



JURISTROCRACY VIZ-A-VIZ PARLIAMENTARISM

By Nimisha Shaswat
LL.M from UILS, Chandigarh University

By Dr. Amita Arora
Assistant Professor, UILS, Chandigarh
University

ABSTRACT

This article helps to understand the rise of Juristocracy in global phenomena. It emphasizes the study of judicial supremacy over legislature. It focuses on the problem of judicial intervention in state affairs. The court intervenes to focus on the integrity of the Democratic process. Consequently, the sovereignty of the people is protected against transient majorities. It studies whether the Juristocracy can be beneficial for the global criteria or not? It stands by its thought process implemented by the judges of various courts where the judiciary has to uplift its standards in order to get justice for maintaining the law and order in society. In this article we will examine whether judicial activism is being over-shadowed by Judicial over-reach at domestic as well as global levels. This article intends to highlight the line of Juristocracy while maintaining the essence of separation of power in the administrative field. Many questions remain unanswered in this article's attempt to describe the changes occurred within the time period. Given India's growing prominence as the world's largest democracy, how it balances representational and good governance arguments in its political institutions is expected to have a significant impact on how democracy progresses globally.

Keywords: Juristocracy, Democracy, New-Constitutionalism, Judicial activism, Judicial Review & Separation of powers etc.

1.1.1. INTRODUCTION

The three pillars of Indian democracy are still at odds after more than seventy years. That sounds excellent if taken literally, because the separation of powers exists expressly for this purpose. Among other things, the Indian Constitution establishes a vast and comprehensive list of authorities and responsibilities for numerous entities necessary for the proper operation of democracy. Parliaments can be found in every civilised country. The English Parliament is known as the Mother of All Parliaments. In a parliamentary administration, there are two types of executives: nominal and actual. The true executive is accountable to the legislature, and it must resign or ask for the legislature's dissolution if it fails a vote of confidence.

The workings of various government agencies have been thoroughly specified by the Constitution's writers in order to prevent any sort of excess or power invasion. The functions of all three organs are clearly defined. The legislative and executive, for example, have the ability to govern, create laws, keep order, and finance, while the court ensures that these two pillars work within constitutional constraints. The Indian Constitution creates a careful balance of checks and balances between three primary pillars. The checks and balances policy has frequently resulted in friction between the two organs, with each insisting on establishing their case before reaching an agreement. We'll delve into the specifics of the interaction between the two organs as we progress.



The phrase "*Equal Justice Under Law*" emphasise the Indian judiciary's ultimate responsibility. The Court must decide whether the law provision or provisions under which the decision-maker acted authorised them to make the decision they did, for the reasons they did, and in the manner they did. In other words, the judicial review process is around interpreting the statute to determine what the decision-maker is allowed to do and what the decision-maker must do.¹ The comment implies that the Supreme Court's establishment in the United Kingdom signals the end of democracy, robbing ordinary citizens of their power, and establishing Juristocracy, or giving judges power.² Despite key limitations such as Judicial Review, the *European Communities Act of 1972*, and the *European Convention of Human Rights*³, various arguments exist in support of the assumption that Parliament's sovereignty still exists.

1.1.2. WHAT IS PARLIAMENT?

Parliamentary Government is defined as "*government by discourse*" or, more precisely, "*government management through dialogue*." The French verb "parle" means "*to speak*." The House of Commons is often referred to as a "*talking shop*." Though it is a disparaging phrase, the term "*parliament*" refers to the institutions and defines them. It is a venue where people assemble to debate national issues. All three functionaries collaborate to fulfil Parliament's actions.

Both Houses are unique entities with distinct characteristics and functions.

The word "*parliament*" first appears in the 11th century's "*Chanson de Roland*," where it simply refers to a two-person conversation. The phrase eventually took on a new meaning: a gathering of people who gather to discuss a topic. The '*Parliament*,' which took place at Runnymede, was where King John "*gave his charter to the barons*." By 1258, the term "*parliament*" had clearly acquired a new meaning. The institution of three '*Parliaments*' per year to deal with the King's and Kingdom's business was one among the reforms advocated by the barons at Oxford in June of that year.

As a result, it is clear that debate is at the heart of Parliament, and the term "*parliament*" was first applied to the great English kings' councils to emphasise their deliberative function.

1.1.3. THEORY OF PARLIAMENTARY SYSTEM

The Parliamentary Democracy System has four parts namely: candidates for elected representatives in Parliament, a system of political parties, and lastly the concept of representation. Every human institution has a natural propensity to institutionalise over time. The problem is exaggerated. Human government is a problem that will never be totally solved. To be successful, this system must meet specified conditions. A pound of

¹ Basu, D. D. , *Limited Government and Judicial review*, 69 (Lexis Nexis)

² From the Oxford dictionary, A democratic government is one in which the people govern themselves. People create a government in which the

people hold the sovereign power, which they exercise directly or through individuals elected by them, such as members of Parliament.

³ Henceforth known as ECHR



theory is said to be worth an ounce of experience.

Factionalism, or intractable party dispute, is one of the saddest defects of a parliamentary system, because the party structure is perhaps the most difficult of all the parts. The main benefit of the parliamentary system is that it provides statesmen with a constant training ground in the form of a peaceful competition in which they can test and measure their powers in front of an audience of spectators and judges.

1.1.4. SEPARATION OF POWERS

To avoid such a situation, the Indian constitution's founders incorporated the concept of separation of powers. The separation of powers system separates the responsibilities of the state into three branches in a democracy: legislative, executive, and judicial. In addition to the separation of powers, these branches are interconnected to act as a check on one another.

"There can be no Liberty," Montesquieu says, "where the legislative and administrative governmental powers are united in one person, or in one body of magistrates," since "dread may arise, lest the same monarch or senate may originate oppressive laws, and execute them in a tyrannical manner."

Judges may act brutally and oppressively if they are related to presidential power. *"Everything would come to an end if the same man or group, whether of nobles or of the people, performed those three powers, passing laws, excluding public judgments, and trying individual cases."* Judges have ultimate authority to uphold law if it exists,

but they cannot create law or attempt to enforce it, according to basic constitutional philosophy.

"The judiciary has intervened to question a mysterious car racing down Tughlaq road in Delhi, allotment of a particular bungalow to a judge, specific bungalows for the judges' pool, monkey capering in colonies, stray cattle on the streets, clearing public conveniences, and other matters under the threat of using contempt power to enforce compliance with its orders," said Hon'ble Mr Justice J.S. Verma, former CJ, in *Dr. K.L. Dubey'* An extreme example is the use of authority to compel railway operators to provide train bookings."

Remember that courts cannot run the government, which is why policy decisions, whether financial, educational, or otherwise, should be left to the executive branch's discretion. As a court, it lacks the knowledge and resources to carry out its executive functions. Unlike governing organisations, courts are not delegate bodies that reflect a wide range of societal dynamics; they should rely on data, as erroneous or missing data leads to poor judgements.

What if our lives were ruled by a constitutional court with no political or judicial oversight?

On several occasions, the Supreme Court has stated that judges should not act as legislators. Mr. Felix Frankfurter, a renowned legal mind who famously advocated for judicial restraint, predicted that if the judiciary usurps the powers of other organs, they will respond, and the judiciary will lose its independence, so judges must



refrain from being policymakers in order to preserve the judiciary's independence.

A similar incident occurred in the United States. Roosevelt was elected President of the United States in 1933, during a period of severe economic crisis in the country. To fight this, he sponsored several bills, the majority of which were economic regulatory measures, but the US Supreme Court overturned them. Roosevelt responded by proposing that the court be rebuilt with six new judges, all of whom he would name. This threat was sufficient, and carrying it out was needless.

In 1937, the court abruptly altered its tune and began defending the law. As a result, Justice Frankfurter's idea could become a reality. The most common justification for entering the administrative body is that the other two organs are failing to fulfil their responsibilities. The judiciary will be first on the list if the argument is accepted, as cases have been languishing in courts for more than 50 years. If the executive and legislative branches of government aren't working well, it's up to the people to fix the problem by voting for candidates who will meet their expectations in future elections, or by utilising other legal means such as peaceful protests.

To put it another way, the judiciary can demolish but not build.

1.1.3. The Legislature's and Judiciary's Constitutional Relationship⁴

⁴ Relationship between Parliament and Judiciary, available at: <https://www.geeksforgEEKS.org/relationship-between-parliament-and-judiciary/#:~:text=The%20Parliament%2C%20Executive%2C%20and%20the,in%20charge%20of%20formulating%20laws.> (Last Visited on May 15th, 2022)

Constitution has been provided with the rights and privileges to ensure the independence of legislature and the judiciary as they are as follows:

1. *Parliamentary Powers and Responsibilities*

A. the Parliament is responsible for making laws, overseeing the executive branch, and representing the people of the country.

B. Laws controlling the judiciary, including the organisation, jurisdiction, and terms of service of judges, are enacted by Parliament. If there is evidence of malfeasance or incapacity, Parliament can also dismiss a judge.

C. Members of Parliament are similarly exempt from legal prosecution for statements or votes made on the House floor.

D. The judiciary has no authority over legislative procedures.

E. The judge cannot ask a Member of Parliament or the presiding officer about any actions they made to govern the House's activity.

1. Important aspects of the interaction between the legislature and the judiciary.

A. *Limitations on Parliament's Constitutional Amendment Powers:* Parliament, under Article 368 of the Constitution, has the power to change any element of the document, including the Fundamental Rights.



However, in the *Golak Nath v. State of Punjab*⁵ case (1967), The Supreme Court ruled that Parliament's constitutional amendment powers are limited and that Fundamental Rights cannot be repealed. As a result, a discussion about the repeal of the Right to Property emerged between Parliament and the judiciary. Between 1967 and 1973, this debate devolved into a full-fledged conflict.

The Kesavananda Bharati ruling⁶, in which the Court determined that The fact that Parliament possessed the power to amend the Constitution, with the exception of the 'Basic structure,' which cannot be changed, put an end to the debate between the two parties. Because the right to property is not part of the fundamental framework, the Court held that it can be altered by Parliament. It goes on to say that the judge has the authority to decide whether a case comes within the basic structure or not.

The judiciary, which defines the relationship of conflict and compromise between the two organisations, limits the legislature's amendment power.

- A. *While the Legislature is responsible for enacting legislation:* The judiciary has aided the process by issuing recommendations and orders under the Constitution's Articles 32 and 142. In the case of *Vishaka v. State of Rajasthan*⁷, The Supreme Court has directed the guidelines for dealing with sexual harassment in the workplace. The Delhi Supreme Court placed a tax on the registration of diesel vehicles in 2016.

- B. *Executive Supervision by Parliament and the Judiciary:* Using the numerous motions at its disposal, Parliament supervises and checks the executive's arbitrary actions. The executive's policies are scrutinised by Parliament to see if they are meant to benefit citizens. The judiciary also oversees the executive's acts and rules on their constitutional and legality. The Supreme Court has the authority to require executive agencies to investigate corrupt politicians and officials like in the *Hawala*⁸ case, the *Narasimha Rao*⁹ case, and so on.

- C. *Judicial Review of Parliamentary Privileges and Proceedings:* To uphold the principle of separation of powers, members of Parliament cannot be held liable for any actions made on the House floor. However, the courts have used their judicial review authority over legislative proceedings and privileges in a few instances. According to the Supreme Court, a speaker's decision to disqualify a Member of Parliament for defection can be challenged in court because the Speaker is performing a judicial duty.

Between the legislative and judicial departments of government, there is a clear separation of powers. Throughout the years, they have had a symbiotic connection of disagreement and eventual compromise, and both entities endeavour to advance the country's people's interests. Their differences have enhanced democracy and given India's constitution a new interpretation.

1.2.JUDICIAL REVIEW

The power conferred by a court of law to scrutinise the activities of the Legislature, the

⁵ AIR 1967 SC 1643

⁶ AIR 1973 SC 1461

⁷ (1997) 6 SCC 241

⁸ S.K. Jain v. Union of India, CRL.A. 340 of 2008 Delhi HC

⁹ P.V. Narsimha Rao v. State, (1998) 8 SCC (Jour) 1



Executive, and the Judiciary is known as "judicial review." This authority is part of the rule of law. By functioning as a check on the power vested in government institutions, judicial review aids in the preservation of the separation of powers. Judicial Review can assist find a statute illegal and unenforceable if it violates the Constitution. The principle of "Limited Government" and "Constitutional Supremacy" underpins Judicial Review, which states that "ordinary law should corroborate the constitution." Judicial Review and Limited Government are two concepts that share three common characteristics.

To begin, a written constitution defining the scope and boundaries of the government's institutions is required. Second, the Constitution should be paramount, deriving its power from all other organs. Finally, a deterrent that would limit, prohibit, or even eliminate a violation of higher law. In today's Constitutional law, judicial review serves as a deterrence or consequence.

Even though the legislature has limitless power to establish laws, it must do so within the Constitution's limitations.

"The examination or review of legislative statutes and executive or administrative acts by the Courts, in cases actually before them, to determine whether or not they are prohibited by a written Constitution or are in excess of powers granted by it, and if so, to declare them void and of no effect," Smith and Zurcher define Judicial Review.

Lord Coke's judgement in the matter of *Dr. Bonham v. Cambridge University* in 1610 established the concept of Judicial Review in England.¹⁰

In the case of *Marbury v. Madison*¹¹, the United States Supreme Court gave the theory complete legitimacy. In both India and the United States, judicial review is a legal tool. The Indian constitution clearly grants this jurisdiction to the Supreme Court of India (Art 32) and the several High Courts (Art 226 and 227). Although the United States Constitution makes no explicit provision for judicial review, Art III and IV can be interpreted to vest this power in the United States Supreme Court.

This study compares and contrasts the judicial review systems in the United States and India. The author also examines and contrasts the two countries' origins and sources of Judicial Review. This research looks at the similarities and differences between the two states in considerable depth. The fact that judges determine the meaning of a statute through the interpretation of statutes⁴ has been considered to diminish Parliamentary Sovereignty¹², but Parliament still reigns supreme. According to *Council of Civil Service Unions v. Minister for the Civil Service*, judicial review is a means of exercising control over executive discretion in three ways.¹³ Illegality, irrationality, and procedural impropriety are the three terms. 'Proportionality' is a fourth option. According to Turpin and Tomkins¹⁴, When a public authority acts in bad faith, exceeding its authority's limits on intent, it is considered criminal. Parliament's power is demonstrated

¹⁰ (1610) 8 Co Rep 114

¹¹ U.S. 137 (1803).

¹² Henceforth known as PS

¹³ (1985) AC 374

¹⁴ British Government and the Constitution, 6th edn, Colin Turpin and Adam Tomkins, p.661



by the distinction between judicial review and an appeal. The distinction is important because in their judicial review jurisdiction, courts should focus on the legality of a decision rather than its merits. *R v Chief Constable of North Wales, ex p. Evans*, confirms this¹⁵. *R v Secretary of State for the Home Department ex parte Brind* also shows it.¹⁶ The goal of the court is to keep a check on those bodies or individuals who have abused their discretion.¹⁷ In this sense, the courts fulfil their responsibility of enforcing Parliament's will.

As a result, while judicial review may be seen as undermining parliamentary authority, courts have demonstrated respect for Parliament and democracy in a number of cases, such as *Duport Steel v Sirs*¹⁸, emphasising that Parliament remains supreme.

1.2.3. THE EXERCISE OF JUDICIAL REVIEW IN INDIA

The expansion of judicial review is the logical response of the judiciary to ensure that the exercise of governmental power is properly checked. People's growing awareness of their rights; the trend of judicial scrutiny of every major government action; and the executive's willingness to seek judicial determination of debatable or controversial issues, sometimes to avoid accountability for its decision, have all contributed to the judiciary's growing importance. The prevalent notion in this country is that the judiciary has been active

in expanding the field of judicial review into non-traditional areas that were previously thought to be beyond judicial purview.¹⁹

A. LIMITS TO THE POWER OF JUDICIAL REVIEW IN INDIA

The Indian Constitution imposes various constraints on the idea of judicial review. The first constraint is enshrined in the constitution. Under Articles 100 (2) and 189 of the Constitution, courts, for example, do not have the authority to declare a House of the Legislature's actions unlawful due to procedural deficiencies. If sessions are held in violation of the constitution's mandatory clauses, the legislature, on the other hand, is not exempt from prosecution. Second, the Directive Principles of State Policy (DPSP), which are incorporated in Part IV of the Indian Constitution, are unenforceable. This means that an individual cannot sue to enforce the DPSP in court. In defence of basic rights, courts have recently overruled this view, implementing certain DPSPs. Article 21 of the Constitution has been viewed extensively and liberally in light of directive principles following the *Maneka Gandhi v. Union of India*²⁰ case.

The judiciary has imposed various constraints on itself while exercising Judicial Review authority. Some instances are as follows:

- The court does not decide whether a hypothetical or intellectual issue is legitimate. A law's constitutionality is not

¹⁵ Id

¹⁶ (1991) 1 A.C

¹⁷ Id

¹⁸ (1980) 1 WLR 142

¹⁹ Rao, Judicial review in India, available at: <https://www.mondaq.com/india/constitutional-administrative-law/20649/judicial-review-in-india> (Last Visited on May 15th, 2022)

²⁰ AIR 1978 SC 597



called into question unless it has a practical effect.

- The person who benefits from the law is usually unable to contest its legitimacy.
- There should be no viable alternative to the statute under consideration.
- The courts can refuse to investigate a legislative or administrative action if it is referred to as a "*policy problem*" or "*political issue*."
- The presumption is always in favour of the legality of the legislation. The severability theory allows a judge to declare only a portion of a statute unconstitutional rather than the entire statute.
- The stare decisis doctrine is applied.
- According to the court, the legislature did not exhibit malafide intent.

1.3.SUPREME COURT

Our political system is founded on the concept that the constitution is the fundamental law of the state. The capacities and functions of the organs have been clearly established. They must operate within the parameters set forth in the Constitution. The constitution recognises a robust and independent judiciary as one of our democracy's major pillars. Our legislatures establish laws for the well of the society, which are then carried out by the administration. In India, the Supreme Court is the final arbiter of constitutional interpretation. Despite the fact that our constitution describes the capabilities of all of the constitution's organs, there is still some confusion about the correct meaning of terms and phrases, as well as the genuine spirit of the lawmakers. The Supreme Court has the authority to interpret the Constitution, and if

it decides that an executive or legislative act is in violation of the Constitution, it can nullify the statute. This is referred to as judicial review power.

The Indian Supreme Court is taking a leading role in defining the scope of judicial review in the country. This power is not acquired by the court over night; rather, it is filtered through a sequence of actions and cases by which the Supreme Court attempts to attain its optimal stage.

1.4.PARLIAMENTARY SYSTEM

Furthermore, Parliament has the authority to interfere and will do so in order to prevent the Supreme Court from establishing a Juristocracy and putting an end to democracy. As a result, Lord Phillips decided that the Supreme Court would never again side with the government. Even if Parliament's jurisdiction is restricted, it might be argued that Parliament is powerful and has the authority to dissolve the new court. This is perhaps why solicitor Questin Bargate²¹ claims that the Supreme Court is a "*product of statute, not the result of a new constitutional structure*." As a result, if Parliament believes the Supreme Court is preparing to challenge the government in the future, it has the power to remove or limit the court's authority.

1.5.RULE OF LAW

"Human rights are universal, indivisible, interdependent, and linked," according to the UN Vienna Declaration of 1993, "and so should be preserved and promoted in a fair and equitable manner by something as fundamental and all-pervasive as the rule of

²¹ Bargate and Murray's senior partner, *available at*: http://bargatemurray.com/pdf/QB_Supreme_Court_A

rticle_15_09_2009.pdf (Last Visited on May 15th, 2022)



law." The recent encounter of mobster Vikas Dubey²² has prompted a debate about the rule of law, as well as worries about the use of violence by official agencies. Critics have come from all around the country, particularly from the opposition, who claim that such an act violates the basics of the law, i.e., the rule of law. In today's world, where incidents such as confrontations and mob lynching have become all too common, it is vital to take action.

1.5.3. DEFEATING MALADMINISTRATION

The Supreme Court, as stated earlier by Jack Straw, emphasises the judiciary's independence, allowing it to exercise control over the government and its personnel if necessary. The Supreme Court implicitly helps democracy by effectively addressing maladministration.²³

A. Prevent Governments from retrospective legislation

Third, traditional courts and the law uphold rights. The courts "*cannot be depended upon to defend rights, especially when there is a climate of great public fear and worry,*"²⁴ according to *R v. Secretary of State for the Home Department, ex parte Brind*.²⁵ The House of Lords refused to intervene in this case to prevent the government from imposing a broadcasting ban on the IRA and other Northern Irish parties which refused to

denounce the use of violence to attain political goals.

Governments are prohibited from passing legislation retroactively, according to Leyland, because such actions are likely to promote unfairness. The outcome would almost probably be different if this case had been heard now, with the new independent Supreme Court. We may support this point by looking at Lord Phillips' statements in the BBC²⁶. Lord Phillips expects that people will remember the Supreme Court as a "*very significant milestone in the constitution of our country*" in 100 years.

The Constitution's involvement in the separation of powers is as follows²⁷: It provides a correct power balance among the state's institutions and limits the use of certain powers to specified institutions. As Leyland points out,²⁸ the United Kingdom lacks a distinct division of powers, resulting in overlapping concerns between the executive, legislative, and judicial branches, which is harmful to individuals.

The 2005 Constitutional Reform Act modifies the procedures for judicial nomination and court administration. This meant that the Lord Chancellor could sit as a judge and select which other Law Lords would hear appeals, creating a clear conflict of interest. Second, the Chancellor presided over several trials as Speaker of the House of Lords that "*involve[d] political themes of*

²² Rule of law and its relevance, *available at*: <https://blog.ipleaders.in/rule-law-relevance/> (Last Visited on May 15th, 2022)

²³ *Entick v Carrington* (1765) 19 St Tr 1030

²⁴ Leyland page 50.

²⁵ (1991) 1 AC 696.

²⁶ BBC, 'UK Supreme Court Judges sworn in', *available at*:

http://news.bbc.co.uk_news/8283939.stm. (Last visited on May 20th, 2022)

²⁷ *The Constitution of the United Kingdom, A Contextual Analysis*, Peter Leyland p.53-63, and *British Government and the Constitution*, 6th edition, Turpin and Tomkins, p.106-136.

²⁸ *Id* at p. 53



controversy surrounding the administration, and increasing reservations were expressed about the Lord Chancellor sitting as a judge in such a court."²⁹

Furthermore, there is no longer any overlap between the judiciary and the executive branch. This overlap was established in decisions such as *R (on the application of Q) v Secretary of State for the Home Department*³⁰ and *R v Secretary of State for the Home Department, ex parte Cheblak*³¹.

1.6.CONCLUSION

Despite limitations to Parliament's sovereignty, such as Judicial Review, European Union Law, and the ECHR, Parliament remains powerful, and the Supreme Court will not represent a new threat. This is the case because the Supreme Court protects the rule of law and the separation of powers. Because the power remains with Parliament, and hence with the citizens, this promotes democracy. Also, positive characteristics of the Court should be highlighted, such as transparency and the separation of the three branches of government: legislature, judiciary, and executive. The US Supreme Court and the UK Supreme Court are diametrically opposed, according to Lord Bingham, because the UK Supreme Court lacks that power and the title "*supreme*" is illusory. With that in mind, if the Supreme Court attempts to establish a Juristocracy in the future, as Lord Philips predicted, Parliament, along with European Union law and the European Convention on Human Rights, can still reform or limit its powers.

The public's only recourse is to the court under Article 32,136 or Article 226 of the Indian Constitution if there is a failure to exercise discretion or a misuse of discretion power to settle a score or generate private benefit as a result of this discretion authority.³²

Judicial Review is a tool for maintaining the separation of powers. The division of powers underpins the scope of Judicial Review. In the hands of the court, any statute or order that is incongruent or in contradiction with the basics of the law may be declared unconstitutional and unenforceable. The Indian Constitution established an independent judiciary with judicial review authority to examine the legality of any statute or government action. Legislative review, judicial review of judicial declarations, constitutional amendments, and judicial review of administrative operations are the three types of judicial review. Other legislation' constitutionality must be determined, according to the Constitution. If a law infringes someone's rights or contradicts a constitutional principle, it must be declared unconstitutional.³³

²⁹ Leyland, pages 56-57.

³⁰ 3 (2003) EWHC 195 Admin

³¹ (1991) 1 WLR 890

³² Ram Javaya v. State of Punjab, AIR 1955 SC 549

³³ Dr. Hari Chand, *The implied limitations Theory-A Critique*, Vol. 4 JBCI 1-4 (1975)