup>

The case of European Union (EU) and the United Kingdom might be instructive in our context. The UK practices the idea of parliamentary supremacy, whereas the EU requires each member country to make its laws compatible with the EU laws. The conflict between the EU laws and the UK legal system was striking. Nevertheless, since the 1960s, the European Court of Justice has established the supremacy of EU laws over the domestic laws of EU member countries, including the UK.<sup>22</sup> For its members, the EU law is automatically effective, without any legislative action on the part of the Member State’s legislature. The EU laws also automatically confer legal rights on individuals, which are enforceable against the Member State’s government.<sup>23</sup>

From the above discussion, it can be inferred that the cardinal principle of the rule of law concept is embodied in the idea of the supremacy of law, but not in the fancies of a person, group, or an institution. This idea has its historical connection to Sir Edward Coke, the British Chief Justice, who in the case of *Prohibitions* of 1607 pronounced, “the King ought not to be under any man but under God and the law.” In democracy, the laws alone govern all power centers and individuals no matter how powerful they are. The law brings everyone under its authority. Therefore, the obligations under international human rights laws to which Nepal is a party provide the very reasoning in choosing the right answer and making a right policy decision. Before making this issue further clear, let us look at the two examples given by Justice Scalia.

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21. See the United Nations, Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies 2004 (S/2004/616).

22. See HILARY BARNETT, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* (Routledge, 2011). Barnett states that, “For the law to be uniform it is essential that the domestic courts work in partnership with the European Court of Justice (ECJ) and that – where necessary – the domestic courts can seek the advice of the ECJ on the correct interpretation of the law. It will be seen that the ECJ has, since the 1960s, insisted on the supremacy of Community law over domestic law. From the Court’s point of view, what has been created is nothing less than a new legal order: a supranational organization, which imposes legal duties on Member States and creates enforceable legal rights for citizens.”

23. *Id.* at 227.

Justice Scalia offers interesting examples of the rule of law. He writes about a person performing an act of selling a certain technology to a foreign country, which is prohibited by a widely publicized Bill passed by both Houses of Congress, but not yet signed by the president. Is that act of selling unlawful and punishable? Scalia argues that it is not illegal. Rather, it is lawful. It is of no consequence that everyone is fully aware that both Houses of Congress and the president wish to prevent the sale. Before the wish becomes a binding law, it must be embodied in a bill that passes both houses and is signed by the president. The second example is of a murderer who has been caught with blood on his hands, bending over the body of his victim. A neighbor has also filmed the perpetration. Scalia states that we nonetheless insist that, before the state can punish this miscreant, it must conduct a criminal trial that results in a guilty verdict. This is what makes it a government of laws and not of men.<sup>24</sup>

Following this long discussion, it should be now obvious that how the rules based propositions help for the successful exercise of the authority of parliamentary oversight, constitution making, and other decision-making processes. Thus, Article 15 of the Universal Declaration of Human Rights (UDHR),<sup>25</sup> Article 24(3) of the International Covenant on Civil and Political Rights (ICCPR),<sup>26</sup> Article 7 of the Convention on the Rights of Child (CRC),<sup>27</sup> and Article 9 of the Convention Against All Forms of Discrimination Against Women (CEDAW)<sup>28</sup> provide the example of the existence of rules based propositions in regard to deciding the right to citizenship. Among others, Article 2 of the CRC, which is quoted in the beginning of this paper, stipulates the following:

- States parties should respect and ensure the rights of each child within their jurisdiction,
- This respect and assurance should be without any discrimination of the parent's race, color, sex, language, nationality, birth, or other status, and
- States parties should protect the child against all forms of discrimination, including the status of the parents.

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24. See ANTONIA SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 25 (New Jersey, Princeton University Press, 1997, Kindle edition).

25. Article 15 of the UDHR, 1948 provides that, "(1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

26. Article 24(3) of the ICCPR, 1966 provides that, "

27. Article 7 of the CRC, 1989 provides that, "(1) The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. (2) State Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless." [emphasis added]

28. Article 9 of the CEDAW, 1979 provides that, "(1) States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. (2) States Parties shall grant women equal rights with men with respect to the nationality of their children."

All these provisions have invariably emphasized the right of the child to get citizenship and have ruled out the requirements of both parents to be the citizen of the same country. Therefore, a child is free to choose citizenship from one of the parents if they are or hold citizenship from different countries. This clearly institutionalizes that any civilized and democratic government should not ignore the rules based proposition since it is the relic of the categorical imperative or the pinnacle of an a priori epistemology. Thus, in a nutshell, the new constitution of Nepal should resolve the problem of citizenship on the basis of the rules based proposition.

## ***2.2 Education: The Divider of Society and Citizens***

There are some encouraging developments in the education sector; such as, more educational enrollment of girls than boys is one of the outstanding achievements of the democratic era of Nepal (see table 1). The literacy rate of female is also increasing fascinatingly; though, it is still below (57.4) than the average literacy rate of 65.94. Also, the total number of female teachers at the school level is growing. However, compared to the population size of women, i.e., 51.5% of the total population, the total number of female schoolteachers is still away below. There are 1,00,446 female school teachers and 1,92,399 male school teachers (Ministry of Education, 2014).

**Table 1: Enrollment status in Nepal**

	<b>Total</b>	<b>Female</b>	<b>Male</b>
<b>School Level (G1-12)</b>	7542393	3822580	3719813
<b>University (all Campus + Medical Institutions)</b>	5,69,665	2,70,806	2,98,859
<b>Non Formal Literates in FY 2069/70 BS</b>	914141	727451	186690

**Source: Ministry of Education, Nepal Education in Figures, 2014.**

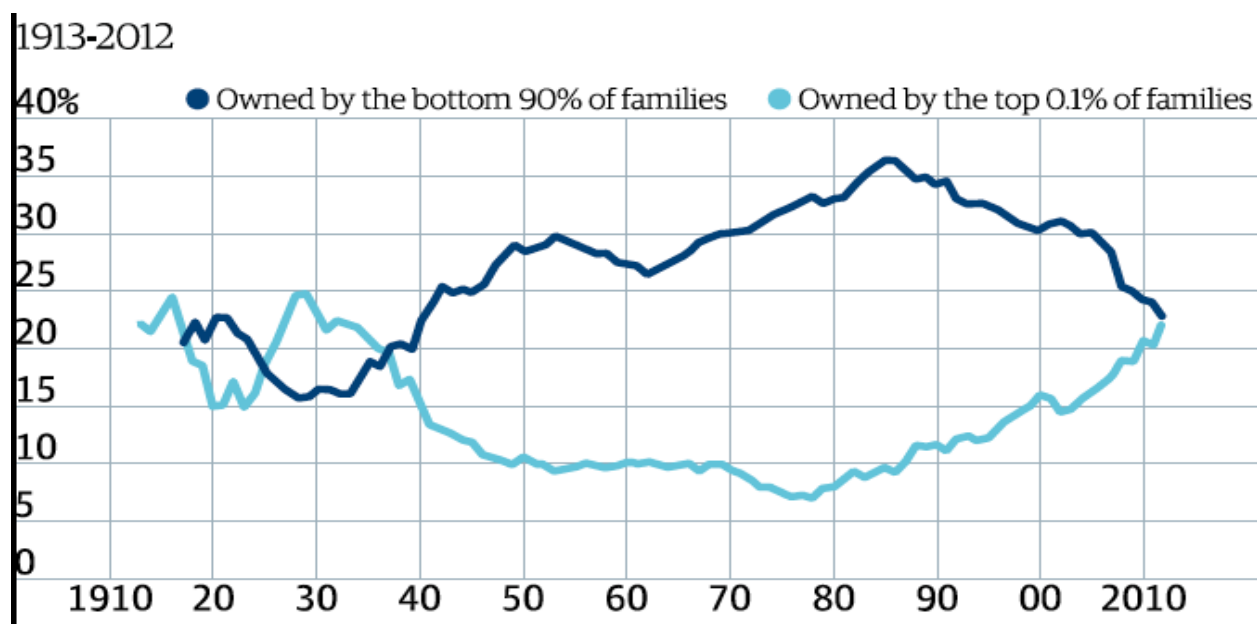
Despite these encouraging progressions, the education system in Nepal has been proved to be the boundless divider of the Nepalese society. It is systematically producing three categories or classes of human resources: competent both at domestic and international marketplace, acceptable at the domestic marketplace, and a huge masses of unskilled individuals. This assumption might be challenged or modified subject to data. However, if it is empirically or objectively supported, it indicates toward a callous disaster that we are waiting. Consequently, it erodes the most basic tenet of a democratic state—equal citizen—and commodifies them in an inequitable echelon by endlessly perpetuating inequality and exploitation. Factually, the highest 30 percent people of Nepal hold over 77% of the national income, whereas the lowest 30 percent of the population holds only 11.9 percent of the national income. With this disparity the Gini Coefficient in 2010 was measured as 0.328.<sup>29</sup> This is still not severe compare to the U.S. where the top 0.1 percent of the population and the rest 90 percent of the population hold the equal amount of national income (see table 2).

29. See The World Bank, Gini Index, World Bank Estimate, 2015.

However, if the present scenario of educational system and production of classes in Nepal continues at the same speed and intensity, it is not hard to notice the Gini rising to the level of 0.5 in a few decades, which will be rather worst.

The real problem comes from the deterioration of the quality of education at the public or community schools. Had there not been the private sector, the crisis would be unimaginable. At the same time, due to a number of factors aggravating simultaneously the poor quality of public education, with some exceptions, it has on the whole turned to be the institution producing unskilled, incompetent, and politically overwhelmed class of society.

Table 2: Income inequality in the US from 1913-2012



Source: The Guardian, November 13, 2014.

Despite having open and democratic environment in the post-1990 period in the country, why the public educational institutions have not been successful in producing quality human resources? Who is responsible? Who should find the causes and address the problems with effective solutions? Perhaps, it is undoubtedly the executive body, more specifically the Ministry of Education. Nevertheless, when the executive body fails or is ineffective, it is the responsibility of the parliamentary committees to make the government responsible and accountable through parliamentary oversight. When parliamentary oversight is formal, ineffective, and politically inundated, it allows the executive failure to be pandemic and perpetuated in the country.

The state of the failure of educational system (one example is that none of the educational institutions in the country belongs to the top 1000 global rankings) requires objective answers to the following assumptions. They are:



- Why educational institutions that are apolitical have succeeded and why educational institutions with heavy political engagements have succumbed to failure?
- Why quality of a teacher/faculty matters for the successful production of the future generation? And, what are the factors that erode the quality of teachers?
- Why investing in the future generation should be the backbone of public educational system? Why strengthening domestic educational institutions matter for the production of capable and efficient future generation?
- What social, political, and economic implications will the country have in the future with the present level of educational quality, specially in the public schools?
- Why should universities prioritize for objective research and quality publication for enhancing the global national image?

The parliamentary oversight can require the government to come up with reliable answers of these or many other related questions and instruct the government for objective and effective solutions. Reform in the educational sector is thus urgent for not only institutionalizing the idea of equal citizens, but also in creating market, expanding the burden sharing mechanism of social security, and strengthening the rule of law. Quality education is indeed the key for nation building. Educational reform in real sense marks an outstanding change in society, i.e., a revolution. A revolution cannot be accomplished by destruction. It truly germinates and succeeds only through—construction, knowledge, creativity, and engagement—the agents of change. Let us learn from the past and take the forum of parliamentary oversight as an opportunity to be the real leader of ushering the desirable changes in the Nepalese society. Parliamentary oversight, thus, can accomplish this function by taking help also from the methodology of welfare-grundnorm, which is discussed below under section 4.

### ***2.3 Child Welfare***

Health, nutrition, security, education, and nationality are basic constituents of child welfare. Deprivation of health care and nutrition causes unbearably detrimental effects to the growth of children both physically and mentally. Deprivation or denial of education or quality education limits the whole life prospects of children. Similarly, dispossession of the right of citizenship on the grounds of the status of parents severely inhibits the civic status in pursuing happiness in life. Engaging children in hazardous activities, including child labor, child soldier, child prostitution, or domestic labor endangers their security and dignity. The quality of child welfare system in the present supports the future attribute of a country. Today, our children, especially from the poor families, even in the post-1990 democratic era are vulnerable and suffering at different levels from all these deprivations and hazards. Some of them are immediately remediable and others are remediable in the mid-term period.

Nevertheless, there are some encouraging developments on the basic indicators related to children. Comparing between the status of 1990 and 2012, one can easily notice the satisfactory achievements. However, these data are also elusive, since they show the average. They don't segregate the indicators between the poor people, middle class and the rich people. Obviously, children from the poor section of society suffer more and are deprived of the basic constituents of child welfare.

Table 3: Basic Indicators on Children	
Under-5 mortality rank	59
Under-5 mortality rate (U5MR), 1990	142
Under-5 mortality rate (U5MR), 2012	42
U5MR by sex 2012, male	44
U5MR by sex 2012, female	39
Infant mortality rate (under 1), 1990	99
Infant mortality rate (under 1), 2012	34
Neonatal mortality rate 2012	24
Annual no. of births (thousands) 2012	593.3
Annual no. of under-5 deaths (thousands) 2012	24

Source: UNICEF, 2015.

On the issue of nutrition too, there have been some tangible achievements. Despite the fact, almost 18 percent children suffer from low birth weight. Almost 29 percent suffer from underweight. Some 40.5 percent suffer from growth retardation. Almost 11 percent suffer from growth retardation due to illness.

Table 4: Child Nutrition	
Low birth weight (%) 2008-2012	17.8
Underweight (%) 2008-2012, moderate & severe	28.8
Underweight (%) 2008-2012, severe	7.7
Stunting (%) 2008-2012, moderate & severe	40.5
Wasting (%) 2008-2012, moderate & severe	10.9
Overweight (%) 2008-2012, moderate & severe	1.5
Vitamin A supplementation full coverage (%) 2012	95
Iodized salt consumption (%) 2008-2012	80

Source: UNICEF, 2015.

Improvement in the access to safe drinking water is encouraging but still not fully covered. Sanitation facilities are below the mark. Specially, in the rural area sanitation facilities cover only 32.2 percent of the population. Routine government financed vaccines cover below 45 percent. Though, on the average the immunization coverage is over 90 percent. The gap between seekers of treatment for pneumonia and receivers of the treatment is still strikingly wide.

Table 5: Health	
Use of improved drinking water (%) 2011, urban	91.2
Use of improved drinking water (%) 2011, rural	86.8
Use of improved sanitation facilities (%) 2011, total	35.4
Use of improved sanitation facilities (%) 2011 urban	50.1
Use of improved sanitation facilities (%) 2011, rural	32.4
Routine vaccines financed by government (%) 2012	44.9
Immunization coverage (%) 2012	90
Pneumonia (%) 2008-2012, Care seeking for suspected pneumonia	49.5
Pneumonia (%) 2008-2012, Antibiotic treatment for suspected pneumonia	7

Source: UNICEF, 2015.

These data are basic, i.e., imperatively needed for the existence of life. In this globally competitive age, mere existence of life is not enough for our kids. Unless they are locally, nationally, regionally,

and internationally competitive, skilled, and able to lead, they cannot expect better life chances. Unless the kids are provided opportunities to grow with life chances, the aspiration for inclusion will hardly be achieved. Thus, the welfare of the children demands for the inclusion in terms of enabling them with the qualities of competition, skill, and leadership ability. It demands switching national attention from the current laissez faire socio-politico orientation to the universal social protection.

The rights enshrined in the new draft constitution related to welfare, including health and education can easily turn to be formal or farce at the worst if the state continues to neglect the adoption of a universal social protection mechanism in the country. It is the prime mechanism in ensuring inclusion of the people in the national life domain. It is undoubtedly the robust way of nation building. The new constitution progressively provides a basic framework, however, it needs to be realized through the determined laws and policies. The existing laws and policies are unequivocally inadequate. Against this background, the parliamentary oversight can play a profoundly important role in designing effective laws, and instructing the government in designing the efficient policies and their faithful implementation. In this post-conflict and post-constitutional era, the significance of parliamentary oversight is undeniable as one of the core democratic functions of nation building in Nepal.

### **3. The Science of Legislation and Parliamentary Oversight**

Despite many weaknesses, Bentham's *Theory of Legislation* is still considered as the pioneer work in the area of the science of legislation. The examination of history, development, and theoretical paradigms on the science of legislation are certainly important, but in this paper, I would like to treat following six features as the cardinal aspects of the science of legislation and the core activities of parliamentary oversight. Thus, this section focuses only on these six features of the science of legislation, they are:

- Ensuring legitimacy and authority of law within the framework of validity,
- Establishing a positive order,
- Institutionalizing the supremacy of law,
- Applying an inclusive structure of law,
- Creating conditions for equal citizens, and
- Ensuring a limited government.

This is not an exhaustive list. Neither they are exclusive. Some of them can be merged. However, for explanatory and analytical ease, I have preferred these six features as the signposts of the science of legislation and parliamentary oversight.

### 3.1 Validity at the Core of the Science of Legislation

In the popular fashion, it may be stated that validity arises from the maintenance of a hierarchical legal order in which a constitution stands at the top as a *grundnorm*.<sup>30</sup> This statement poses at least three problems. First, it ignores the distinction between authoritarian and democratic constitutions, permitting any constitution to be the source of validity. With this obliteration of the distinctions, a question may arise: do authoritarian constitutions have a source of validity? Second, Kelsen's *grundnorm* fails to explain the validity standards for countries that do not have a written constitution, since they practice parliamentary supremacy. In particular, a question may arise: does the United Kingdom lack the standard of validity? Third, Kelsen's *grundnorm* may also create some contradictions in appreciating the relationships between a constitution and international law. In fact, Kelsen is one of the proponents of a cosmopolitan legal order in which, by allowing international laws to override any domestic *grundnorm*, sovereignty will lose its dominating position, leading to its natural demise.<sup>31</sup> The relationships might be expressed in a number of ways. For example, a domestic law, while compatible with the constitution, might be inconsistent with an international law. Alternatively, a constitution, the highest norm (*grundnorm*) itself, might contradict some international rule. A question may thus arise: how could the *grundnorm* of constitutional supremacy resolve this inconsistency?

These questions could be addressed only when the epistemological basis of validity is discovered in constitutionalism, which might be entrenched in either written or unwritten form of a constitution. Constitutionalism as an *a priori* order expressed through individual autonomy, freedom of choice, and personal liberty builds the foundation of social relationships culminating in the exchange of goods, services, ideas, information, and culture for a politically sustainable society. Thus, constitutionalism as a positive order expands interests of all stakeholders without any undercut, which can be called social or constitutional optimality. However, in any dynamic society, not all social interests might be always amenable to social optimality. Moreover, they may tend to enter into harmony for social efficiency, which can be termed constitutional efficiency. Further, if social optimality and efficiency is contested due to inter and intra stakeholder conflict of interests, the utilitarian approach might come to the forefront to release the society from plunging into inefficiency, which can be termed as constitutional equilibrium. Any society existing beyond the framework of constitutional optimality, efficiency, and equilibrium is in a condition of inefficiency marred with immense socio-economic and political problems that tear apart the rule of law. Perhaps the state of rule by law can be better understood in connection with the condition of inefficiency.

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30. See HANS Kelsen, GENERAL THEORY OF LAW AND STATE 115 (Anders Wedberg trans., The Law Book Exchange Ltd., 2009/1945). Kelsen writes that, “. . . The validity of this first constitution is the last presupposition, the final postulate, upon which the validity of all the norms of our legal order depends . . .”

31. See generally Danilo Zolo, *Hans Kelsen: International Peace through International Law*, 9 EUROPEAN JOURNAL OF INTERNATIONAL LAW 306-324 (1998).

Constitutionalism, in the form of constitutional optimality, efficiency, and equilibrium, is best explained with the methodology of welfare-*grundnorm* (WG), which is discussed in section 4 of this paper. Conceptually, a limited government, the separation of powers with checks and balance in place, and judicial review are the bedrocks of the constitutional optimality. Equality before the law, due process of law, human rights, and fundamental rights propagate constitutional efficiency. Justice according to law is an example of constitutional equilibrium. However, if the law is optimal, justice follows optimality.

At this point, it can be comfortably stated that, at their best, the authoritarian constitutions may maintain constitutional equilibrium, but beyond that level, they ignore constitutional efficiency and optimality. Further, it can be said that, with the exception of the realization of a fully-fledged system of judicial review (review of both legislative and administrative acts), countries practicing parliamentary supremacy, such as the United Kingdom, exhibit not all but most of the features of constitutionalism. Regarding the issue of harmony between domestic and international laws, constitutional supremacy under both authoritarian and non-authoritarian constitutions might give effect to the international rules into their domestic legal systems. If they adopt the monist approach, they could better achieve a higher level of harmony between domestic and international rules.

In short, validity springs from the obedience of a constitution or constitutional convention entrenched in constitutionalism, which is the source of legitimacy and enforceability (authority) of law. Validity institutionalizes positive order, which is a necessary precondition for a limited government and justice, inspired by constitutional optimality, efficiency, and equilibrium. Thus, validity is the spirit of the rule of law. Hereinafter, we briefly discuss a positive order, and a limited government.

### ***3.2 A Positive Order: The Quest for the Science of Legislation***

Transmutation of normative standards into a valid, legitimate, and enforceable regime is the name of a positive order.<sup>32</sup> A normative standard could receive legitimacy through the accomplishment of a legislative process and may command authority through the involvement of state's apparatus in the implementation of the legitimized standards. However, legitimate and authoritative standards may lack validity, which reminds us of the conditions of rule by law. Conversely, the rule of law is a condition where validity, legitimacy, and enforceability exist in a unified whole or harmony. The following illustration helps explain the idea of a positive order.

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32. The term 'order' is used as a system.

### Chart 1: A Framework of a Positive Order

In the early nineteenth century, the analysis August Comte conducted on the weaknesses of theological and metaphysical systems and their remedy through a positive system pioneered the idea of positive order.<sup>33</sup> The logical and scientific link by which all our varied observations could be brought into one consistent whole is the name of the positive order, or the science of society given by Comte.<sup>34</sup> Comte stressed a point that mere observation or empiricism applied to normative order alone could not produce a positive order. Realizing this point, Comte emphasized the role of an *a priori* element in the formulation of a positive order.<sup>35</sup> The *a priori* element was the foundational basis of the positive analysis in the philosophy of Socrates and Plato, which Immanuel Kant tried to harmonize with Aristotelian empiricism. Comte's reference to an *a priori* element in devising a positive system marks an important direction towards the epistemological foundation of validity. An *a posteriori* order could not offer valid criteria, since in Comte's terms, the observations could also be

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33. See AUGUST COMTE, THE POSITIVE PHILOSOPHY 27 (Harriet Martineau trans., Batoche Books, Vol. 1, 2000/1896). Comte examines that, "In order to understand the true value and character of the positive philosophy, we must take a brief view of the progressive course of the human mind . . . From the study of the development of human intelligence, in all directions, and through all times, the discovery arises of a great fundamental law, to which it is necessarily subject, find which has a solid foundation of proof, both in the acts of our organization and in our historical experience. The law is that each of our leading conceptions—each branch of our knowledge—passes successively through three different theoretical conditions: the Theological or fictitious; the Metaphysical or abstract; and the Scientific or positive. In other words, the human mind, by its nature, employs in its progress three methods of philosophizing, the character of which is essentially different and even radically opposed . . ." See also AUGUST COMTE, SYSTEM OF POSITIVE POLITY (London, Longman Greens & Co., 1875/1852); AUGUST COMTE, A GENERAL VIEW OF POSITIVISM (J. H. Bridges trans., London, George Routledge & Sons Ltd., 1908).

34. See AUGUST COMTE, A GENERAL VIEW OF POSITIVISM 1-2 (J. H. Bridges trans., London, George Routledge & Sons Ltd., 1908).

35. See LLOYD OF HAMPSTEAD & M. D. A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 550 (London, Stevens & Sons, 5th ed., 1985).

varied and applied to a normative order. In other words, they would lack a unified, consistent whole as validity criteria. However, Kelsen named the highest validating system as a normative system, in the form of the highest norm or *grundnorm*. In the Kelsenian explanation, the highest validating norms emanated from the constitution were thus comparable to normative orders. Further, a constitution, which adopts rule by law systems, in the Kelsenian terms, also reflects the highest validating order. Therefore, Kelsen failed to unravel the puzzle between the rule of law and rule by law. Therefore, a positive order, which is key to a parliamentary oversight, should be explicated in the paradigm of the supremacy of law, integrated structure of law, and the equality before the law.

### ***3.3 Supremacy of Law: The Goal of the Science of Legislation***

Aristotle's exposition on the rule of law offers a clear account that supremacy of law over all authorities and institutions in governance and managing human relations is the key to the rule of law, which should be intrinsically guaranteed by rules. Hayek observes that, in the political history of mankind, when the conception that legislation should serve to protect the freedom of individual was lost, the Aristotelian concept 'the empire of laws, not of men,'<sup>36</sup> which is based on the idea of individual autonomy and freedom, had been weakened for thousand years. This was especially true when the art of legislation was found in the code of Justinian, i.e., a conception of a prince who stood above the law that served as the model.<sup>37</sup> Through the rise of absolutism, the idea of supremacy of law was demolished everywhere, but somehow retained it to initiate the modern growth of liberty.<sup>38</sup> With the growing importance and practice of positive law, the rule of law is gaining strength in the modern age, which seems to be bringing back the tradition that "in a democracy the laws should be masters."<sup>39</sup>

Hayek elucidates how arbitrary rules and discriminations were challenged in the United Kingdom with the demand for integrating basic organizing principles of governance such as equality before the law into the body of law. This process celebrated the rule of law in creating rights against the arbitrary form of government. The famous British judge, Lord Coke, had already written in 1624 that it is not the discretion of the government or the King, but the laws made by the parliament that should measure every activity.<sup>40</sup> Moreover, with the abolition of the Star Chamber,<sup>41</sup> the British democracy had settled the question of policy versus law, giving priority to the latter, which politicians often dislike. However, disgracefully a democracy with a legacy of such illumination happened to ignore the rule of law in other countries and colonized a number of countries for the

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36. Cited in F. A. HAYEK, *THE CONSTITUTION OF LIBERTY*, Ch. 11 Kindle Loc. 6016 (The University of Chicago Press, 2011/1960, Kindle Edition).

37. *Id.*, Kindle Loc. 6043.

38. *Id.*, Kindle Loc. 5950.

39. *Id.*, Kindle Loc. 5992.

40. Referred in *id.* Kindle Loc. 6016.

41. *Id.*

sheer greed of supplying resources to its domestic industries and in turn monopolizing the market in the colonized countries.<sup>42</sup>

In the eighteenth century, a British jurist, A. V. Dicey explained the ‘supremacy of law’<sup>43</sup> as one of the three components of the idea of the rule of law. However, his concept of the supremacy of law is limited to the idea of constitutional equilibrium discussed above. In addition to the concept of Dicey, the realm of the rule of law exemplifies the constitutional efficiency and optimality, which exist only when all powers and political ideologies are brought within the framework of constitutionalism. No power and ideology should thus assume their supremacy over constitutionalism and its products. The supremacy of law engenders a movement from the supremacy of ideology to the supremacy of the rule of law.

The significance of the rule of law has been caused to flow from the historical fact of the changing nature of the organizing standards from tribalism to religion, from religion to political ideology, and from political ideology to the rule of law. Witnessing crises and opportunities, confusions and certainties, skepticism and faith, intolerance and harmony, and localism and globalism, our time has recognized the pressing *sine qua non* (indispensable nature) of positivity reflected in the rule of law for guiding and governing us.

In human history, religions have indeed played important roles in organizing and regulating human relationships. Christianity in the Christian world, Islam in the Islamic world, Dharma in the Hindu society, Buddhism in some of the Asian countries, are a few examples in regard to the role of religion in organizing human relationships. Since the Enlightenment in Europe, and the growing function of reason as the definer of human relationships across the globe, the role of religion as the doctrine of social organization and governance has gradually weakened and was substituted by political ideologies. Nevertheless, in the Islamic world, the *Quran* and *Sunna* of the Prophet Mohammed still play an important role in social organization and governance. The world has largely seen the development of political ideologies in different hues and forms. In all these developments, the tenets of religion and political doctrines were consistently being translated into law as governing tools. Being aware of the implications of political and ideological divisions in society, the Western tradition of liberal democracy focused its vision on the concept of the rule of law, bolstered by the idea of constitutionalism in defining and organizing human relationships, including institutional relationships.

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42. See Surendra Bhandari, *From the Era of Colonization to Globalization: Making Rules in the GATT/WTO*, in *ASIAN APPROACHES TO INTERNATIONAL LAW AND THE LEGACY OF COLONIALISM* 119-137 (Paik, Lee, & Tan eds., London, Routledge, (2012).

43. See A. V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION*, Kindle Loc. 5292 (Evergreen Review Inc., 2007). He mentions that, “That rule of law, the, which forms a fundamental principle of the constitution, has three meanings, or may be regarded from three different points of view. . . . It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.”



The movement from tribalism to religion, religion to political ideology and political ideology to the rule of law reinforced by constitutionalism offers a captivating tradition connecting our social, economic, political, and cultural relationships. The antagonism, struggle, as well as cooperation between political ideologies and liberal constitutionalism vividly present the astounding and enlightening lessons. At a time when political ideologies have attempted to hold their supremacy over constitutionalism, autocracy, religious fundamentalism, and ethnic conflicts have unfortunately risen, dominating the socio-economic processes. Perhaps, the universally growing movement towards the supremacy of constitutionalism over political ideologies and other normative belief systems, including religion and ethnic identity, is one of the priceless achievements of the profound human endeavor toward achieving harmony, peace, respect, dignity, autonomy, freedom, liberty, rights, and duty-based relationships. In short, the rule of law movement is a sobriquet of transforming normative system into a positive system.

Why should these normative systems be transformed into a positive system? The answer is not easily palatable, unless normative prejudices are unnerved, looking both at the constructive and destructive roles played by them. For example, the primordial or tribal societies were basically governed with racial or ethnic identities in the focus. Tribal societies followed by convergence into cooperation and bigger social networks were historically governed by religion, customs, ethics, morality, and other normative standards. Following the success of the Enlightenment movement in the European societies, political ideologies came to the forefront of modernization and governance, replacing religious standards. Subject to their time limitation, both religious and political standards have contributed in uniting, harmonizing, and moving societies forward with a unity of purpose. However, at the same time, they have also caused conflict, violence, war, and sustained tyranny through dividing societies in the name of religion and ideologies. Thus, in many cases, they have failed to offer a universal standard of national and international cooperation.

Fascinatingly, the political ideologies have promoted the concept of the rule of law. Nevertheless, time and again, they have also resisted the autonomy (purity) and supremacy of the rule of law. Amidst the struggle between political ideologies and the idea of the rule of law, the evolution and institutionalization of the concept of constitutionalism as the foundational stone of liberal democracy has indeed shaped the nature of democracy, which is called a liberal democracy. The development and growth of the rule of law is thus closely connected to the movement from a normative to a positive system of the rule of law, which is essential for the institutionalization of democracy.

Let us imagine three situations. First, there is a democratic system with a democratic government in place. The government either forms a majority in parliament or it is a coalition government with majority in parliament. The government believes in the popular will of the people and thus demands that the existing laws (including the constitution) should not limit its actions in pursuit of democracy. Further, in the name of promoting democracy, it decides to provide lifelong honorarium, facilities, and financial support to people who hold certain positions in the executive

body, including the prime minister. Second, there is a democratic system in place and a parliament composed of the representatives of people. They consider that the popular will should be unchecked. Thus, they should not be restricted from amending existing laws or enacting any new laws, as the parliament may deem necessary. They like to amend the constitution and laws frequently to serve their political purposes. Let us say, among others, they have amended the constitution and laws to prolong the terms of office of the parliament so that the members of the parliament could keep their offices without facing elections, which they consider necessary for democracy. Third, there is a country that has a constitution, laws, and a legal system of its kind. By liberal democratic standards, it is not a democratic country. However, it claims the status of a democratic country and its constitution states that it is a democratic country governed by the dictatorship of proletariat. It has achieved a number of socio-economic indicators that show their human development index is improving. Nonetheless, people are demanding political freedom, where they want to see free competition between political parties for the office of the government. The existing government denies people's demands. Should the people be allowed to break laws that suppress democratic aspirations? How should the concept of the rule of law deal with these situations?

Before we answer these questions, let us review how legal political thinkers and philosophers have surveyed the issue of popular will and its relationship with the rule of law. Aristotle observed that, when individuals rule, rather than the law, it is a manifestation of oligarchy in democracy.<sup>44</sup> Aristotle further posits that, when individuals arbitrarily exercise power and disregard their responsibilities for personal advantage, they act against the will of the people.<sup>45</sup> Aristotle further considers, in a number of ways, that democracy will be indistinguishable from tyranny when it is not subject to law and the best citizens are left out from holding prominent positions. There should be no demagoguery in democracy, as laws alone should be the supreme masters. If demagoguery prevails, people in power collectively become monarchs.<sup>46</sup>

The demagogues make decrees in the name of people to override laws, by referring to the popular will. Therefore, they attain immense power because they hold in their hands the votes of the people, who are more than ready to listen to them. To keep people happy, they say, "Let the people be judges;" consequently, the authority of every office is undermined. Where the laws have no authority or supremacy, there is no democracy.<sup>47</sup> The established constitution may lean towards democracy, but it might be administered in an undemocratic spirit. This type of state, according to Aristotle, often emerges after revolution because the dominant parties become content with encroaching a

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44. See ARISTOTLE, *POLITICS* Book IV, Ch. VI, Kindle Loc. (Benjamin Jowett trans., Kindle Edition 2012).

45. *Id.* Ch. X, Kindle Loc. 4854.

46. *Id.* Ch. I. Aristotle writes, "... political insight will enable a man to know which laws are the best, and which are suited to different constitutions; for the laws are, and ought to be, relative to the constitution, and not the constitution to the laws. A constitution is the organization of offices in a state, and determines what is to be the governing body, and what is the end of each community. But law should not be confounded with the principles of the constitution; they are the rules according to which the magistrates should administer the state, and proceed against offenders."

47. *Id.* Ch. IV, Kindle Loc. 4839.

little upon their opponents. In addition, the authors of the revolution now have the power in their hands.<sup>48</sup> Under the rule of law conditions, Aristotle examines the role of politics as an institution that enables people to be cognizant of the rule of law.<sup>49</sup> With these observations, Aristotle has answered the first two of the three questions raised above.

In a liberal democracy, neither political parties nor political leaders or their ideologies should be masters. When Tracey coined and used the term ‘ideology’ for the first time in 1817, he employed it as a science to acquire positive ideas free from normative prejudices. He emphasized the universal human needs as the common originator of ideas. McLellan observes that, in its origin, the notion of ideology was positive; however, it quickly became pejorative. The oscillation between a positive and normative connotation characterizes the entire controversy pertaining to the concept of ideology.<sup>50</sup>

Rousseau, who championed the idea of ‘general will’, found the problem of defining a form of association in which human autonomy and liberty would be defended together with uniting individuals with the social whole. He believed that the civil state is the only form of association that could accomplish the profound task of rational human conduct.<sup>51</sup> In this process, Rousseau claims that a person loses unlimited claim over objects that are guided by natural instinct; yet, in turn, he/she gains civil liberties and proprietary rights.<sup>52</sup> In a civic state, the idea of ‘general will’ becomes a considerably important concept, as a tool for promoting public advantage. Yet, Rousseau observes that this is not always true. He remarks that people are often deceived and, in such cases, the popular will becomes harmful, especially when expressed by social factions or partial associations. These factions undermine the general will of the state for their vested interests. Therefore, Rousseau strongly denounces a partial and fragmented society within a state.<sup>53</sup> This leads to the question of how political parties could be legitimized within a democratic framework, which are indeed the form

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48. *Id.* Ch. V, Kindle Loc. 4841.

49. *Id.* Ch. IV, Kindle Loc. 4838. Aristotle observes, “At all events this sort of democracy, which is now a monarch, and no longer under the control of law, seeks to exercise monarchical sway, and grows into a despot; the flatterer is held in honor; this sort of democracy being relatively to other democracies what tyranny is to other form of monarchy. The spirit of both is the same, and they alike exercise a despotic rule over the better citizens. The decrees of the demos correspond to the edicts of the tyrant; and the demagogue is to the one what the flatterer is to the other. Both have great power; the flatterer with the tyrant, the demagogue with democracies of the kind which we are describing.”

50. See DAVID MCLELLAN, *IDEOLOGY* 5 (Buckingham, Open University Press, 2nd ed. 1995).

51. See JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 14 (Amazon Digital Service Inc., 2006).

52. *Id.*

53. *Id.* 23. Rousseau writes, “if, when the people, being furnished with adequate information, held its deliberations, the citizens had no communication one with another, the grand total of the small differences would always give the general will, and the decision would always be good. But when factions arise, and partial associations are formed at the expense of the great associations, the will of each of these associations becomes general in relation to its members, while it remains particular in relation to the State: if may then be said that there are no longer as many votes as there are men, but only as many as there are associations. The differences become less numerous and give a less general result. Lastly, when one of these associations is so great as to prevail over all the rest, the result is no longer a sum of small differences, but a single difference; in this case there is no longer a general will, and the opinion which prevails is purely particular.”

of a partial society. Practicably, the most reasonable answer is grounded in the idea of the rule of law. All political parties, their ideologies, and activities should be compatible with constitutionalism and directed towards respecting and promoting the cause of the rule of law, which is the primary precondition for the victory of democracy.

If the popular will is unchecked, it breeds arbitrariness. Hayek argues that power, whoever exercises it, can become arbitrary if not checked. An arbitrary use of power is a condition where the power holders exercise it in an uncertain, irregular or *ad hoc* way. The only remedy for such malaise is the subordination of power to the rule of law. It is not only the executive branch of the government, which is often criticized for its tendency for arbitrary power, but also the legislative body that should function under the established dictate of the rules.<sup>54</sup>

With these discussions, the first two of the three questions posed above have been answered clearly. The third situation depicts a case of rule by law because constitutionalism, the constitution, and the entire body of laws are not promulgated with public reason, conscience of an autonomous institution, but are rather based on the denial of the inclusive structure of law. Moreover, judicial review is also denied. The public reason, autonomy of an individual (including of an actor), and responsibility of institutions are *a priori* conditions of human dignity and progress. They inherently possess *a posteriori* proof because they are self-evident. The supremacy of ideology, expressed through the rule by law setting, denies the very *a priori* conditions and rules out the significance of the inclusive structure of law. To remedy the defects of the rule by law situation, liberal democratic processes are instrumental, which are the harbingers of positive order and the inclusive structure of law.

### ***3.4 Inclusive Structure of Law Reflects the Idea of the Science of Legislation***

As mentioned above, it is not only the state of rule by law, but also the mainstream juristic theories that treat the rule of law partially, either from the disengaged vantage point of existence, or application, which undercut the inclusive structure of law. For positivist jurists like Austin, Hart, and Raz, among others, the existence of law is a sufficient condition for the positivity of law. They disregard the need for positivity in the law-making process. Ronald Dworkin claims that, especially in hard cases, law defining must be governed by certain principles. Lon Fuller and other naturalist jurists would like to apply certain moral principles to the making and interpretation of law. These juristic explanations either undermine the positivity of law or insist on a reductionist positivistic position. In either case, they ignore the significance of an inclusive structure of law as a precondition for the positivity of law. The separation of a positive requirement in each stage of law (e.g., making, existence, and application), or reducing the need of positivity to the realm of existence only, can offer, at best, the condition of constitutional equilibrium and often results into the state of rule by law. Before we discuss how positivity should be maintained in each of the three stages, let us briefly review the positions of some of the leading contemporary positivist jurists.

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54. See HAYEK, *supra* note THE CONSTITUTION OF LIBERTY, Ch. 11 Kindle Loc. 6115.

Joseph Raz acknowledges ‘Hayek’s observation<sup>55</sup> on the rule of law as one of the clearest and most powerful formulations of the ideal of the rule of law.<sup>56</sup> At the same time, Raz states that he cannot support some of the conclusions derived by Hayek.<sup>57</sup> Raz’s discontent with Hayek’s idea of the rule of law pertains to Hayek’s disapproval of Raz’s conception that, “The rule of law is a political ideal which a legal system may lack or may possess to a greater or lesser degree.”<sup>58</sup> Raz argues that there is no conceivable connection among the rule of law, justice, and democracy. This is the case because, in a society where there is no democracy, where there is poverty, inequality, lack of human rights, racial segregation, gender discrimination, et cetera, the rule of law can still exist.<sup>59</sup> He further argues that, like political doctrines, rule of law varies in details and thrives in a variety of political and cultural environments with different meanings. In other words, it is not a universal moral imperative.<sup>60</sup>

Joseph Raz’s position comes from his disregard for the distinction between the concept of rule by law and the rule of law. He egregiously argues that there is no conceivable connection between the rule of law and democracy.<sup>61</sup> This explanation of the rule of law is utterly reductionist and unsatisfactory. Furthermore, Raz also fails to separate the idea of the rule of law from legal principles and a condition of rule by law. In the following paragraphs, we will elaborate how the rule of law and legal principles are interconnected, but retain distinctive individuality.

Some jurists and legal philosophers view the idea of the rule of law as an elusive and value-laden concept.<sup>62</sup> This statement reflects one of the hardest realities that many positivists and normative

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55. See F. A. HAYEK, *THE ROAD TO FREEDOM* 112 (Bruce Caldwell ed., The University of Chicago Press, 2007/1944, Kindle). Hayek writes, “Nothing distinguishes more clearly conditions in a free country from those in a country under arbitrary government than the observance in the former of the great principles known as the Rule of Law. Stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand—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.”

56. See JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210 (New York, Oxford University Press, 1979).

57. *Id.*

58. *Id.*, at 211.

59. *Id.* Raz argues that, “We have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph . . . the rule of law is just one of the virtues which a legal system may 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 democracies.

60. See JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 370 (Clarendon Press, rep. 1996).

61. See RAZ, *supra* note *THE AUTHORITY OF LAW*, at 211.

62. See HILAIRE BARNETT, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 51 (Routledge, 8th ed., 2011, Kindle Edition). Barnett observes, “The rule of law is a concept, which is capable of different interpretations by different

jurists often explain: the idea of the rule of law not as an intrinsic part of the law, but as a descriptive principle of law. Joseph Raz elucidates the rule of law as a principle of law, but not as an intrinsic part of law. Similarly, Ronald Dworkin, who is considered a critic of both positivist and naturalist schools, expounds the idea of the rule of law as an interpretative principle.<sup>63</sup> Further, one of the leading jurists of the natural law school, John Finnis, also explicates the rule of law as the virtue or quality of institutions and processes.<sup>64</sup>

In Ronald Dworkin's terms, principles are descriptive and laws are prescriptive (positive). Dworkin maintains that what is law on the issue is discoverable in principle.<sup>65</sup> In Dworkin's view, a principle states a reason, which argues in one direction, but does not necessitate a particular decision.<sup>66</sup> Dworkin argues that, in deciding a case, each judge applies principles. Such decisions are political in the sense that the rulebook conception of the rule of law condemns it.<sup>67</sup> Dworkin's explanation of the relationship between law and principles is defective on at least two issues. First, it recognizes principles outside the remit of law. This immediately poses the question of who is bound to apply any standards that are not internalized by the law. Or, why should such standards be considered binding in discovering law itself? Dworkin's argument is also refutable not only with the evidence from domestic legal systems, but also from the perspective of international law.<sup>68</sup> Second, it allows a normative system to take a role in defining the prescriptive content of law, which is analytically illogical.

Let us consider whether the legal principle—*actus non reum facit, nisi mens sit rea*—no one will be punished for a crime without a guilty mind or intention ipso facto forms a part of the rules or not. Let us say, Country Z or Legal System Z has a statute that prescribes that under a charge of drugs transaction, human trafficking or terrorism, the overt act (*actus reus*) is sufficient for establishing a case. Can the legal system, or more specifically judges, apply the principle of *actus non reum facit, nisi mens sit rea* in this situation? The most obvious answer is 'no.' In other words, unless a legal principle

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people, and it is this feature which makes an understanding of the doctrine elusive. Of all constitutional concepts, the rule of law is also the most subjective and value-laden." See also Andrei Marmor, *The Ideal of the Rule of Law*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY, 666 (Dennis Patterson ed., Wiley-Blackwell, 2nd ed., 2010). Marmor argues that, "The fact that we tend to refer to the rule of law as an ideal suggests that the rule of law is a general normative principle, and one that can be attained, in practice, to various degrees; legal systems can meet the normative requirement of this ideal to a greater or lesser extent."

63. See RONALD DWORKIN, A MATTER OF PRINCIPLE 1-2 (Harvard University Press, 1985). Dworkin argues that, "... law is a matter of interpretation rather than invention ... cases must be decided at retail, in their full social complexity; but the decision must be defended as flowing from a coherent and uncompromised vision of fairness and justice, because that, in the last analysis, is what the rule of law really means."

64. See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 270-276 (Oxford University Press, 2nd ed., 2011).

65. See John Mackie, *The Third Theory of Law*, 7 PHILOSOPHY AND PUBLIC AFFAIRS 3-16 (1977).

66. See Joseph Raz, *Dworkin: A New Link in the Chain*, 74 CALIFORNIA LAW REVIEW 1103-1119, 1105 (1986).

67. See DWORKIN, *supra* note A MATTER OF PRINCIPLE, at 17.

68. See *Canada v. the United State* (the Gulf of Maine case), 1984 ICJ Reports 246. The ICJ mentioned that rule and principles are essentially one and the same idea as principles clearly meant the principles of law.

is internalized in the prescriptive content of law, it is merely a normative standard that cannot be applied in the interpretation and application of law. Using this argument, we can claim that, unless principles are internalized either in the form of constitutionalism or in the contents of the existing laws, they cannot be applied to describe or discover the law in question. This proposition might be useful in the exercise of legislative oversight.

However, Dworkin's contention specifically focuses on a situation where law is silent or in a penumbra. Hart endorses the 'minimum content of morality'<sup>69</sup> to resolve the penumbral situation. However, for Hart, the judges should search the 'minimum content of morality' from within the legal system. Dworkin considers Hart's proposition incongruent, since there is a gap in law that, for Dworkin, can only be fulfilled by principles. In this sense, principles are extraneous to the prescriptive aspects of law, but they serve to fill the inadequacy in the prescriptive aspects of the law. This can be termed as the Dworkinian conception of the rule of law. The fallacies of this Dworkinian conception can be exposed with two simple examples from civil and criminal law, respectively. Let us imagine absence of law that regulates and penalizes electronic crime. A person called Mr. R, through electronic use of the credit card of Ms. Y, takes X amount of money from Ms. Y's credit card account. No principle can penalize Mr. R merely on the charge of electronic crime. However, Mr. R can be prosecuted on fraud or other charges, and he might be additionally liable for a tort. In no condition, a gap in criminal law can be supplied by principle. Principles alone can neither create crime nor penalize. However, the parliament can transform principles into legal structure through the process of legitimacy.

Let us take another example from civil law. Mr. R and Ms. Y have entered into a business agreement that prescribes in detail their corresponding rights and duties. It stipulates that, on selling 2000 items of goods by Ms. Y, Mr. R will get additional 2 percent benefit from Ms. Y. Commendably, Ms. Y had sold 2000 items; however, unfortunately one item was returned by one of the customers. While Mr. R demands to get the 2 percent benefit, Ms. Y refuses the payment on the grounds that the last item was returned, reducing the sold number to 1999 items. Let us say, Mr. R's lawyers bring the claim before the court on the grounds of the principle of equity. Can a court honor the claim of Mr. R on the grounds of the principle of equity? Or, in other words, can rights and duties be created on the grounds of principles? The simple and clear answer is 'no', unless the principle of equity has already been recognized by law as a tool to interpret or supply missing requirements in a dispute. The point here is that, the law cannot be reduced, modified, or supplied by any external or internal agencies; otherwise, law gets mired in normative altercations and its whole purpose of certainty and

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69. See HART, *supra* note THE CONCEPT OF LAW 193-200, 248, 250, & 254.. Hart admits that his theory is not a plain-fact theory of positivism since amongst the criteria of law it admits values, not only plain facts (at 248). Hart also says that his theory of rule of recognition conforms to moral principles or substantive values as criteria of legal validity (at 250). In a penumbral situation, the judge's duty will be to make the best moral judgment he can on any moral issues he may have to decide (254); see also H. L. A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 64 (Clarendon Press, 1983). In the *Essays*, Hart explicates his idea of necessary intersection between law and morals. S. B. Drury, *H. L. A. Hart's Minimum Content Theory of Natural Law*, 9 *POLITICAL THEORY* 533-546 (1981).

predictability gets defeated. One of the main vigilances the parliamentary oversight can perform is that it protects the very idea of positivity by making the government responsible and accountable for it.

However, a legal system can recognize 'principles' by internalizing them in the prescriptive content of law. Yet, the recognition may allow the possibilities for competitive principles. In this situation, how do we know which principle should be given priority or chosen over another? This is not a hypothetical argument. Article 84 of the 1990 Constitution of the Kingdom of Nepal had internalized this idea, stating, "Powers relating to justice in the Kingdom of Nepal shall be exercised by courts and other judicial institutions in accordance with the provisions of this Constitution, the laws, and the recognized principles of justice." Article 84 of the 1990 Constitution is comparable with Article 129 of the Draft Constitution, 2015. Further, the 2007 Interim Constitution of Nepal has retained the same provision in Article 100 (1); and has further added one more provision, i.e., Article 100 (2), which provides, "Following the concept, norms and values of the independent judiciary, and bearing in mind the aspirations of the people's movement and democracy, the judiciary of Nepal shall be committed to this Constitution." Perhaps, with such a wide range of power and internalization of principles of justice by the Constitution, the Nepalese judiciary could move forward on a proactive path. However, the limit comes only from the phrase 'recognized principles of justice.'

Can the process or system of recognition permit the applicability of a principle in the legal system? For Hart, recognition is a sufficient condition. His concept of recognition also sustains a number of flaws; among them, typically, it is alien to the idea of judicial review over legislative acts. In fact, in the UK, which adopts parliamentary supremacy, the idea of judicial review of the legislative action was absent for a long time. For example, let us say, a piece of legislation (statute) adopts a principle that limits judicial review. Can recognition by parliament of the principle of limitation on judicial review stand as a principle governing the legal system? It was true for the UK, especially before the adoption of the Human Rights Act in 1999. Still, for many other countries having judicial review in their legal system, it would be inconceivable to justify the legislative action without examining its validity. For instance, on a number of occasions, beginning with the famous *Golak Nath* case of 1967, the Indian Supreme Court has struck down any legislative attempt that curtails the power of judicial review in any form. Even in the UK, following the enactment of the Human Rights Act, the doctrine of judicial review has been expanded from the narrow scope of only reviewing the administrative actions to the review of legislative actions as well.

Against the background of the above discussion, any principle to be applied by a legal system needs to be legitimate, valid, and enforceable. In other words, having solely the condition of legitimacy, the principle cannot cause any practical difference. The principle should also be valid and able to create rights and duties having proper authority, so that it could be enforced with the power of sanctions. With the attainment of these three features, a principle becomes a part of a legal system and is transformed into rules. A principle, devoid of these three features (validity, legitimacy, and



enforceability) is simply a normative standard, not a legal standard. The following chart illustrates the relationship between the rule of law and principles.

#### Chart 2: The Rule of Law & Principles

Joseph Raz regards the rule of law as a non-universal concept.<sup>70</sup> Further, for him, it is a doctrine that is conditioned by political cultural context, including its justification and meaning.<sup>71</sup> Raz also claims that it is the function of the rule of law to facilitate the integration of particular pieces of legislation with the underlying doctrines of the legal system.<sup>72</sup> The function of the rule of law, in this Razian explanation, has a misplaced position because a socialistic legal system inspired by political ideology may produce laws compatible with the doctrines of socialism that also fits with the Razian concept of the rule of law. The Razian concept, thus, fails to appreciate the function of the legislature in choosing the most appropriate principles in the given context that are compatible not with the rule by law, but with the inclusive structure of law.

Raz exposes a further issue when he claims that the authority of the court is to harness legislation to legal doctrines.<sup>73</sup> This proposition is partly true, if the doctrines are part of the existing rules. However, Raz's idea of the rule of law gives an account in the form of principles that are not posited. This brings Raz closer to Dworkin in assigning non-posited principles a role to bring legislation compatible with such doctrines or principles. This proposition undermines not only positivism itself, but also the citadel of the rule of law.

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70. See RAZ, *supra* note, ETHICS IN PUBLIC DOMAIN, at 370. Raz writes, "I do not regard the rule of law as a universal moral imperative. Rather it is a doctrine which is valid or good for certain types of society provided they meet the cultural and institutional presuppositions for the rule of law, i. e. those on which the rule of law depends for its success."

71. *Id.*, at 370. Raz writes, "Like many other political doctrines (such as that of democratic government) the rule of law, precisely because it varies in details and thrives in a variety of political and cultural environments, can have different meanings and moral justifications in different countries."

72. *Id.*, at 375.

73. *Id.*

Principles enter into the form of the rule of law and, in a broader sense, into the body of law. In addition, in a specific sense, they also enter into a particular rule (law), through the process of recognition (legitimization). Both the legislative body and judiciary, by the nature of their function and authority, engage in the discourse of recognizing principles. However, an important distinction persists between the legislative recognition and judicial recognition. Legislative recognition can be an *a priori* recognition as well as an *a posteriori* recognition, but the judicial recognition is fundamentally an *a posteriori* recognition. As an *a priori* recognition, the legislative body (perhaps constituent assembly), having authority to institutionalize constitutionalism, may propound and internalize a set of principles into the body of law. Following the institutionalization of constitutionalism, both the legislative body and the judiciary can exercise their authority constrained by constitutionalism. However, when constitutionalism offers more than one possibility of interpretation, it is the judiciary, rather than the parliament, that recognizes the best possible principle in the form of rules to give effect to the constitution, with the best possible effort for efficiency and optimality. The judiciary might benefit from the application of the methodology of WG. Indeed, with the application of WG, the legislative body may also benefit from adopting positive tools to ensure that the law making process is compatible with the idea of the rule of law, which is not only the basis of parliamentary oversight, but also refurbishes the core democratic functions.

Irrespective of the place of its origination, the idea of the rule of law has achieved universal recognition. For example, among the three ideas of the rule of law explained by Dicey in the eighteenth century, the ‘supremacy of law’<sup>74</sup> and ‘equality before the law’<sup>75</sup> have been universally recognized as an intrinsic part of the rule of law. On the other hand, his third idea, associated with explaining a constitution as the result of ordinary law, is peculiar to the local conditions of the United Kingdom. Nevertheless, the idea of enforceability of the rights of individuals associated with the concept of ordinary law is universally applicable.<sup>76</sup>

Though, the idea of the universality of the rule of law is both academically and politically contested. The political contestation stems from the ideological intolerance of the supremacy of the rule of law,

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74. See DICEY, *supra* note INTRODUCTION TO THE STUDY, Kindle Loc. 5292. He mentions that, “That rule of law, the, which forms a fundamental principle of the constitution, has three meanings, or may be regarded from three different points of view . . . It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.”

75. *Id.*, at Kindle Loc. 5301. Dicey mentions that, “It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the rule of law in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals . . .”

76. *Id.*, at Kindle Loc. 5308. Dicey mentions that, “The rule of law, lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts; that, in short, the principles of private law have with us been by the action of the Courts and Parliament so extended as to determine the position of the Crown and its servants; thus the constitution is the result of the ordinary law of the land.”

while the academic contestation arises from the disillusionment spread with the notion of the rule by law. One of the representative illusions can be found in the work of Marmor, who considers the rule of law ‘a general normative principle’ that can be attained in varying degrees of practice.<sup>77</sup>

Here, one question may arise: how could positivity be applied and maintained in each of the three stages (making, existence, and application) of law? This question is discussed below under the sub-heading ‘welfare-*grundnorm*.’

### ***3.5 Equal Citizens: the Foundational Outcome of the Science of Legislation***

No institution was ever capable of nor any state could be capable of ensuring all its citizens equal in terms of efficiency, wealth, economic conditions, and intelligence. Irrespective of human origin and belongingness, each individual has different capabilities. A state, however, can reduce these inequalities, by taking certain measures, as John Rawls suggests under his second principle of justice. The idea of democracy, among others, plays vital role in reducing these inequalities by creating opportunities through securing freedom, liberty, and human rights. This particular role of a state is possible in a liberal democracy. In other words, liberal democracies excel to perform this role.<sup>78</sup>

The concept of equality before law, however, pertains to equal citizens in terms of opportunities, rights, and status available without discrimination to all in the society. However, these novel and lucid ideas have frequently been vulnerable due to a number of factors, such as discrimination, unequal treatment, pervasive exploitation, social stratification, and injustice, among others. In this context, at least, three examples from Nepal will suffice to draw the required attention: gender discrimination on citizenship rights, the caste system, and the education system.

The notion of an equal citizen is one of the strongest bonds of unity and the foundational stone for nation building. The state of gender discrimination practiced during the Rana and Panchayati period, especially on the issue of citizenship, has been inopportunately continued in the democratic era too. It is still guided by the patriarchal myth, which denies equal status to women in imparting citizenship to their children. Among others, it also constitutionally denies the right of womb, including being a single mother. The Constituent Assembly of Nepal with the proposed new constitution has given continuity to the discriminatory citizenship provisions, which in fact rolls back from the citizenship

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77. See Andrei Marmor, *The Ideal of the Rule of Law*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY, 666 (Dennis Patterson ed., Wiley-Blackwell, 2nd ed., 2010). Marmor argues that, “. . . legal systems can meet the normative requirement of this ideal to a greater or lesser extent. Presumably, the better the law meets these standards, the better law is, at least in some respect. However, as soon as we begin to think about the rule of law as an overall normative ideal, some dangers lurk in the background. One obvious danger is to confuse the ideal of the rule of law with an ideal of the rule of good law. Many commentators associate the rule of law with the kind of legal regime that respects, for example, personal freedom and human dignity. Others go even farther and maintain that a legal regime that violates human and civil rights is one that fails to comply with the rule of law. Undoubtedly, these are noble ideals but their connection to the rule of law is questionable.”

78. See Joseph T. Siegle, Michel M. Weinstein, & Marton H. Halperin, *Why Democracy Excel*, 83 FOREIGN AFFAIRS 57-71 (2004).

provision offered by the Interim Constitution. The proposed provision denies the central idea of equal citizens and reinforces the discrimination and inequality through a constitution. Essentially, there are three main arguments against the proposed language on citizenship: it endorses the gendered notion of nationality, gives continuity to inequality and discrimination guided by deep-rooted patriarchal values, and fails in fulfilling Nepal's international human rights commitments.<sup>79</sup>

The centuries-long practices of the caste system have largely been legally addressed in the post-2006 polity. However, the discrimination still exists in social practice. Though, many legal advances in ending the discrimination on the grounds of caste system have been constitutionalized in the draft of the new constitution. Pathetically, the education system in Nepal is openly and legitimately breeding at least two different classes in society: a public school class with no hope and possibility in enjoying social-economic opportunities, and a private school class with better education and competitive edge. These discrepancies have not been lessened even during the democratic era. Instead, this boundary has further fostered the threshold of divided society, which poses a serious threat to the process of nation building. Against this background, the written book provisions of equality before the law in ignoring the problems of unequal citizens have been widely criticized as denial of justice in the Nepalese society. These instances testify that only having law is not enough. Indeed, law should be formulated on the grounds of WG and implemented in its true spirit.

In short, I would like to quote Mr. Brown, who observes that, “. . . one overarching lesson is clear: succeeding is not simply a question of legislative and policy changes, necessary though they be. Constitutions and legislation that provide protections and guarantees . . . are a critical foundation for broader freedoms. But unless the political culture also changes—unless citizens come to think, feel and act in ways that genuinely accommodate the needs and aspirations of others—real change will not happen.”<sup>80</sup> In other words, equality before the law is not simply an ideal, but a practical program on which the daily life of people should be governed and treated by all. Therefore, for providing opportunities in creating a level-playing field to the left-behind sections of society, the state should also be proactive in taking affirmative actions as well.

### ***3.6 Limited Government as the Success of the Science of Legislation***

The separation, checks and balance of power and judicial review in place are the minimum preconditions for a limited government. John Locke, in his *Second Treaties on Civil Government*, aimed to find an effective solution to the practical problem of arbitrariness. He posed a question: how can power, whoever exercises it, be prevented from being arbitrary? He found the answer in the erection of liberty by legislative power.<sup>81</sup> In short, Locke's conception of the rule of law affirms the idea of a

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79. See Indu Tuladhar, Constitution Making Process in Nepal: Citizenship Discourse Impact on Women and Children, UNICEF Nepal Working Paper WP/2015/001 (2014).

80. See Mark Malloch Brown, *Foreword*, in Human Development Report 2004: Cultural Liberty in Today's Diverse World (UNDP, 2004).

81 Referred in F. A. HAYEK, THE CONSTITUTION OF LIBERTY, Ch. 11 Kindle Loc. 6016 (The University of Chicago Press, 2011/1960, Kindle Edition).

limited government. This legislative power needs to be enlivened both through the legitimization process and the parliamentary oversight.

The United Nations strongly recognizes the concept of the rule of law as intrinsic to the idea of a limited government. The 1948 Universal Declaration of Human Rights resolves that ‘human rights should be protected by the rule of law’; i.e., human rights should be protected not through the unenforceable principles but by the positive law itself, which creates a duty to the government.<sup>82</sup> Considering the rule of law at the very heart of its mission, the UN subscribes to the principles of accountable government entrenched in laws.<sup>83</sup> In other words, the principles of governance have their source in laws. Therefore, such principles should be promulgated, enforced, and adjudicated by an independent judiciary; the UN endorses the following:

- Supremacy of law
- Equality before the law
- Accountability to law
- Fairness in the application of law
- Separation of powers
- Participation in decision-making
- Legal certainty
- Avoidance of arbitrariness
- Procedural and legal transparency

The list provided by the UN is by no means exhaustive, for it lacks judicial review, among others. However, it emphasizes that these principles should be legitimate, valid, and enforceable; otherwise, they cannot create any rights or duties. If principles are not translated into laws, they will be ignored and relegated to demagoguery. In Rousseau’s terms, this is a situation where a government “continually exerts itself against the sovereignty.”<sup>84</sup> In other words, a government that contests or bends the rule of law abuses the sovereign power.

The following table shows the distinctions between the rule of law and the rule by law.

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82. See UN, Universal Declaration of Human Rights 1948 (UDHR). The Preamble of the UDHR provides that, “Whereas 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.”

83. See UN, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General, S/2004/616 (23 Aug. 2004). Paragraph 6 of the Report reads, “The rule of law is a concept at the very heart of the Organization’s mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.”

84. See ROUSSEAU, *supra* note THE SOCIAL CONTRACT, at 75.

**Table 6: Comparison Between the Rule of Law & Rule by Law**

<b>Rule of Law</b>	<b>Rule by Law</b>
<u>Conceptual Framework</u> <ul style="list-style-type: none"> <li>• Positive Order</li> <li>• Integrity of Law</li> <li>• Welfare-grundnorm</li> </ul>	<u>Conceptual Framework</u> <ul style="list-style-type: none"> <li>• Political Instrumentality of Law</li> <li>• Ideological Domination</li> <li>• Political and Administrative Discretion</li> </ul>
<u>Main Features</u> <ul style="list-style-type: none"> <li>• Supremacy of Law</li> <li>• Equality Before the Law</li> <li>• Judicial Review</li> </ul>	<u>Main Features</u> <ul style="list-style-type: none"> <li>• Rule by a person or a group undermining the rule of law</li> <li>• Rulers can change law to fit their passions, ideologies, and situations</li> <li>• Lack or weak judicial review</li> </ul>

A state in which rule by law prevails, paradigmatically detracts the nature and function of constitutionalism and law, placing the idea of a limited government within the purview of political ideology. Within such a framework, laws are changed to meet political interests and personal benefits of the leaders, similar to an autocrat. If only a single ideology exists, as would be the case in an absolute monarchy or a communist state, perhaps to a certain level, they may command stability, albeit at the cost of autonomy, freedom, and liberty, among others. Similarly, in plural but illiberal societies, ideologies often victimize the rule of law; they either contest both constitutionalism and the constitution or reject them to institutionalize ideological order or the hegemony of the so-called leaders in the name of ideology.

The failure of the Constituent Assembly of Nepal to formulate constitutionalism and promulgate a constitution during the 2008–2014 period can be taken as one of the examples of a plural but illiberal society where the interests of few leaders took prominence in the name of political ideologies and political parties. At the same time, divisions among political ideologies also distorted the positivity of law. The case of Nepal unmistakably suggests that, unless political actors are ready to shed ideologies and stand steadfast in the search for constitutionalism unwaveringly on the positive grounds inspired by the idea of the rule of law, constitutionalism succumbs to the roiled political demagoguery. These inherent defects in rule by law can only be cured by the purity or positivity of the rule of law. Parliamentary oversight can play an important role in disallowing the state and its machinery from being renegade to the basic idea of constitutionalism and the rule of law.

The duality between rule by law and the rule of law is often sustained by the misconception of the relationship between ideology or politics and the rule of law. Many legal and political thinkers, even those grounded in a liberal democratic tradition, have become muddled with the concept of political foundation of the rule of law. In fact, looking closely at the practices of liberal democracies around

the world, it is not difficult to perceive the opposite, i.e., constitutionalism and the rule of law as the baseline of liberal politics or liberalism. Nevertheless, in many illiberal democracies and totalitarian societies political ideologies or the interests of leaders determine law. However, the degree of ideological determinism apparently varies between totalitarian and illiberal democratic societies.

For instance, China can be one of the best examples in this regard. China has a constitution and statutes. It allows private law making through contractual relationships. It has judiciary and recognizes precedents. It is a hub of foreign investment. Many of its laws are market-friendly as well. The stable political environment is generous to the growth of the market and the securing of foreign investment. China has secured the honor of the second largest economy in the world. It has brought down poverty to the level of around ten percent, which is admirable. Chinese statutes are legitimate and enforceable, as well as compatible with the Chinese Constitution. Content of many Chinese laws is similar to that of their counterparts in many democratic societies. Some of the criminal, commercial or business laws, as well as many others, can be taken as examples. Can we say that China is an example of the rule of law adopting country?

Article 5 of the Chinese Constitution, 1982 provides that, “The state upholds the uniformity and dignity of the socialist legal system. No law or administrative or local rules and regulations shall contravene the constitution. All state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the constitution and the law. All acts in violation of the constitution and the law must be investigated. No organization or individual may enjoy the privilege of being above the constitution and the law.” In short, the supremacy of the constitution and law is clearly stipulated in Article 5 of the constitution, which is one of the cardinal principles of the rule of law.

Reading Article 5 of the Chinese Constitution, one can immediately notice that China upholds a socialist legal system. The idea of the socialist legal system comes into the spotlight when it is read with Article 1 of the Chinese Constitution, which provides that, “The People’s Republic of China is a socialist state under the people’s democratic dictatorship led by the working class and based on the alliance of workers and peasants. The socialist system is the basic system of the People’s Republic of China. Sabotage of the socialist system by any organization or individual is prohibited.” Article 3 of the Constitution further stipulates that, “. . . All administrative, judicial and pro-curatorial organs of the state are created by the people’s congresses to which they are responsible and under whose supervision they operate . . .” The Preamble of the Constitution makes it clear that China is governed under the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong Thought and Deng Xiaoping Theory with a proletariat dictatorship.

Reading these constitutional provisions, it is clear that, in China, constitutionalism is derived not from the autonomy and wisdom of the freethinking people, but from the political ideology of the Communist Party of China. In short, the Chinese Constitution is an ideologically deterministic constitution. The Communist Party (practically the only political party) holds all power, including

political leadership in all state apparatus. All laws should be compatible with the socialistic conception. Laws can be made or amended to serve the political ideology. Regretfully, the judiciary is not independent. The judiciary does not have the power of a judicial review. Against this background, one can conclude that China lacks the rule of law and instead holds rule by law. However, Chinese legal system and laws are gradually adopting universally accepted legal concepts and many of their commercial laws, for example, have adopted legal concepts comparable to the legal concepts of commercial laws adopted in liberal democratic societies. In this regard, it can be concluded that the aspirations for the rule of law are hard to be ignored and are growing in China too.

Now, a highly pertinent question may arise: is the idea of the rule of law different from law? If the rule of law and law are the same concepts, then should we acknowledge North Korea as having the rule of law, since it does have a constitution and laws and is also governed by those laws? A careful consideration reveals presence of a persistent and dynamic relationship between law and the rule of law. The basic proposition is that governance or human relationships should not be merely based on the existence of law, but also on the making of law, the contents of law, and the application of law the validity criteria must be reflected. Moreover, the interpretation of law should be derived from the positive system of the rule of law. In other words, the principles of governance and human relationships (positive legal principles) should be a part of the law. If these features are denied in promulgating law, the system is known as ruled by law, not the rule of law. In quintessence, the features of the rule of law should be translated into the intrinsic part of the constitutionalism, which is further internalized in the contents of constitution and other laws, including statutes and precedents. This very feature anticipates the parliamentary oversight to bring off its responsibility at the forefront of its mission.

#### **4. Welfare-Grundnorm the Methodology of the Science of Legislation and Parliamentary Oversight**

A welfare-*grundnorm* (WG) is a methodology that explicates how positivity could be applied and maintained in making, existence, and application (including the interpretation) of law. The WG gives effect of validity as an inherent condition of legitimacy and enforceability (authority) coherently introduced in the making, existence, and application of law. Validity, as discussed above, reflects constitutional (legal)<sup>85</sup> optimality, efficiency, and equilibrium as its methodological tools. With these methodological tools, as shown in chart 3 below, normative standards are transformed into principles and concepts, which are finally transmuted into law by assessing their benefits on three levels: optimality, efficiency, and equilibrium. Any indoctrination, political instructions, and ad hoc decision will have an ill effect to this osmosis process since the transmutation grows and matures only under the conditions of objectivity, logic, and validity.

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85. The constitutional optimality, constitutional efficiency, and constitutional equilibrium are further molded into a specific shape through specific laws: statutes, precedent, rules, regulations, and contract. Therefore, in specific terms the idea of constitutional optimality, efficiency, and equilibrium can be stated as legal optimality, efficiency, and equilibrium.



All rules in their primary stage—that is to say, before undergoing a legislative process that legalizes rules—exist in the form of concepts. Broadly speaking, these concepts are social facts, which can be broken down into different disciplinary domains, such as economic concepts, cultural concepts, political concepts, ethical concepts, and so on. In all of these forms, the common and immutable feature of these concepts lies in their normative character. The welfare-*grundnorm* transmutes these normative concepts into constructs (law) through the application of the three levels of tests. In this sense, the methodology of WG obtains its inspiration from Bentham’s theory of utilitarianism and Kelsen’s theory of *grundnorm*. Perhaps, WG can be better stated as a further extension of Bentham’s science of legislation; however, WG is distinct from Bentham’s utilitarianism and Kelsen’s *grundnorm* in terms of its nature and explication. Instead, it is much more closer to the methodology of Pareto.

The WG is different from the conventional or mainstream positivism as well. The discrete existence of a sovereign entity or a parliament is adequate for the conventional positivism to posit rules, which turns into positive standard merely on the fact of position. For the welfare-*grundnorm*, rules are not positive by the mere fact of being posited. Rules are positive only when the nature and content of the rules are derived from a positive framework or a model called WG. Consequently, the validity criterion should be the reason for the source of the content and the nature of rules. Thus, WG offers a valid criterion to authorize the legitimization process. Chart 3 illuminates the distinction between the conventional positivism and the welfare-*grundnorm*.

The differences are particularly potent in explaining command or the authoritative determination of rules. The conventional version of positivism treats a command as a neutral concept and, by virtue of such command, posited rules are thus claimed to be neutral. The welfare-*grundnorm*, instead, explains a command as neither neutral nor biased, but amenable to both. This is the case because a command can be both normative and positive subject to its linkage with a validity criterion. A command can be normative if the sovereign is unlimited and acts beyond the premise of the validating framework. The validating framework is the methodology that transmutes normative concepts into a construct or rules with a positive methodology. A command can be positive if it derives the reason for its rules from the WG framework. In a constitutional democracy, where constitutionalism is institutionalized uncontested, the validity of the transmutation of normative order into positive order is smoother and more stable. In conflict-ridden societies, where constitutionalism is contested and is not institutionalized, the WG methodology could be usefully applied to formulate constitutionalism. Thus, the WG can be applied in institutionalizing constitutionalism, promulgating a constitution, and legislating and interpreting laws.

Austin’s concept of sovereign is not amenable to any such framework, since it is unyielding. As a result, Austin’s command theory is basically normative. Therefore, for any rules deemed to be positive, the WG offers four processes: conceptual discourse, transmutation of concepts (principles) into constructs by the application of validity framework, a legitimization process, and the production of positive rules.



In its simplest and most lucid form, the validity framework adopts three approaches. These approaches are considered in transforming concepts (principles) into the remit of rules through the process of legislation. They are as follows:

- First, by finding a condition where the interests of all stakeholders will be expanded without any limitation to their interests, which is a constitutional and legal optimality.
- Second, if the interests of the stakeholders cannot be expanded or are not amenable to the constitutional and legal optimality, then it seeks a condition where these interests are harmonized, which is constitutional and legal efficiency.
- Third, if both aforementioned possibilities are practically inconceivable, then it endorses the cost-benefit analysis to address both inter-stakeholder and intra-stakeholder conflicts, which is a constitutional and legal equilibrium.

With the application of these three frameworks, the making, existence, and application of law correspond to positivism. However, the third methodology often results in majority and minority practices that are often called democratic decision-making processes. In fact, they remind us of the limited version of the democratic decision-making process. In a positivistic sense, the first two methods are the cornerstones of any democratic decision-making process, while also being the preconditions of the third methodology. In any social situation, there often exist possibilities for the application of the first and second conditions. For example, constitutionalism might be contested in a political process. With the success of a revolution, the earlier constitution might be replaced with a new one. However, in modern liberal democracies, hardly a situation would arise where constitutionalism does not exist. If it seems *prima facie* non-existent, because of political contestation, it might exist in constitutional conventions and in precedent. The central idea is that the majority should not engage in liberty to take any decision as they please, by renouncing constitutionalism. Constitutionalism should thus be an unavoidable limitation to both majority and minority. However, majoritarian decision compatible with constitutionalism can establish the equilibrium of law endorsed by the rule of law, implying that the minority should not obstruct the majority from the implementation of such decisions. Rather, the minority is expected to offer

possible cooperation with the majority. However, the minority should always have forum to access before the court in settling its discontents.

If the legislative body ignores these three coherent methodologies, as its members are primarily motivated by populist and short-term goals or by some other vested political interests, it unfortunately aggravates serious democratic deficits. Raz correctly postulates that, “no cogent political theory has ever found much merit in majoritarianism.”<sup>86</sup> Certainly, democracy is a condition where people feel that law, law enforcing institutions, and the law enforcing personnel are their friends and protectors, rather than foes posing a threat to them. They are friends because in all situations they are required to implement constitutionalism and law faithfully. Law is the protector of the people through its agencies because it alone is the highest standard of civic conditions. In a society where these foundations are absent, democracy fails and institutions crumble. A strong and independent judiciary is thus important in espousing a counter-hegemonic role as a savior for preventing lawlessness.

In short, it can be stated that, when a legislature finds the WG as a useful methodological tool, perhaps it will be able to address the normative problems. The search for a positive condition where interests of all stakeholders are expanded without any threat or limitation invites a non-normative quest. For example, judicial review, sustainable development, or adult franchising might be the only few instances in enlarging welfare of all stakeholders. It is not compulsory that in all conditions the welfare or interests of all stakeholders are enlarged equally. Nevertheless, it is a condition where everybody feels better off. Therefore, the rule of law is a condition of positivity.

With the above discussion about the rule of law, especially its relationship with principles and law or rules, the question where the principles come from has been answered. We have examined how principles should be incorporated into the body of law in the form of rules with validity, legitimacy, and enforceability. This examination unites the concept of the rule of law with posited law (positivism). However, there are serious normative challenges down the road. These challenges are expressed in the form of divisive concept of the rule of law, such as the Western, the Asian, the African, the Islamic, the socialist concept of the rule of law, and so on. At the core, these divisive or fragmented concepts do no help to elucidate the concept of rule of law rather they attempt to explain the rule of law on the erroneous bandwagon of ideology.

The rule of law being embedded in its purity engages in discourse with normative concepts and in turn transforms them into positive constructs, if the normative concepts fit into its methodology, especially in the course of making rules. As soon as the rules are posited with the WG methodology, the normative concepts yield to the posited rules. Otherwise, the idea of a limited government or government by law, not by men, turns out to be futile. It is understandable that normative standards produce biased, partisan, narrow, and disharmonious socio-political, economic and cultural

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86. See RAZ, *supra* note ETHICS IN PUBLIC DOMAIN, at 376.

conditions. Yet, remedies to these problems cannot be found in any ideology, but rather in the positive osmoses accomplished through the methodology of welfare-*grundnorm*.

## 5. Conclusion

As discussed above, the act of parliamentary oversight performs one of the core democratic functions. It often involves in three major domain of activities: making laws, requiring the government to be responsible and accountable in implementing laws, and placing the best persons in the right positions through parliamentary hearing. Engaging in all these activities, parliamentary oversight constantly deals with a question that how to make or reach at the correct decision and conclusion.

In the post-1990 democratic era of Nepal, parliamentary oversight has been practiced in all the three domains as mentioned above. Apparently, we don't have a long history of parliamentary oversight and understandably we are in a learning phase. Nevertheless, the social expectations are exceedingly high that do not allow much time for us to take the learning phase for granted. The state of pandemic corruption, the scale of politics being a lucrative business, the tendency of monopolizing state apparatuses and offices in the name of political quotas, the abuses of political power against the backdrop of party position, recruitment of political loyalists in all organs of the state, and the prevalence of discriminatory and derogatory laws and policies are only a few examples that demonstrate how parliamentary oversight in Nepal is still awaiting to be effective.

By examining three cases: citizenship issue, the issue of education, and the system of social protection, the paper has identified five major stumbling blocks that impede the efficient and result oriented application of parliamentary oversight in Nepal. They are: erosion in democratic practices, a skinny distance between the parliament and political parties, mounting whip and sinking autonomy, desiderata of actors and their quality, and the interplay of interests, instructions, and temptation for power. To remedy these problems through adopting a right decision, this paper has suggested two methodologies: the methodology of rules based proposition, and the methodology of welfare-*grundnorm*.

The major challenges the parliamentary oversight faces in accomplishing its mission come from political denial of their independent functioning beyond the interests and instructions of political leaders. At the same time, they have also been tempted by the power and position in the government. The nexus of interests, instructions, and temptation has almost relegated the possibility of the key democratic functions expected from the parliamentary oversight. The post-2006 Nepalese experience shows that the problem gets rather worst when there is a hung parliament, the country is in transition, and power sharing becomes the game of national consensus.

Against this background, this paper mainly argues that the effectiveness and efficiency of parliamentary oversight in Nepal depends on the ability of the actors in addressing these challenges. Looking at the meteoric rise of political determinism in the country, it seems extremely difficult to address these challenges practically. However, theoretically, the solutions are unambiguously distinct:

the rules based proposition and the welfare-grundnorm. Also, the country has no choice except institutionalizing and bringing the function of parliamentary oversight into the mainstream for enabling the people to feel and realize democracy in the country. It is one of the key counter-hegemonic roles of public institutions and no democracy can relegate the significance of parliamentary oversight.

Let me take an example from health sector. One of the best ways to avoid getting sick and spreading illness is to wash hands and not to cut them. One of the easiest ways to catch a cold or influenza is to rub nose or eyes when germs have contaminated hands. The best defense against such contaminations is to wash hands regularly. Good hygiene prevents the spread of diseases. Similarly, parliamentary oversight should prevent the spread of political diseases and correct politics by bringing it within the premise of the rule of law. Public agents (both individuals and institutions) should understand the agency principle and act accordingly. Our optimism allows us to see the bright days ahead. With the institutionalization of the science of legislation, the objectives of parliamentary oversight can truly accomplish the core of its functions in the country. It is the way that we can strengthen parliamentary oversight into the heart of democracy.