PARLIAMENTARY OVERSIGHT AND THE SCIENCE OF LEGISLATION

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Summary

This paper 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 and help realize the constitutional aspirations. For any democratic state, bringing and managing power within the framework of the rule of law has consistently been a daunting challenge and the paramount mission. Hence, this paper examines factors that have posed limitations on the successful accomplishment of parliamentary oversight, while also providing some effective solutions. Section 1 and 2 describe the problematic aspects, the solutions to which are presented in Section 3 and 4. Section 5 concludes the paper by summarizing its main arguments.

5.1 PARLIAMENTARY OVERSIGHT IN NEPAL

Parliamentary committees can play profoundly important roles for institutionalizing democracy. They can shape the paradigm in realizing constitutional supremacy, ensuring a limited government, making effective and efficient laws, and empowering the people, among their other functions. Theoretically, by ushering parliamentary oversight in its functional realm, a parliament may take a foundational role in engineering the society. However, it is essential to identify the factors that would ensure the success of parliamentary oversight. Thus, the question is, what can ensure that the parliamentary oversight does not escape from and rise above the typical conventionalism and instead serves as the spot-on forum for core democratic functions? These issues will be addressed based on the Nepalese experience of parliamentary oversight.

The Nepalese parliament (known by a rather odd name of ‘legislative parliament’ in the post-2006 polity) comprises of Legislative Committee, 11 different Subject-matter Committees, and Special Committee on the Parliamentary Hearing (Hearing Committee). As such, it exercises its authority over the executive body in making the government responsible and effective in the implementation of the laws enacted and policy decided by the parliament. With all distinctions, a parliamentary oversight requires the

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government for respecting the constitution, devising good laws, formulating effective policies and programs compatible with the constitution and laws, implementing the laws and policies, maintaining financial and operational integrity of all branches of government and actors, and examining the annual or periodic performance reports. In addition, if needed, the parliamentary committees also give instructions or advice to the government in fulfilling its responsibilities, and ensuring effective and good governance. Against this background, this paper underscores the role of parliamentary oversight within three broad realms: enacting good laws, and ensuring that the merit system is in place (i.e., the best persons are placed in the right official positions) as well as that the executive body is responsible and accountable to the parliament, including in terms of financial propriety.

In the post-1990 democratic era, parliamentary oversight in Nepal has been institutionalized as one of the core democratic functions of the state. Understandably, Nepal does not have a long history of parliamentary oversight and is undergoing the learning process. Nevertheless, as the social expectations are exceedingly high, this does not allow much time for the parliament to remain in the learning phase. At the same time, dissatisfaction and critical outlook toward the functions of parliamentary oversight have already been widespread. The institutional inability in addressing the dissatisfaction has gradually relegated the spirit of parliamentary oversight into volatility. Moreover, parliamentary oversight has consistently endured heavy demands of political allegiances from leaders and political parties. Despite the elevated theoretical significance, the practical side of parliamentary oversight has been episodically depreciated. Moreover, objective assessment is difficult, given that hardly any scientific research has been carried out on the issues of parliamentary oversight in Nepal and the available data is limited. Finally, despite its immense significance, parliamentary oversight has often been neglected by almost all sections of society.

5.1.1 The Parliamentary Committees

The number, types, and names of parliamentary committees have been regularly changed along with the constitutional changes. Despite this fact, the major functions remain similar to those noted above. In the following sections, the parliamentary committees, as provided by the Parliamentary Rules of 2013 are discussed.

The parliament has formed a Legislative Committee\(^3\) 11 Subject-matter Committees\(^4\) and a Parliamentary Hearing Special Committee.\(^5\) Each of these committees has important roles to play. The Hearing Committee administers hearing to 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

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3. I\(d\) Rule 110.
4. I\(d\) Rule 118.
by two-thirds of the total number of committee members, the recommended nominee is considered being approved by the Hearing Committee. With this 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 for administering the hearing systematically and effectively. The Nepalese experience, especially in the post-2006 period, demonstrates that, when the nominees are decided on the grounds of vested political interests and from party’s quota, the parliamentary hearing inevitably becomes a mere formality.

Thus, the parliamentary hearing is often abrogated and deflected from its main purpose of democratic checks and balances. When the entire country is run based on the political quota system, the quest for system building is bitterly defeated. In this context, not only the system of parliamentary hearing has been victim of this excessive politicization of the country, but the Legislative Committee and Subject-matter Committees have also fallen prey to this intolerantly rising anti-democratic political culture prevalent in the country. When fairness is undermined, justice is denied, and the rule of law is relegated, the parliamentary oversight has an important role to play. Nevertheless, the stronghold political allegiances and pervasive whip system have intensely handicapped the practices of parliamentary hearing. John Rawls argues that, when personal or group interests govern decisions, they neglect fairness. Democracy without fairness is indeed a farce and less distinctive from illiberal or authoritarian practices, which the Nepalese society continues to suffer in the post-2015 constitutional period too. Nevertheless, the period is overtly short to draw any conclusions about the 2015 Constitution and its implications. Though, why Karl Popper named such habits as dangerous prophecies that deny human reason and allow the enemies of democracy to come from within, might be instructive in the effective implementation of the 2015 Constitution.

The Legislative Committee is one of the most important committees empowered with the main function of detailed discussion and reporting on Bills tabled before the parliament. 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

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6. Id. Rule 119.5.
7. 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.”
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, assessment of the parliamentary oversight would be incomplete without putting into perspective the constitution making process and the constitution.

The Hearing Committee can make sure that the best person is placed in the right position, whereas 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 functions aimed at enacting good laws, making government responsible and accountable, and placing the best person in the right position (merit system), the parliamentary oversight accomplishes one of the key democratic functions or the counter-hegemonic role.

The state of pandemic corruption, the scale to which politics is perceived as a lucrative business, the tendency for 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 the ineffectiveness and inefficiency of parliamentary oversight in Nepal. This leads to two important questions: Why is this the case of inefficiency? How could under such circumstances the parliamentary oversight be effective in serving and upholding the core democratic principles?

5.1.2 The Issues and Analytical Tools

The members of the parliamentary committees have repeatedly 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 as expected from the parliamentary oversight. The post-2006 Nepalese experience shows that the problem worsens when there is a hung parliament, a coalition government, the country is in transition, and power sharing dominates the idea of national consensus.

Among others, this paper presupposes the following cognitive limitations as serious obstacles to the successful application of the methodology of welfare-grundnorm (WG) and the rules-based proposition that are critical for championing the cause of parliamentary oversight in Nepal:

- Erosion in Democratic Practices
- A Short Distance among 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 decisions 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, making the solutions practically difficult, if not impossible. Loyalties are divided on political lines. Autonomy comes into focus only when the nexus of interest, instruction, and temptation does not serve the expectations. Taking decisions on merits and objectivity is always difficult because this requires integrity, dedication, deep study, robust analysis, and an unflinching sense of fairness. Moreover, loyalty, autonomy, merit, and objectivity are closely related to ensuring a fine balance between categorical and hypothetical imperatives; willingness in adopting the methodologies of welfare-grundnorm and the rules-based proposition; and a commitment to the system of positivity.

5.2 Parliamentary Role under the 2015 Constitution

Akin to parliamentary democracies across the world, the Parliament of Nepal primarily performs six major functions, as shown in Chart 1.

The 2015 Constitution of Nepal has divided the parliamentary power and functions at three different levels—the federal, the provincial, and the local level. The six major functions shown in Chart 1 generally apply to the federal parliament. Also, the provincial legislative bodies may carry out similar functions. However, the local legislative bodies will only have limited functions.

Formation and dissolution of a government are the major functions and authorities of the parliament. Parliament is the only institution in a parliamentary democracy that can form a government. Article 62, 76, 100, and 101 of the 2015 Constitution provide detailed provisions on the formation and dissolution of the government. Often, through the majority or a coalition, political parties in the parliament form a government or tender a no confidence motion. With its approval, they dissolve the existing government, opening the door for a new government or elections. Constitutionally, this privilege of the parliament in forming and dissolving government can be exercised without soliciting public opinion or carrying out public discussions on the suitability of the candidates for the ministerial position. There are no constitutional and legal requirements for public outreach. Against this background, time and again, corrupt, incompetent, and unskilled individuals have been placed to the ministerial or high level state positions. This has been
one of the reasons for system instability, systemic erosion, and bad governance in the country. These unfavourable conditions ultimately widen the state-citizen relationships, frustrate the public expectations, and downplay the democratic aspirations of the people. Correction of this state of play is urgent in Nepal if parliamentary democracy is to function effectively and meet the public aspirations. For this reason, the following two specific areas of interventions might be useful:

(i) The political parties, while forming government, can be required by law to solicit wider public opinion on the identity of the ministers. Currently, there is no such law in existence. This requirement can be legalized through reforming the existing laws, including the election laws.

(ii) Civil society or think-tank institutions can mobilize opinion builders, including the media, academia, experts, and public figures, for a transparent public auditing of the suitability of candidates for the ministerial portfolios.

However, given the present level of political awareness, these suggestions seem merely idealistic. Nevertheless, the need is more urgent in the new scenario of the transformation of the country from a unitary into a federal structure.

Parliamentary oversight in ensuring good governance can play regulative and communicative roles, as noted in Chart 2. Under the regulative role, it can act to institutionalize a limited and responsible government. Under the communicative role, it can facilitate public outreach by providing forum to the public and private agencies. In both cases, it can bring the government and its agencies, constitutional bodies, private sector (market), and the civil society organizations within the scope of parliamentary oversight.

Not only the practices of parliamentary oversight are new in Nepal, but the process is also marred by a number of challenges. In the post-1990 democratic era of Nepal, the parliamentarians have been mostly focused on securing their constituency for the next election. For that reason, they tend to perform activities to please their party leaders, attain a position on the executive body, and/or provide opportunities for their cadres in the state organs and agencies. In this race, parliamentarians have often assigned less priority to their roles as lawmakers, and as actors in charge of making the executive body responsible and accountable. Thus, they have often failed to review the acts of the
executive body and other organs of the state in order to ensure that these are functioning in congruent with the constitution and laws of the country.

Nevertheless, parliamentary oversight in Nepal is a new area with immense opportunities for strengthening democracy. However, due to the lack of experience, knowledge, information, and analytical tools, the parliamentary committees have not been effective in espousing their expected roles. Similarly, there is also a gap in the systematic analysis of the cases, strengths, achievements, weaknesses, and failures of the parliamentary oversight in Nepal. For example, a comprehensive database on parliamentary oversight is presently lacking. The much-needed knowledge bank and database on the issues of parliamentary oversight might be useful in gaining a better understanding of the significance of parliamentary oversight. With the effective implementation of parliamentary oversight, individual’s participation in the state’s affairs from the local to the provincial and central level would be effectively promoted. Presently, Nepal has no experience of parliamentary oversight at the provincial and local levels. Against this new scenario of federal structure in Nepal, a comprehensive database of parliamentary oversight would immensely useful to the provincial and local level parliaments in streamlining their activities, including parliamentary oversight.

The law-making function is the most important area of parliamentary authority and responsibility. This function can be divided into three distinct clusters, as shown in Chart 3.

Amendment to the constitution, promulgation of statutes, and budgetary outlays are three major law-making functions of the parliament. A two-thirds majority of both houses of the federal parliament can amend the constitution, with the exception of provisions related to the boundary of provinces and Annex 6 of the constitution.

Amendment to Annex 6, which is related to the legislative power of the provinces and the boundary issues, requires the approval of the concerned provincial legislation. Amendment to the constitution is a special type of legislative function and is therefore not part of the daily activities of the parliament. The promulgation of laws (statutes) is the main business of the parliament.

Law making is a complex task. First, in the age of global constitutionalism, domestic laws should be promulgated in consonance with international laws, which requires sufficient knowledge of international laws as well. Second, in a democratic society, the idea of the rule of law plays important role in guiding the legislative body. In this context, the
decisions, i.e., case laws of the judiciary, should be comprehended in their propriety. Third, there exist a number of laws, rules, regulations, and policies. In many cases, they might not be compatible with each other and may challenge the hierarchy of law. For ensuring their compatibility, a comprehensive and in-depth technical knowledge is necessary. Fourth, in the new federal structure, harmony among federal, state, and local laws and policies signifies another important area of intervention to secure the rule of law and good governance in the country.

Article 274(3) of the constitution requires the publication of the constitutional amendment proposal for public information before the conclusion of the amendment. Rule 63 of the Legislative Parliament requires the parliament to publish the Bills for public consultation if a proposal is approved by the parliament to that effect. However, only on rare occasions the legislative body has solicited public response on Bills. One such example was the Bill on the Contempt of Court. Despite the legal provision on public outreach in the law making, the process has not been actively practiced. The reason is simple—the law does not require a mandatory process of public consultation. Furthermore, under the existing system, a proposal should be approved by the parliament to exhaust the public consultation process. This provision needs to be changed by legitimizing a negative vote system, i.e., unless public consultation is disapproved by the parliament, each Bill should be published for public consultation after (or before, as appropriate) the committee process.

Similarly, the budgetary outlay system is more complex than it was in the unitary system. For the first time, Nepal is practicing federal budgetary outlay system. In this course, a number of challenges need to be addressed. For technical support, Paper 26 of the 2015 Constitution has envisioned a National Resources and Finance Commission. Despite this fact, the final and formal decision should come from the parliament. In this context, one of the prominent challenges lies in ensuring the capability of the members of parliament for understanding, assessing, and taking right decisions on complex financial issues.

In addition to its law-making function, the parliament is also the highest-level policy-making agency. It takes a number of important policy-making decisions, including ratification of treaties, public policy decisions, and reviewing the annual reports of the constitutional bodies.

Under Article 279 of the constitution, the parliament is authorized to ratify international treaties, some of which require two-thirds majority, while others require a simple majority. Ratification of any treaty that relate to the authority of provinces requires consultation with the concerned provinces as well.

Chart 4: Policy Making Functions of the Parliament
On many occasions, treaties ratified in the past were simply guided by the idea of deferring to international demands. In some cases, also due to the lack of political motivation, important were not ratified. Ratification of international treaties creates rights as well as obligations. Therefore, it is always advisable to have wider public discussion on the strengths, weaknesses, advantages, and obligations arising from those treaties, as well as ensuring that strategies for fulfilling those obligations are in place. Treaties are those instruments that are considered core in conducting international relations, including bilateral relations.

Besides ratification of treaties, the parliament is responsible for taking a number of important public decisions. For example, under Article 275 of the 2015 Constitution, the parliament can take decision for a referendum on any important national issue. Under Paper 21 of the Rules, parliament has the authority to approve or disapprove the declaration of emergency by the head of state. The parliament also discusses the State of Address delivered by the President to the Parliament (Rule 11). Parliamentarians can also pose questions to ministers on the issues of contemporary and public importance (Paper 6). They can also make a proposal on public issues for discussion and decision in the parliament (Paper 7). Moreover, parliamentarians can request the parliament for necessary discussion and taking decision on the government policies and activities (Paper 10), among others.

Under Rule 115, parliamentary committees have authority and responsibility to inspect, review, and give necessary directions to constitutional bodies and commissions. This is one of the exceedingly important functions of the parliament. However, in most cases, this function is performed as a mere formality. As a result, the people are not aware of the functions and achievements of the constitutional bodies and commissions. In addition, such institutions are not responsibly engaged in public outreach activities.

Impeachment is one of the key democratic tools in the hands of the legislative body, which can be employed to control the abuses of authority, gross violation of the constitution, and strengthen state’s responsibility. For these reasons, the parliament can initiate and approve the impeachment process against individuals holding top public positions, such as the president, vice-president, prime minister, chief justice, judges, heads and members of constitutional bodies, and other authorities as prescribed by the constitution.
However, during the entire democratic era of Nepal, impeachment has never been exercised. Indeed, impeachment is a rare tool even in established democracies, such as the United Kingdom, South Africa, and India. It is generally employed when all other constitutional and legal mechanisms fail to correct the system.

5.3 Parliamentary Outreach in the UK, India, and South Africa

As a means of learning some valuable lessons from other countries, the parliamentary outreach in the UK, India, and South Africa is briefly discussed in the following paragraphs. Parliamentary outreach is extremely important in connecting parliament and the representatives with the people.

In each of these countries, the systemic aspects and operational modalities of parliamentary outreach are uniquely distinct. For example, in the United Kingdom, much emphasis is given to elections. Since the electoral reform in 1884, public participation in the parliamentary activities has focused on the “integrity, quality, and impartiality” (IQI) of the election, the conduct of the representatives, and the outcome of the parliamentary activities. With the IQI system in place, public concerns are overwhelmingly reflected in the parliamentary activities. Besides the IQI, the press and media are exceptionally strong in playing important roles in disseminating and communicating the parliamentary activities to the public. At the same time, the UK parliamentary activities are also disseminated through “parliamentary outreach podcast” and “BBC Parliament” television channel. Moreover, the UK parliament has created a system of voice-box, which allows people to provide their feedback and concerns directly to the parliament. At the same time, the youth parliament debates have been extremely useful instruments in allowing the youth to understand the parliamentary process and prepare future leaders. The UK parliament media program called “connecting parliament with public” allows useful ways of building mutual confidence and sharing of information between the parliament and the people.

The Home Page of the South African Parliament mentions that, “The constitution says that there must be public participation in what goes on in Parliament. After all, the word “Parliament” comes from the word meaning to speak.” It clearly conveys the idea that representation alone was insufficient for ensuring democratic legitimacy in South Africa. In addition to election, the Constitution through a number of provisions requires public participation in the activities of the parliament. Nevertheless, voters are the soul of democracy. Only voters can correct a malaise in the system. Therefore, the South African system of parliamentary outreach also puts a great emphasis on the transparent and accountable functioning of the members of parliament. Voters cast vote for the political party or candidates of their choice. This, however, does not mean that the elected representatives are free to act in a way they like or interpret the wishes of the people subjectively. Therefore, the parliamentarians are under a constant duty of promoting

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transparency and accountability in their activities. These duties are performed, in a number of ways, including the following:

i. **Forums**: Parliament provides forum for public participation in its work in a number of ways. These forums allow people to directly participate and express their concerns in the parliamentary process.

ii. **Committee Meetings**: People are also allowed to participate in the parliamentary committee meetings and express their concerns.

iii. **Parliamentary Democratic Offices (PDOs)**: These offices are instrumental in ensuring public participation in the parliament. Articles 59 and 72 of the 1996 Constitution of South Africa require the parliament to facilitate public involvement in the legislative process. In all nine provinces, the PDOs have been established with the aim of creating an immediate and sustained parliamentary presence, particularly in the deep rural, under-resourced and under-serviced local communities, which for various reasons have remained outside national debates in society and the mainstream of public involvement and participation. The PDOs also engage in expanding parliament’s ability and opportunities to be directly in touch and continuously engage with the people who are ordinarily outside national debates in society. They also coordinate public participation and involvement in the legislative processes and other activities of both the National Assembly and National Council of Provinces and their Committees in all the provinces, in accordance with the parliamentary strategic plan and annual calendar. The PDOs also ensure a greater level of efficiency, economy, and effectiveness in accessing communities and the public.

iv. **Submissions**: The South African Constitution makes provision for public involvement in law making, oversight, and other parliamentary processes. South Africa’s democratic system not only allows the citizens to elect their representatives, but also enables them to have a say in matters that affect them. One of the ways that the public can make their voices heard is by making submissions to the National Assembly Committees, the National Council of Provinces Committees or Joint Committees. A submission is the presentation of views or opinions on a matter or piece of legislation under consideration by a committee of the parliament. Submissions may be presented in the language chosen by the individual or a group and are usually in the written form. They can be reinforced through oral representation to the committee, if the person or group that has made the submission is invited to make an oral presentation. Making submissions creates an opportunity for any member of the public to propose changes or suggest possible actions to ensure that the laws being considered by the parliament serve their purpose.

v. **Petitions**: Article 56(d) and 69(d) of the Constitution of South Africa provide for the National Assembly and the National Council of Provinces to receive petitions, representations, or submissions from any interested persons or
institutions. Public participation in law making, oversight, and other processes of parliament is an important constitutional provision of South African democracy. Parliament has developed a number of ways for promoting public involvement in the work of the institution. One way the public can exercise their right to participate in parliament is through submitting a petition.

The system of parliamentary outreach in India is not as vivid and comprehensive as in the United Kingdom and South Africa. Nevertheless, the Lok Sabha TV Channel disseminates the activities of parliament to the people. Recently, the Indian parliament has also started to educate students about the parliamentary processes. For that purpose, parliamentarians visit schools and discuss the parliamentary processes with students. This practice is useful for disseminating the parliamentary processes, at the same time contributing to build future leadership. Besides these activities, numerous committees allow public to provide their concerns to the parliamentary committees.

Against these backgrounds, the state of parliamentary outreach in Nepal is clearly at its inception phase and many methods and modalities need to be institutionalized and carried out in a planned way if it is to mature to the levels comparable to those noted above. Undoubtedly, the South African model of public outreach is the most encompassing and participatory one to learn from for building a system parliamentary outreach in Nepal. Against this background, the prompting question is that how could the Nepalese parliament prioritize its contribution to designing good laws and policies. This is not a simple issue either theoretically or practically. Nonetheless, some solutions are proposed in the following section.

5.4 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 section, 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 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 nation building, and
- Ensuring a limited government.

This is not an exhaustive list. Neither they are exclusive. Some of them can be combined. However, for explanatory and analytical ease, I have preferred these six features as the signposts of the science of legislation at the core of parliamentary oversight.
5.4.1 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.\(^{11}\) 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.\(^{12}\) 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. In any dynamic society, not all social interests might be amenable to social optimality. However, they 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 stands on 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.

\(^{11}\) 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 . . .”

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.

5.4.2 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. 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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13. The term ‘order’ is used as a system.
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. 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. 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. 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 varied and applied to a normative order. In other

14. 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).


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.

5.4.3 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 peace and progress. 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,’ 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. 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. 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.”

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. Moreover, with the abolition of the Star Chamber, 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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18. *Id.*, Kindle Loc. 6043.
19. *Id.*, Kindle Loc. 5950.
20. *Id.*, Kindle Loc. 5992.
22. *Id.*
sheer greed of supplying resources to its domestic industries and in turn monopolizing the market in the colonized countries.\(^{23}\)

In the eighteenth century, a British jurist, A. V. Dicey explained the ‘supremacy of law’\(^{24}\) 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 constitutionalism and the constitution. Witnessing crises and opportunities, confusions and certainties, skepticism and faith, intolerance and harmony, and localism and globalism, our time has recognized the pressing \textit{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 \textit{Quran} and \textit{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.


\(^{24}\) See A. V. Dicey, \textit{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 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. 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 state apparatuses, 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. Aristotle further posits that, when individuals arbitrarily exercise power and disregard their responsibilities for personal advantage, they act against the will of the people. 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 demagogy in democracy, as laws alone should be the supreme masters. If demagogy prevails, people in power collectively become monarchs.

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.

The established constitution may lean towards democracy, but it might be administered

26. Id. Ch. X, Kindle Loc. 4854.
27. 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.”
28. Id. Ch. IV, Kindle Loc. 4839.
in an undemocratic spirit. This type of state, according to Aristotle, often emerges after revolution because the dominant parties become content with encroaching a little upon their opponents. In addition, the authors of the revolution now have the power in their hands. 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. With these observations, Aristotle has answered the first two of the three questions raised above.

In 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.

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. 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. 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. This leads to the question of how political parties could be legitimized

29. Id. Ch. V, Kindle Loc. 4841.
30. 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.”
33. Id.
34. 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
within a democratic framework, which are indeed the form of a partial society. Practically, 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.35

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, and responsibility of institutions are \textit{a priori} conditions of human dignity and progress. They inherently possess \textit{a posteriori} proof because they are self-evident. The supremacy of ideology expressed through the rule by law setting denies the very \textit{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.

\textbf{5.4.4 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

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

Joseph Raz acknowledges ‘Hayek’s observation’\(^{36}\) on the rule of law as one of the clearest and most powerful formulations of the ideal of the rule of law.\(^{37}\) At the same time, Raz states that he cannot support some of the conclusions derived by Hayek.\(^{38}\) 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.”\(^{39}\) 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.\(^{40}\) 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.\(^{41}\) Raz’s parochialism denies recognizing the distinctions between law and the rule of law.

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.\(^{42}\) 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.

\(^{36}\) 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.”


\(^{38}\) Id.

\(^{39}\) Id., at 211.

\(^{40}\) 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.


\(^{42}\) See Raz, supra note The Authority of Law, at 211.
Some jurists and legal philosophers view the idea of the rule of law as an elusive and value-laden concept.\textsuperscript{43} This statement reflects one of the hardest realities that many positivists and normative 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.\textsuperscript{44} 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.\textsuperscript{45}

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.\textsuperscript{46} In Dworkin’s view, a principle states a reason, which argues in one direction, but does not necessitate a particular decision.\textsuperscript{47} 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.\textsuperscript{48} Dworkin’s explanation of the relationship between law and principles is defective on at least two facades. 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.\textsuperscript{49} Second, it allows a normative system to take a role in defining the prescriptive content of law, which is analytically illogical.

\textsuperscript{43} See Hilaire Barnett, \textit{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 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, \textit{The Ideal of the Rule of Law}, in \textit{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.”

\textsuperscript{44} See Ronald Dworkin, \textit{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.”

\textsuperscript{45} See John Finnis, \textit{Natural Law and Natural Rights} 270-276 (Oxford University Press, 2nd ed., 2011).


\textsuperscript{48} See Dworkin, \textit{supra} note A Matter of Principle, at 17.

\textsuperscript{49} 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.
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 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’\(^\text{50}\) 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

\(^{50}\) See Hart, supra note TH E 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).
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 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.” Further, the 2007 Interim Constitution of Nepal retained the same provision in Article 100 (1); and has further added one more provision, i.e., 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.’ Like Article 84 of the 1990 Constitution, the 2015 Constitution has also incorporated a similar concept under Article 126(1).

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, in fact, endures 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. 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

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51 Article 126(1) of the 2015 Constitution provides that, “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.”
legislative attempt that curtailed 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 this background, 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 law and principles.

Chart 6: Law & Principles

Joseph Raz regards the rule of law as a non-universal concept. Further, for him, it is a doctrine that is conditioned by political cultural context, including its justification and meaning. 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. 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.

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52. 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.”

53. 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.”

54. Id., at 375.
Raz exposes a further issue when he claims that the authority of the court is to harness legislation to legal doctrines. 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.

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 develop constitutionalism, may propound and institutionalize 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 one of 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’ and ‘equality before the law’ have been universally recognized as the 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 constitutionalism...

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55. Id.
56. See DICKEY, 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.”
57. 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 . . .”
enforceability of the rights of individuals associated with the concept of ordinary law is universally applicable.\textsuperscript{58}

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, 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.\textsuperscript{59}

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.’

5.4.5 Nation Building: the Foundational Outcome of the Science of Legislation

This issue has been discussed under paper three of this book.

5.4.6 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, which the 2015 Constitution has envisioned under various provisions. John Locke, in his Second Treaties on Civil Government, aimed to find an effective solution to the practical problem of arbitrariness, 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.\textsuperscript{60} In short, Locke’s conception of the rule of law affirms the idea of a limited government, which needs to be invigorated 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

\textsuperscript{58} 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.”

\textsuperscript{59} 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.”

protected not through the unenforceable principles but by the positive law itself, which creates a duty to the government.⁶¹ Considering the rule of law at the very heart of its mission, the UN subscribes to the principles of accountable government entrenched in laws.⁶² 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: 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, and procedural and legal transparency.

The list provided by the UN is long, though 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 demagogy. In Rousseau’s terms, this is a situation where a government “continually exerts itself against the sovereignty.”⁶³ 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.

<table>
<thead>
<tr>
<th>Rule of Law</th>
<th>Rule by Law</th>
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<tbody>
<tr>
<td><strong>Conceptual Framework</strong></td>
<td><strong>Conceptual Framework</strong></td>
</tr>
<tr>
<td>• Positive Order</td>
<td>• Political Instrumentality of Law</td>
</tr>
<tr>
<td>• Integrity of Law</td>
<td>• Ideological Domination</td>
</tr>
<tr>
<td>• Welfare-grundnorm</td>
<td>• Political and Administrative Discretion</td>
</tr>
<tr>
<td><strong>Main Features</strong></td>
<td><strong>Main Features</strong></td>
</tr>
<tr>
<td>• Supremacy of Law</td>
<td>• Rule by a person or a group undermining the rule of law</td>
</tr>
<tr>
<td>• Equality Before the Law</td>
<td>• Rulers can change law to fit their passions, ideologies, and situations</td>
</tr>
<tr>
<td>• Judicial Review</td>
<td>• Lack or weak judicial review</td>
</tr>
</tbody>
</table>

⁶¹ 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.”

⁶² 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.”

⁶³ See ROUSSEAU, supra note THE SOCIAL CONTRACT, at 75.
A state in which rule by law prevails, paradigmatically detriments 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 2008–2012 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 demagogy. 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 leaders interests 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 proletarian 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. Regrettfully, 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.

5.5 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 to 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)64 optimality, efficiency, and equilibrium as its methodological tools. With these methodological tools, as shown in the chart below, normative standards are transformed into principles and concepts, which are finally transmuted into law by assessing their qualities 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.

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.

64. 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.
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. The following chart 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, implementing the constitution effectively, 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.

**Chart 7: Conventional Positivism v. Welfare-Grundnorm**

<table>
<thead>
<tr>
<th>Conventional Positivism</th>
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<tr>
<td>Sovereign / Parliament</td>
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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.”65 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 conditions. Yet,

65. See RAZ, supra note ETHICS IN PUBLIC DOMAIN, at 376.
remedies to these problems cannot be found in any ideology, but rather in the positive osmoses accomplished through the methodology of welfare-grundnorm (WG).

5.6 Conclusion

As discussed above, parliamentary oversight is one of the core democratic functions. It often involves in three major domains 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 of how reach the correct decision and arrive at the most appropriate conclusion.

In the post-1990 democratic era, parliamentary oversight in Nepal has been practiced in all the three domains noted above. Clearly, as Nepal does not have a long history of parliamentary oversight, it is still in its learning phase. Nevertheless, the social expectations are exceedingly high and thus do not allow much time for the learning phase to continue. The state of pandemic corruption, the scale to which politics are seen as a lucrative business, the tendency for 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 that parliamentary oversight in Nepal is still highly ineffective.

This paper has identified five major obstacles that impede the efficient and result-oriented application of parliamentary oversight in Nepal, namely erosion in democratic practices, a very thin margin 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 by adopting right decisions, two methodologies are proposed—the rules-based proposition, and the welfare-grundnorm.

The major challenges the parliamentary oversight faces in accomplishing its mission come from political denial of its independent functioning beyond the interests and instructions of political leaders. At the same time, those responsible for parliamentary oversight 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 worsens when there is a hung parliament, the country is in transition, and power sharing becomes the sole purpose 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 to address these challenges. Yet, given the meteoric rise of political determinism in the country, it seems extremely difficult to overcome these challenges practically. However, theoretically, the solutions are unambiguously distinct—the rules-based proposition and the welfare-grundnorm, as noted above. Moreover, the country has no choice but to institutionalize
and bring 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.

This is best exemplified by analyzing the health sector. Regularly washing hands is the best and simplest way to avoid getting sick and spreading illness. On the other hand, one of the easiest ways to catch a cold or influenza is to rub nose or eyes with contaminated hands. Thus, 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 realm of the rule of law. Public agents (both individuals and institutions) should understand the agency principle and act accordingly. This is the way that Nepal can strengthen parliamentary oversight as the heart of democracy in the country. There is no better way than to hope for the effective and successful practices of parliamentary oversight in the future.