CHAPTER 2

BASIC CONSTITUTIONAL PRINCIPLES

Rule of Law

General : One of the basic principles of the English Constitution is the Rule of Law. This doctrine is accepted in the Constitution of U.S.A. and also in the Constitution of Pakistan. The entire basis of Administrative Law is the doctrine of the Rule of Law. Sir Edward Coke, the Chief Justice in James I's reign was the originator of this concept. In a battle against the King, he maintained successfully that the King should be under God and the Law, and he established the supremacy of the law against the executive. As early as in 1215, in *Magna Carta*, it had been said, "No free man shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go or send for him, except under a lawful judgment of his peers and by the law of the land." Dicey developed this theory of Coke in his classic book *The Law and the Constitution* published in the year 1885.

Meaning : According to Dicey, the Rule of Law is one of the fundamental principles of the English Legal System. In the aforesaid book he attributed the following three meanings to the said doctrine:-

(*i*) Supremacy of law;

(*ii*) Equality before law; and

(*iii*) Predominance of legal spirit.

(i) **Supremacy of law :** Explaining the first principle, Dicey states that rule of law means the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power or wide discretionary power. It excludes the existence of arbitrariness, of prerogative or even wide discretionary authority on the part of the Government. According to him the Englishmen were ruled by the law and by the law alone; a man with us may be punished for a breach of law, but can be punished for nothing else. In his words, "Wherever there is discretion, there is room for arbitrariness and that in a republic no less than under a monarchy discretionary authority on the part of the Government must mean insecurity for legal freedom on the part of its subjects". As Wade says, "The Rule of Law requires that the Government should be subject to the law, rather than the law subject to the Government."

The Rule of Law implies the banning of 'rule of the jungle' in matters pertaining to a person or a nation. It is so imperative that the reign of law should not be reduced to anarchy by a wilfully lawless minority.

In other words, according to this doctrine, no man can be arrested, punished or be lawfully made to suffer in body or goods except by due process of law and for a breach of law established in the ordinary legal manner before the ordinary Courts of the land.

(ii) **Equality before law :** Explaining the second principle of the rule of law. Dicey states that there must be equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the

ordinary law Courts. According to him, in England, all persons were subject to one and the same law, and there were no extraordinary Tribunals or special Courts for officers of the Government and other authorities. He criticised the French legal system of *droit administratif* in which there were separate Administrative Tribunals for deciding cases between the officials of the State and the citizens. According to him, exemption of the civil servants from the jurisdiction of the ordinary Courts of law and providing them with the Special Tribunals was the negation of *equality*.

If there is one bulwark that guards the freedom of the average citizen, it is the law Court. Courts of justice are more important than even the military to guard the freedom of the country and of the individual by enforcing adherence to the Rule of Law.

(iii) **Predominance of legal spirit :** Explaining the third principle, Dicey states that the general principles of the Constitution are the result of judicial decisions of the Courts in England. In many countries rights such as right to personal liberty, freedom from arrest, freedom to hold public meetings are guaranteed by a written Constitution; in England, it is not so. Those rights are the result of judicial decisions in concrete cases which have actually arisen between the parties. The Constitution is not the source but the consequence of the rights of the individuals. Thus, Dicey emphasised the role of the Courts of law as guarantors of liberty and suggested that the rights would be secured more adequately if they were enforceable in the Courts of law than by mere declaration of those rights in a document, as in the latter case, they can be ignored, curtailed or trampled upon.

In his words, "Our Constitution, in short, is a judge-made Constitution, and it bears on its face all the features, good and bad, of judge-made law." According to him, mere incorporation or inclusion of certain rights in the written Constitution is of little value in absence of effective remedies of protection and enforcement. He propounded: "Habeas Corpus Acts declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty."

Application of Doctrine : In England, the doctrine of rule of law was in fact applied in concrete cases. According to Wade if a man is wrongfully arrested by the police, he can file a suit for damages against them just as if the police were private individuals. In *Wilkes* v. *Wood*, it was held that an action for damages for trespass was maintainable even if the action complained of was taken in pursuance of the order of the Minister. In the famous case of *Entick* v. *Carrington*, a publisher's house and papers were ransacked by King's messengers sent by the Secretary of State. In an action for trespass, damages to the tune of £300 were awarded to the publisher. In the same manner, if a man's land is compulsorily acquired under an illegal order, he can bring an action for trespass against any person who tries to disturb his possession or attempts to execute the said order.

Dicey's thesis had its own advantages and merits. The doctrine of rule of law proved to be an effective instrument in controlling the

administrative authorities within their limits. It served as a kind of touchstone to judge and test the administrative actions.

According to Wade, the British Constitution is founded on this doctrine, Yardley also says that in broad principle the rule of law is accepted by all as a necessary constitutional safeguard. Dicey's theory has thwarted the recognition and growth of Administrative Law in England. Although, in the 20th century, complete absence of discretionary powers with the administration is not possible, yet this doctrine puts an effective control over the increase of executive and administrative powers and keeps those authorities within their bounds. As the supremacy of the ordinary Courts of law is accepted, they have power to control the actions taken by the administrative authorities. They must act according to law and cannot take any action as per their whims or caprice. It is the duty of the Courts to see that these authorities must exercise their powers within the limits of the law.

The doctrine of the Rule of Law expounded by Dicey was never fully accepted in England even in his days. Wade rightly says that if he had chosen to examine the scope of Administrative Law in England, he would have to admit that even in 1885 there existed 'a long list of statutes which permitted the exercise of discretionary powers which could not be called in question by Courts' and the Crown enjoyed the immunity under the maxim '*The King can do no wrong*'. The shortcoming of Dicey's thesis was that he not only excluded arbitrary powers but also insisted that the administrative authorities should not be given wide discretionary powers, as according to him, 'wherever there is discretion, there is room for arbitrariness'. Thus, Dicey failed to distinguish *arbitrary power* from *discretionary power*. Though arbitrary power is consistent with the concept of rule of law, discretionary power is not, if it is properly exercised. The modern welfare state cannot work properly without exercising discretionary power. As Wade and Phillips observed: "If it is contrary to the Rule of Law that the discretionary authority should be given to Government departments or public officers then the Rule of Law is inapplicable to any modern Constitution."

One thing must be noted. In modern times, Dicey's rule of law has come to be identified with the concept of rights of citizens. As Wade and Phillips rightly state, it is accepted in almost all the countries outside the Communist world with some variations. It is invoked in modern democratic countries to keep control over the oppressive, capricious and arbitrary exercise of powers by the administrative authorities. The International Commission of Jurists, in their 'Delhi Declaration' made in 1959 accepted the idea of the rule of law as a modern form of law of nature.

Droit Administratiff--Meaning : Under the French Legal System, known as *droit administratiff*, there are two types of laws and two sets of Courts independent of each other. The ordinary Courts administer the ordinary civil law as between subjects and subjects. The Administrative Courts administer the law as between the subject and the State. An administrative authority or official is not subject to the jurisdiction of the ordinary civil Courts exercising powers under the civil law in disputes between the private individuals. All claims and disputes in which these

authorities or officials are parties fall outside the scope of the jurisdiction of ordinary Courts and they must be dealt with and decided by the Special Tribunals. Though the system of *droit administratiff* is very old, it was regularly put into practice by Napoleon in the 18th century.

If the French system did not adequately protect the individuals as against the State, it would be a serious criticism; but it was not so. The fact is that this system was able to provide expeditious and inexpensive relief and better protection to the citizens against administrative acts or omissions than the common law system. Wade says: "Once rid of the illusion that administrative Courts must inevitably be biased, one can see that they hold the keys to some problems which are insoluble under the separation of powers as practised in England." Schwartz also says: "An analysis of the French Law of State liability shows clearly that it has developed a complete systems of State responsibility far beyond anything thus far evolved in the Common Law world. Not only has the French system been able to free itself from all traces of the doctrine of sovereign immunity; it has gone much further than to make the State liable for its torts on the same basis as an individual citizen. The private citizen in France is still liable primarily for the damages caused by his faults. The State in France, on the other hand, is no longer liable only or even primarily, on the basis of fault.

Concrete cases : Let us examine some concrete cases to illustrate this proposition:

(*a*) If an employee in a Government factory is injured by an explosion, according to the administrative Courts in France, the risk should fall on the State, but the English Courts will not hold the State liable unless the injured proves negligence of some servant of the Crown. Thus, English Courts still apply the conservative and traditional approach that there should be no liability without fault; on the other hand, French administrative Courts adopt the theory that 'justice requires that the State should be responsible to the workman for the risk which he runs by reason of his part in the public service.

(*b*) On the one hand, when a passer-by chased a thief and was stabbed, the *Consul d'Etat* held that he was entitled to recover damages which would not have been done under the English Law. On the other hand, as the French administrative Courts are recognised as guardians of public servants, the latter also get better protection from their employers. Thus, where a Rector of Strasbourg Academy was asked to take up some other duties and relieved from his post without in fact new duties being assigned to him, the administrative Court held that he was removed from service and gave him redress. According to Denning, in England, the ordinary Courts of law could not have protected him because as a rule, public servants can be dismissed by the Crown at pleasure.

(*c*) Under the Act of 1872, the Government had a right to have a monopoly of manufacturing matches and for that purpose it could acquire the factories run by private persons. A provision to pay the compensation for compulsory acquisition was also

made in the Act. However, if a factory was ordered to be closed on the ground of improvement of health no compensation was required to be paid. In one case, an order to close the factory was passed by a minister on the ground of improvement of health, but in reality, the motive was to avoid payment of compensation to the owner of the factory. An ordinary Court could not have given any redress to the owner in this case, but the *Conseil d'Etat* held that, the power was abused by the Minister and awarded £20,000 to the victim factory owner.

(*d*) A, a private gas company entered into an agreement with the Town Planning Council to supply gas at a particular rate for a period of 30 years. The agreement was made on the basis of the rates of coal in the year 1904. But after the First World War, the rates shot up. An application was filed by the gas company before the *Conseil d'Etate* for revision of rates. An ordinary Court would have rejected this application and would not have granted the relief prayed for, but the *Conseil* accepted it and revised the rates. According to the *Conseil*, it was in the interest of the public at large that the company should continue to work rather than be wound up and if compelled to provide gas at the fixed rates, it amounted to compelling the works into liquidation.

(*e*) *Barel's case:* The Minister concerned did not permit certain candidates to appear at the civil service examination. It was reported in the newspaper that the Government had decided to refuse permission to candidates who were Communists. The Minister, however, denied it. The candidates approached *Conseil d'Etat*, which quashed the order, since no reasons were recorded by the Minister for refusing such permission. The *Conseil* presumed that there were no reasons which would justify such a refusal. Thus, the *Conseil d'Etat* took the view in 1954 which was taken by English Court in 1968. **1968 AC 997.**

(*f*) *Fortune's case: A* wanted to appear at a competitive examination. He was not permitted to appear on the ground that his confidential file contained certain adverse remarks. In an action by *A*, the *Conseil d'Etat* went through the records and called upon the Secretary to justify the order. The Secretary pleaded that it was an '*Act de Government*' (Act of State) and that the Court had no jurisdiction to deal with the matter. He did not produce any document. The Court passed an order to produce the entire file relating to the matter, went through it and quashed the order. In England, governed by the rule of law one cannot conceive of such a situation, for the ordinary Courts of law have no right to interfere with any 'Act of State', or with ministerial discretion nor can they have access to the secret documents.

(g) Again, when the decision of *Liversidge* v. *Anderson*, **1942 AC 206**, was brought to the notice of the French Administrative Tribunal wherein the principle of *suggestive satisfaction* was upheld by the Court of law even in case of a preventive detention, the *Conseil d'Etat* was unable to agree with the same. According to the French officials, the decision in *Liversidge* cannot be accepted in any civilised country and more particularly in a country which had evolved the concept of rule of law.

Modern concept of the Rule of Law : As stated above, Dicey's concept of Rule of Law was not accepted fully even in 1885 when he formulated it, for even in that period, Administrative Law and administrative authorities were existent. Today, Dicey's theory of rule of law cannot be accepted in its totality. Davis gives seven principal meanings of the term 'Rule of Law':-

(1) Law and order;

(2) Fixed rules;

(3) Elimination of discretion;

(4) Due process of law or fairness;

(5) Natural law or observance of the principles of natural justice;

(6) Preference for judges and ordinary Courts of law to executive authorities and Administrative Tribunals; and

(7) Judicial review of administrative actions.

Separation of Powers

General : According to Jain and Jain: "If the 'rule of law' hampered the recognition of Administrative Law in England, it was the doctrine of 'separation of powers' which had an intimate impact on the thinking on administrative process and Administrative Law in the United States." Davis also says, "Probably, the principal doctrinal barrier to the development of the administrative process has been the theory of separation of powers".

Meaning : It is generally accepted that there are main categories of governmental functions:

(*i*) the Legislative;

(*ii*) the Executive, and

(*iii*) the Judicial.

At the same time, there are three main organs of the Government in a State:

(*i*) the Legislature;

(*ii*) the Executive, and

(*iii*) the Judiciary.

According to the theory of separation of powers, these three powers and functions of the Government must, in a free democracy, always be kept separate and be exercised by separate organs of the Government. Thus, the legislature cannot exercise executive or judicial power, the executive cannot exercise legislative or judicial power; and the judiciary cannot exercise legislative or executive power of the Government.

Historical Background : The doctrine of separation of powers has emerged in several forms at different periods. Its origin is traceable to Plato and Aristotle. In the 16th and 17th centuries, French philosopher John Bodin and British politician Lock respectively had expressed their views about the theory of separation of powers. But it was Montesquieu who for the first time formulated this doctrine systematically, scientifically and clearly in his book '*Esprit des Lois*' (The Spirit of the Laws), published in the year 1748.

Montesquieu's doctrine : Writing in 1748, Montesquieu said:

> "When the legislative and executive powers are united in the same persons, or in the same body of Magistrates, there can be no liberty, because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty if the judicial power be not separated from the legislative and the executive. Where it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Where it joined to the executive power, the judge might behave with violence and oppression.
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> There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions and of trying the causes of individuals."

Lord Acton rightly says, 'every power tends to corrupt and absolute power tends to corrupt absolutely'. In the 18th century, there was complete and full-fledged monarchy in France. Louis XIV was well-known for his absolute and autocratic powers. The King and his administrators were acting arbitrarily. The subjects had no right or liberty at all. On the other hand, Montesquieu was very much impressed by the liberal thoughts of Lock and he also based his doctrine on analysis of the British Constitution of the first part of the 18th century as he understood it. According to him, the secret of an Englishman's liberty was the separation and functional independence of the three departments of the Government from one another.

According to Wade and Phillips separation of powers may mean three different things:-

(*i*) that the same persons should not form part of more than one of the three organs of Government, *e.g.*, the Ministers should not sit in Parliament;

(*ii*) that one organ of the Government should not control or interfere with the exercise of its function by another organ. *e.g.*,

the Judiciary should be independent of the Executive or that Ministers should not be responsible to Parliament; and

(*iii*) that one organ of the Government should not exercise the functions of another, *e.g.*, the Ministers should not have legislative powers.

Criticism : Though, theoretically, the doctrine of separation of powers was very sound, many defects surfaced when it was sought to be applied in real life situations. Mainly, the following defects were found in this doctrine:

(*a*) Historically speaking, the theory was incorrect. There was no separation of powers under the British Constitution. At no point of time, this doctrine was adopted therein. As Prof. Ullaman says, "England was not the classic home of separation of powers." The Donoughmore Committee also observed, "In the British Constitution there is no such thing as the absolute separation of the legislative, executive and judicial powers." It is said, "Montesquieu looked across foggy England from his sunny vineyard in Paris and completely misconstrued what he saw."

(*b*) This doctrine is based on the assumption that the three functions of the Government, *viz.*, legislative, executive and judicial are divisible from one another. But in fact, it is not so. There are no watertight compartments. It is not easy to draw a demarcating line between one power and another with mathematical precision. According to Friedmann and Beneficial, "The truth is that each of the three functions of the Government contains elements of the other two and that any rigid attempt to define and separate those functions must either fail or cause serious inefficiency in Government."

(*c*) It is impossible to take certain actions if this doctrine is accepted in its entirety. Thus, if the legislature can only legislate, then it cannot punish anyone committing a breach of its privilege; nor can it delegate any legislative function even though it does not know the details of the subject-matter of the legislation and the executive authority has expertise over it; nor could the Courts frame rules of procedure to be adopted by them for the disposal of cases.

(*d*) The modern State is a welfare State and it has to solve many complex socio-economic problems and in this state of affairs also, it is not possible to stick to this doctrine. As Justice Frankfurter says: "Enforcement of a rigid conception of separation of powers would make modern Government impossible."

(*e*) According to Basu, in modern practice, the theory of separation of powers means an *organic* separation and the distinction must be drawn between 'essential' and 'incidental' powers and that one organ of the Government cannot usurp or encroach upon the *essential* functions belonging to another organ, but may exercise some *incidental* function thereof.

(*f*) The fundamental object behind Montesquieu's doctrine was the liberty and freedom of an individual; but that cannot be achieved by mechanical division of functions and powers. In England, theory of separation of powers is not accepted and yet it is known for the protection of individual liberty. For freedom and liberty, it is necessary that there should be rule of law and an impartial and independent judiciary and eternal vigilance on the part of the subjects.

Thus, on the whole, the doctrine of separation of powers in the strict sense is undesirable and impracticable and therefore, it is not fully accepted in any country. Nevertheless, its value lies in the emphasis on those checks and balances which are necessary to prevent an abuse of enormous powers of the executive. The object of the doctrine is to have "a Government of law rather than of official will or whim". Again, almost all the jurists accept one feature of this doctrine that the judiciary must be independent of and separate from the remaining two organs of the Government, *viz.*, legislature and executive.
