Chapter - 3

PARLIAMENTARY VERSUS JUDICIAL SUPREMACY: THEORETICAL FRAMEWORK

The issue of parliamentary versus judicial supremacy has been a subject of heated scholarly debate over the last few years. It has exercised the minds of legislators, jurists, politicians and non-professionals as well throughout the world. The supporters of absolute independence of judiciary argue that in the absence of an impartial, independent and sovereign judiciary, democracy cannot succeed. In contrast to this view, supporters of parliamentary supremacy pursue the concept that judicial supremacy which is expressed in the form of judicial review, is incompatible with a democratic government because the importance of majority rule lags behind by the few unelected judges who are not directly accountable to people.¹

In the United States of America, Australia, United Kingdom, Canada, Switzerland, India and many other countries, the Supreme Court strikes down a law if it violates the fundamental rights or the basic structure of the Constitution. The superior courts are held in high esteem by the legislatures, governments and the people of these countries for their role in protecting and guarding the rights of the citizens, advising the government on complex constitutional issues, dispensing justice to people, awarding, confirming, reducing or enhancing the punishments awarded. Therefore, with the introduction of the doctrine of ‘judicial review’ and its recent expansion in the form of ‘judicial activism’, a debate has been generated among scholars and analysts on the question of supremacy between the two major branches of government.

It is generally assumed that in a democratic country like India, with having a written constitution, both the legislative and judicial organs are supreme for the proper functioning of the largest democracy of the world. At some point we
may think that neither legislature nor judiciary can claim supremacy in isolation. Both should work in co-operation with each other, avoiding conflict or collision. Both should consider the problems and appreciate the roles played by each other. Each of them has its assigned role to perform under the Constitution, which is important for democracy. Both have revised and amended their stands, rulings, laws and pronouncements several times. Moreover, all this is unavoidable. Legislature is repealing and amending earlier laws, introducing new ones frequently. Judiciary is also playing its own role by declaring some laws or parts thereof as unconstitutional. Thus, there is confusion and instability all the time. A sort of rivalry and competition has started between the two most important organs of the government.\textsuperscript{2} For the success of democracy both should act in co-operation and understanding, keeping in view the general welfare of the people.

Therefore, the burning issue for scholars of social sciences today is whether the judiciary should have over-ruling authority over Parliament. If the parliament passes any law for economic and social uplift of the people and the establishment of a socialist pattern of society, the judiciary should not strike down such laws and stand in the way of progress. The Parliament represents the verdict of the electorate and its members actually reflect the will of the masses. Therefore, any attempt to throttle parliament would mean suffocating democracy. But, in a socio-culturally segmented or diversified society like India where minority rights may be infringed under the majority rule if an independent, impartial and sovereign judiciary does not have a look over the activities of the parliament.

In the United Kingdom, the parliament is supreme and the supreme judiciary still forms a part of the legislature. However, the judges there have liberty to give decisions without fear or favour on matters coming to them. Not only due to the constraints of a federal structure, the fathers of the American constitution also had a very strong faith in the judiciary hence, an independent judiciary was established in that country. They were convinced that if any fetters are placed
on the independence of judiciary, the rights and liberties of people might be endangered. If experience is any guide, the Supreme Court has invariably shown a high degree of independence in awarding judgements, many of them going against the government.

Similarly, in many other countries including India the impartial and independent judiciaries have been playing an important role in securing social justice by using the power of judicial review over legislative or administrative actions. This overwhelming power of judicial review to dismantle an act of the parliament led to some scholarly debates over the problem of supremacy between the core organs of the government in recent years. Therefore, prior to looking at the details on the specific jurisdiction, it would be more appropriate to discuss the theoretical and historical background of the controversy over the supremacy between the two organs of government.

**Theoretical Background**

The powers of colonial and early American courts followed the pattern set in Britain. Theories of parliamentary/legislative sovereignty ensured that courts remained incapable of limiting the power of the sovereign. Within a modern legal system, enacted laws remain in force until they are repealed or amended, unless they are declared when enacted to have a limited life. It is inherent in the nature of a legislature that it should be free to make new laws. The rise of popular sovereignty, however, brought a new function for the courts; the power of judicial review. Over time, judicial review metamorphosed into the judicial supremacy enjoyed by the United States Supreme Court and its state court counterparts. This tradition has been diffused gradually in many of the political systems in the world. An attempt has been made in this chapter to understand the problem by referring to some of the scholarly analyses on the issue of supremacy.

Scholars of constitutionalism throughout the world continue to grapple with the question of which institutional balance of courts and legislatures should
have the ultimate authority to determine the meanings ascribed to the constitution. The issue of the relative interpretive authority of courts and legislatures is not a matter of recent concern for constitutional scholars. Even in a regime defined primarily by the legal doctrine of parliamentary rather than judicial or constitutional sovereignty, debate over the way in which judges interpret statutes has significance not unlike that of the contemporary debate over constitutional ‘dialogue’.\(^4\) Dennis Baker has urged constitutional scholars to confront this central issue of interpretive authority of the court.\(^5\)

Albert Venn Dicey commented briefly with identifying the approach to statutory interpretation which he argued was the corollary of the doctrine of the sovereignty of parliament. Calling the legal doctrine of the sovereignty of parliament the “dominant characteristic” of British political institutions, he argued that Parliament—Queen, Lords, and Commons “acting together”—had the right to “make or unmake any law whatever”, and “no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.”\(^6\) J. Alex Corry’s views on statutory interpretation show that although he adopted Dicey’s exposition of the doctrine of parliamentary sovereignty, he arrived at dramatically different conclusions regarding the approach to statutory interpretation appropriate to the doctrine. The point of the comparison is to show that even the legal doctrine of parliamentary sovereignty does not in and of itself resolve the “central issue” of the balance of courts and legislatures in resolving legal-interpretive disputes.\(^7\) Thus, the confusion arise that either the parliament which is a popular body, is supreme authority or the court which is composed of some aristocrats sitting on a highly dignified office and not accountable to masses, is the supreme authority of the land.

Both Dicey and Corry argued that parliamentary sovereignty prohibits a role for judges in challenging the validity of properly enacted statutes, and both accepted that judges were nominally obliged to interpret statutes according to the “will of parliament.” At the same time, however, Dicey and Corry came to
different conclusions regarding the implications of this approach to statutory interpretation. Dicey focused on the importance of judges interpreting merely the words of the statutes as the source of legislative intent. This approach was, indeed, consistent with traditional common law canons of statutory interpretation, but Dicey may have accepted it for other reasons as well. He appears to have seen that an approach to statutory interpretation which prescribes a focus on words alone was a means through which judges could control the meanings ascribed to statutes.

In Dicey’s view, judges should use the 19th century laissez-faire liberal values which infused the common law to temper the increasingly interventionist (“collectivist” or “socialist”) policy implications of statutes, particularly those relating to administrative law. Corry too focused on the words of the statutes, but he did so as an occasion to argue that judges should interpret statutes, particularly those pertaining to administrative law, by adopting meanings consistent with the tangible and obvious public-policy purposes of legislatures. Only this way, Corry believed, would judges purge themselves of their deep attachments to precisely those laissez-faire liberal common law values which Dicey had believed should continue to infuse public policy regardless of the policy-aims of parliamentarians.

Corry urged judges to exchange laissez-faire liberal common law values for the newer values of parliamentarians which, he believed, were consistent with the needs of the 20th century administrative state. In Corry’s view, these new values recognized the necessity of state intervention into the private sphere of individual liberty, contract, and property in the name of facilitating the development of individual “personality”. Although Dicey and Corry expected judges to draw from different values associated with different political institutions in interpreting the meaning of statutes, each argued that this approach was consistent with the doctrine of parliamentary sovereignty.
However, one lesson to be learned from the examination of Dicey’s and Corry’s views on the interpretation of statutes is a simple and familiar one. Even if only implicitly, we put our intellectual support behind the balance of courts and legislatures which we believe is most likely to produce the policy outcomes we find it acceptable according to the political, social and economic values we accept. Within the context of the scholarly examination of approaches to statutory and constitutional interpretation, we may consider Geoff Hall’s reminder that any claim that an approach to statutory or constitutional interpretation is legitimate “must necessarily entail at least an implicit theory about democracy and the role of the courts in relation to a democratically elected legislature, as it constitutes the point at which the courts must confront and ascribe meaning to a product of the legislature whose meaning is contested.”

Although Hall directs this comment to the judges whose task includes the choice of approach to statutory interpretation, it is just as important to consider its implications for scholarly debate over the balance of interpretive authority between courts and legislatures in constitutional debate today.

Jeremy Waldron, a longstanding opponent of judicial review in a recent paper, titled, ‘The Core of the Case against Judicial Review’, summarises the arguments that judicial review is incompatible with democratic government. Shorn of historical digressions and contentious interpretations of American constitutional practice. Waldron presents the democratic case against judicial review in the form of two theses:

1. **Substantive Thesis** that maintains that it is impossible to decide whether or not judiciaries are better than legislatures at protecting rights, because evidence on this matter is inconclusive.

2. **Procedural Thesis** that holds that legislatures are overwhelmingly superior to courts from a procedural perspective. This is because legislatures are more legitimate, egalitarian and participatory than courts, (according to Waldron,)
and so embody crucial democratic rights and values to an extent that is impossible for the latter to imitate.

Thus, Waldron maintains,

“Judicial review is vulnerable to attack on two fronts. It does not, as is often claimed, provide a way for society to focus clearly on the real issues at stake when citizens disagree about rights and it is politically illegitimate, so far as democratic values are concerned: by privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality.”

Waldron’s arguments find an echo in Richard Bellamy’s *Political Constitutionalism* which contrasts a legal constitutionalism, based on the idea that courts should enforce a substantive set of rights, expressive of democratic equality, with a political constitutionalism informed by Philip Pettit’s reinterpretation of republican political thought. For Bellamy, as for Waldron, judicial review is undemocratic on procedural grounds, because the power it gives judges to over-rule legislatures is at odds with democratic principles. As Bellamy summarises his political constitutionalism:

‘A system of “one person, one vote” provides citizens with roughly equal political resources; deciding by majority rule treats their views fairly and impartially; and party competition in elections and parliament institutionalizes a balance of power that encourages the various sides to hear and harken to each other, promoting mutual recognition through the construction of compromises. According to this political conception, the democratic process *is* the constitution. It is both constitutional, offering a due process, and constitutive, able to reform itself.’

In contrast, Brettschneider and Eisgruber argue that judicial review is sometimes justified by the democratic outcomes that it secures – and, in
particular, by the ability of judges to protect core democratic rights.\textsuperscript{17} Thus, Brettschneider believes that the US Supreme Court ‘can act democratically by overriding majoritarian decision making’ when ‘the core values of democracy’ are at stake; and in defence of the right to participate, ‘when this right is more fundamental than the negative impact of a policy on the core values of democracy.’\textsuperscript{18} Likewise, Eisgruber claims that ‘the institution of judicial review is a sensible way to promote non-majoritarian representative democracy; not surprisingly, it is becoming increasingly popular in democratic political systems throughout the world.’\textsuperscript{19}

Judicial supremacy, according to Brettschneider and Eisgruber, is not democratic simply on substantive grounds or in terms of the democracy-promoting consequences that it is likely to secure. Rather, they argue, it matters that judiciaries be constituted so that they reflect democratic values and are likely to promote them. As Brettschneider describes it, ‘The aim of judicial review is to ensure democratic outcomes while preserving popular participation in democratic processes’, and Eisgruber attaches a great deal of weight to the ‘democratic pedigree’ which ensures that judges – at least in America – are chosen by elected representatives primarily on political, rather than on legal grounds.\textsuperscript{20-21} Their defence of judicial review is, therefore, meant to be democratic, and to distinguish arguments for judicial review from those for benevolent dictators.\textsuperscript{22}

These are subtle, often attractive views. But their weakness as a response to Waldron is their claim that judges are more likely to protect fundamental rights than legislators. Brettschneider believes that judges are not well suited to implementing welfare rights, and so his arguments for judicial review can be distinguished from those, such as Cecile Fabre, who believes that we must constitutionalise all fundamental rights in order to protect them.\textsuperscript{23} Similarly, Eisgruber maintains that, ‘There is nothing wrong with the fact that unelected justices decide questions about (for example) federalism or gay rights or economic justice on the basis of controversial judgements of moral principle.’\textsuperscript{24}
Nonetheless, he claims that judges should defer to legislators on questions that require comprehensive strategic judgement, and restrict themselves to doing what they do better than legislatures – which is determining what side-constraints morality and democratic government place on the comprehensive strategic judgements of others.25

However, it is not easy to ignore the fact laid in Waldron’s skepticism that judges are evidently better than legislatures at protecting rights. Thus, substantive thesis given by Jeremy Waldron strikes here as correct, because the relative merits of judicial, as compared to legislative, protections for rights inevitably turn on complex counterfactual judgements and interpretations of events, ideas and arguments. Eisgruber may be right that ‘few observers’ of the American Supreme Court ‘look at the Court’s track record and claim, with the benefit of hindsight, that the United States would have been better off during the last fifty years without judicial review.’26

Thus, judicial review can have a democratic justification even though judges are not better than legislators at protecting rights. The point of judicial review is to symbolize and give expression to the authority of citizens over their governors, not to reflect the relative wisdom, trustworthiness or competence of judges and legislators.27 Hence the presence or absence of judicial supremacy is not a proxy for people’s beliefs about the relative virtues and vices of legislators and judges. Above legitimacy of a threshold level of competence – which may be impossible to determine a priori – the judicial review does not turn on the special wisdom, virtue or personal qualities of judges. Instead, it reflects the importance that democracies properly attach to the ordinary virtues and competences of individuals in justifying power and authority.

Therefore, there is more scope for lay participation in government and this is as true of the judicial, as of the legislative, executive and administrative features of government. Democracies are not indifferent to the wisdom, consistency or efficacy of their leaders. However, these are not the only properties which they
seek in government, nor is there much agreement on how these properties should be identified and institutionalized. That, in part, is why it is hard to justify judicial review on substantive, or consequential, grounds.

It is misleading, therefore, to imply that a preference for legislative over judicial politics follows from a democratic commitment to political participation. There are many ways to specify the ideal of democratic government, even if one values political participation, because there is no uncontested account of the relative powers of legislatures vis a vis families, churches, trade unions and business associations, or individuals. Hence, democratic concerns for accountability, equality, participation and procedural fairness can all be consistent with judicial review, although judges can be as disappointing as legislators whatever one’s ideals.

Judicial supremacy over parliament can be democratic, without being mandatory, because there is not enough evidence that it is necessary to protect rights, though it is sometimes very helpful. However, judicial review can be an attractive supplement to otherwise democratic institutions because it enables individuals to vindicate their rights against government in ways that parallel those they commonly use to vindicate their rights against each other, and against non-governmental-organisations. This is normatively attractive on democratic grounds, and is probably quite practical as well.

The barriers that judicial supremacy raises to the rectification of injustice are unlikely to be so bad absolutely, or so much worse comparatively than those created by the regular legislative process. It is equally doubtful that consideration of the legislative barriers to the rectification of injustice, in Waldron’s core cases, will show that judicial review is required on democratic grounds either. Democratic principles support a procedural justification of judicial review, then, and do not require us to show that judges are especially good at protecting rights as compared to either voters or legislators. For all their subtleties, the arguments of Brettschneider and Eisgruber mistake the
protection of certain canonical rights with the protection of democratic government. Their account of democracy, therefore, elevates the formal, legal and rational aspects of government over the spontaneous, competitive and participatory. Annabelle Lever believes that the procedural justification is not the only way to justify judicial review in democracies. We can expect democracies to be characterized by a variety of arguments for and against judicial review – as with any important matter.  

Judicial review can be justified on democratic grounds, although its appeal may be largely symbolic. This democratic symbolism, illuminates the attractions of judicial review even to people who are not especially suspicious of their government, solicitous of minorities, or confident that laws, lawyers and judges will impartially protect their rights, or do so better than legislators. Judicial reviews can instantiate the commitment to citizen judgement, protest, rights, responsibilities, freedom and equality which characterize democratic arguments for electoral representation. Therefore, it is no surprise that judicial review can be justified democratically, even if its benefits are uncertain for the same might be said of democratic government itself, though we have every reason to cherish that, and to share in the costs of maintaining it.  

**The Decline of Parliamentary Sovereignty**  
The idea of the sovereignty of Parliament was long seen as the core of democratic practice. The superior position of the popularly elected legislature and its corollary of majority rule have been central principles for democratic revolutionaries since the notion was appended to the unwritten English constitution. At that time, the threat to liberty was monarchical power, and the subjugation of monarchical power to popular control was the primary goal. The resulting doctrine was that Parliament had “the right to make or unmake any law whatever; and further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.”
In the continental tradition, the intellectual underpinning of parliamentary sovereignty was provided by the Rousseauian concept of the general will. The people were supreme, and their general will as expressed through their republican representatives could not be challenged. This theory, combined with the regressive position of the judicial *parlements* in the French Revolution, led to a long tradition of distrust of judges in France. The *government du judges* replaced the crown as the primary threat to popular will in French political thought. It was natural that the early proponents of democracy supported parliamentary sovereignty. They saw threats to liberty from the traditional sources: the ancient regime, the monarchy, and the church. Once these formidable obstacles to popular power had been overcome, theorists could hardly justify limitations on the people’s will, the sole legitimate source of power. As democratic practice spread, however, new threats emerged. In particular, Europe’s experience under democratically elected fascist regimes in World War II led many new democracies to recognize a new, internal threat to the *demos*. No political institution, even a democratically legitimate one, ought to be able to suppress basic liberties.

Post-war constitutional drafting efforts focused on two concerns: first, the enunciation of basic rights to delimit a zone of autonomy for individuals, which the state should not be allowed to abridge; and second, the establishment of special constitutional courts to safeguard and protect these rights. These courts were seen as protecting democracy from its own excesses and were adopted precisely because they could be countermajoritarian, able to protect the *substantive* values of democracy from procedurally legitimate elected bodies. The ideal of limited government, or constitutionalism, is in conflict with the idea of parliamentary sovereignty. This tension is particularly apparent where constitutionalism is safeguarded through judicial review. One governmental body, unelected by the people, tells an elected body that its will is incompatible with fundamental aspirations of the people.
This is at the root of the “countermajoritarian difficulty,” which has been the central concern of normative scholarship on judicial review for the past three or four decades.\textsuperscript{38} Although the post-war constitutional drafting choices in Europe dealt parliamentary sovereignty a blow, the idea retained force in terms of political practice. More often than not, the idea was used by undemocratic regimes. Marxist theory was naturally compatible with parliamentary sovereignty and incompatible with notions of constitutional, limited government. Similarly, new nations in Africa and Asia reacting to colonialism often dressed their regimes in the clothes of popular sovereignty, though oligarchy or autocracy was more often the result.

Today, in the wake of a global “wave” of democratization, parliamentary sovereignty is a waning idea, battered by the legacy of its affiliation with liberalism. Judicial review has expanded beyond its homeland in the United States and has made strong inroads in those systems where it was previously alleged to be an anathema. From France to South Africa to Israel, parliamentary sovereignty has faded away. We are in the midst of a “global expansion of judicial power,” and the most visible and important power of judges is that of judicial review.\textsuperscript{39}

Even in Britain, the homeland of parliamentary sovereignty and the birthplace of constitutional government, there have been significant incursions into parliamentary rule. There have been two chief mechanisms, one international and the other domestic. The first mechanism is the integration of Britain into the Council of Europe and the European Union (EU), which has meant that supranational law courts are now regularly reviewing British legislation for compatibility with international obligations. The domestic subordination of legislation of the British Parliament to European law was established when the House of Lords misapplied a parliamentary statute in response to the European Court of Justice’s (ECJ) \textit{Factortame} decision of 1991.\textsuperscript{40} More recently, the incorporation of the European Convention of Human Rights into United Kingdom domestic law by the Human Rights Act 1998 has led to greater
involvement of courts in considering the “constitutionality” of parliamentary statutes (and administrative actions) under the guise of examining compatibility with Convention requirements.\textsuperscript{41} Although as a matter of domestic law the Human Rights Act attempts to preserve parliamentary sovereignty in that it allows an explicit parliamentary derogation from the convention, it has not been wholly successful. The Parliament now tends to scrutinize legislation for conformity with the convention, and this is a source of constraint; furthermore, even explicit parliamentary derogations may still lead to a finding by the European Court of Human Rights that Britain has violated its obligations. Thus, it cannot really be said that the Parliament is truly sovereign in Dicey’s sense of being unchecked by other bodies.

The second mechanism is the growth of domestic judicial review as shown by an expanding body of administrative law. According to many observers, United Kingdom (UK) courts are exhibiting growing activism in checking the government, especially since the 1980s.\textsuperscript{42} This administrative law jurisprudence has grown in recent years. The practice of international courts reviewing British legislation, no doubt, played a role in undermining the primary objection to domestic judicial review. The British objection to domestic courts exercising judicial review was not that judges were incapable of it or that the rule of law was a secondary goal. Indeed, it was the assertion that government was subject to ordinary law applied by ordinary judges that was at the heart of Dicey’s celebration of the English constitution. Rather, the traditional objection to judicial review was that the people acting through Parliament possess complete sovereignty. This argument has now lost force. If the will of the Queen in Parliament is already being constrained by a group of European law professors sitting in Strasbourg, then the objection to constraint by British judges is much less potent.

Even if one believes that Parliament is still sovereign in the United Kingdom, the adaptability of the always-anomalous British unwritten constitution as a model is clearly declining. In Britain itself, academics widely agree that there is
a crisis of constitutional legitimacy. Furthermore, several countries that were historically recipients of the British model have recently departed from it. In the Caribbean, several former British colonies have joined together to establish a new supranational court of final appeal, the Caribbean Court of Justice, discontinuing the practice of appeal to the Privy Council in London. Other former colonies have adopted constitutional acts or amendments entrenching new rights in the constitution. In some countries, such as New Zealand and Israel, these acts are amendable by ordinary majorities and not entrenched as in other polities. Nevertheless, they maintain great normative power as constitutional legislation and, politically speaking, are more difficult to amend than legislation concerning routine matters of governance, even if not institutionally protected. There has even been a step in this direction in Saudi Arabia, although the Saudi government continues to take the formal position that it has neither a constitution nor legislation other than the law of Islam.

The major bastions resistant to judicial involvement in constitutional adjudication have lowered their resistance in recent years. The concept of expanded judicial power has even crept surreptitiously into the international system, where there has been recent consideration as to whether there is a sort of inherent power of judicial review in international law. The issue under consideration concerns whether the United Nations Security Council’s findings that it is acting to defend peace and security under Chapter VII of the United Nations Charter (UN Charter) are reviewable by the International Court of Justice. There is no explicit provision for judicial review in the UN Charter, and a Belgian proposal to establish it during the drafting of the UN Charter was rejected. The International Court of Justice has, however, considered the issue in dicta.

The court has thus far carefully avoided making an express finding that the security council has acted outside of the scope of its powers, but it refused to explicitly deny that the court has the power to review the Security Council’s actions. The United Nations, of course, is not a democratic system, nor one
wherein majority rule has ever been unconstrained, by virtue of the institutional entrenchment of particular founding nations through the veto power in the Security Council. It is nevertheless interesting that some of the same questions that confront new democracies are being asked at the international level as well. Is there any action by supreme organs in a legal system that is *ultra vires*? If so, who has the power to decide whether an action crosses the line? And if the answer is a judicial body, who guards the guardians of legality? As the “third wave” of democracy has proceeded around the globe, it has been accompanied by a general expansion in the power of judges in both established and new democracies. Virtually every post-Soviet constitution has at least a paper provision for a constitutional court with the power of judicial review. New constitutional courts have been established in many new democracies.

Observing the situation, a Joint Colloquium on “Parliamentary Supremacy and Judicial Independence...towards a Commonwealth Model” was held at Latimer House in the United Kingdom, from 15 - 19 June 1998. Over 60 participants attended representing 20 Commonwealth countries and 3 overseas territories. The Colloquium was sponsored by the Commonwealth Lawyers’ Association, the Commonwealth Legal Education Association, the Commonwealth Magistrates’ and Judges’ Association and the Commonwealth Parliamentary Association with the generous support of the Commonwealth Foundation, the Commonwealth Secretariat and the United Kingdom Foreign and Commonwealth Office. The seminar passed the guidelines on good practice governing relations between the Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights to ensure the effective implementation of the Harare Principles.

The successful implementation of these guidelines calls for a commitment, made in the utmost good faith, of the relevant national institutions, in particular the executive, parliament and the judiciary, to the essential principles of good governance, fundamental human rights and the rule of law, including the independence of the judiciary, so that the legitimate aspirations of all the
peoples of the Commonwealth should be met. Each institution must exercise responsibility and restraint in the exercise of power within its own constitutional sphere so as not to encroach on the legitimate discharge of constitutional functions by the other institutions. Representatives have resolved to adopt the following principles and guidelines and propose them for consideration by the Commonwealth Heads of Government meeting and for effective implementation by member countries of the Commonwealth.

1. The legislative function is the primary responsibility of parliament as the elected body representing the people. Judges may be constructive and purposive in the interpretation of legislation, but must not usurp parliament’s legislative function. Courts should have the power to declare legislation to be unconstitutional and of no legal effect. However, there may be circumstances where the appropriate remedy would be for the court to declare the incompatibility of a statute with the constitution, leaving it to the legislature to take remedial legislative measures.

2. Commonwealth parliaments should take speedy and effective steps to implement their countries' international human rights obligations by enacting appropriate human rights legislations. Special legislation (such as equal opportunity laws) is required to extend the protection of fundamental rights to the private sphere. Where domestic incorporation has not occurred, international instruments should be applied to aid interpretation.

3. Judges should adopt a generous and purposive approach in interpreting a bill of rights or fundamental rights. This is particularly important in countries which are in the process of building democratic traditions. Judges have a vital part to play in developing and maintaining a vibrant human rights environment throughout the Commonwealth.
4. International law and, in particular, human rights jurisprudence can greatly assist domestic courts in interpreting a bill of rights. It also can help expand the scope of a bill of rights or fundamental rights making it more meaningful and effective.

5. While dialogue between the judiciary and the government may be desirable or appropriate, in no circumstances should such dialogue compromise judicial independence.

6. People should have easy and unhindered access to courts, particularly to enforce their fundamental rights. Any existing procedural obstacles to access to justice should be removed.

7. People should also be made aware of, and have access to, other important fora for human rights dispute resolution, particularly Human Rights Commissions, Offices of the Ombudsman and mechanisms for alternative dispute resolution.

8. Everyone, especially judges, parliamentarians and lawyers, should have access to human rights education.49

**Controversy over Supremacy in Specific Jurisdiction**

In the United States of America, the tension between judicial review and judicial restraint has been present since the foundation of the republic and the creation of the Supreme Court. The history of the Supreme Court of the United States teaches that judicial activism is not confined to a particular ideological or social viewpoint. It may be liberal. But it may also be quite conservative. In the early years of this century the ‘judicial activists’ on the Supreme Court of the United States impeded legislation enacted by the Congress, or the legislatures of the States, dealing with social or economic affairs. Thus, legislation governing child labour, workers' hours and workers' rights were consistently struck down as being violations of the commerce clause of the US Constitution or the judicially created doctrine of "liberty of contract" under the
due process clause of the 14th Amendment. A well known example of this kind of judicial activism is the decision of the Supreme Court in *Lochner v. New York.* In that decision, the Court invalidated legislation of the State of New York regulating the hours that bakers could work. The Court held that this was a violation of “liberty of contract.” These doctrines extended well into the 1930s. At one point they even threatened the New Deal programme of President F. D. Roosevelt. The President threatened to enlarge the Court to overcome their unpopular doctrines.

In the United States, a water-tight type of separation of the judiciary from the political arena does not occur. The American judiciary enjoys a greater scope of functions that they undertake as compared with the most of the other judiciaries in the world. This enlarged role, in part, stems from the presence of a written constitution with a separate Bill of Rights. The constitution of the United States incorporates a written Bill of Rights. It places great symbolic weight on human rights. It elevates the basic rights of man to supreme constitutional status.

The structure in the United States imposes the judicial branch, in some sense, as the protector of these essential human rights, while limiting the actions of other branches against those rights. Analyzing the American judicial function, Ruggero J. Aldisert concludes, “Early in our tradition, the judicial branch declared itself the overseer of the executive and legislative branches.” Courts in the United States, as the guardians of the individual rights, are able to make fundamental changes in the law especially through judicial review. For two centuries American judges have ruled both national and state legislation invalid because it invaded the rights of freedom of speech or religion or of the due process of law or of the equal protection of law that the United States Constitution recognizes. Priest states “our civil courts have become the most powerful regulatory institution of the modern state.” American judges are more political than their counterparts in the world due to the differences in power allocation between the judiciary and the legislative branches. Many
American judges at the state level are elected contributing to the politicized nature of the American judiciary. The American system allows lawyers to specialize in a variety of areas of the law. The extensive specialization of lawyers may be one of the main reasons for the over-litigious tendencies in the United States. The American system lacks a political organ with the legislative authority that is as domineering and far-reaching as the English Parliament. Therefore, in the U.S., the judicial branch naturally extends its power into legislations.

Moreover, the American public expects the legal system to intervene and right the wrongs when they feel that their rights are trampled. Tetley asserts that “Americans look primarily to the courts, rather than to legislatures, to compensate the victims of tortuous behaviour in U.S. society.” Viscusi argues “the allocation of responsibilities for policy becomes blurred, as litigation increasingly becomes the mechanism for forcing regulatory changes.” Lord Irvine of Lairg observes, ‘The U.S. system, through its constitutional texts, articulates a positive approach to human rights: They are marked out, from the very beginning, as sacrosanct.’

Thus, implications of the institutional setting on government action and behaviour in the U.S. can be explained surrounding two key arguments. First the American institutional setting assigns significant amount of political power to the legal system whereby in many cases the authority to regulate safety reverts back to the courts. As a result, society is left with legal liability as deterrence and compensatory mechanism. Second, the American constitutional setting with protected fundamental rights at its core pre-disposes the legal system to operate in a way that avoids punishing the innocent.

**In the Indian Context**

The contradiction between the principles of parliamentary sovereignty and judicial review that is embedded in India's constitution has been a source of major controversy over the years. After the courts overturned state laws
redistributing land from zamindar estates on the grounds that the laws violated the zamindars' Fundamental Rights, Parliament passed the first (1951), fourth (1955), and seventeenth amendments (1964) to protect its authority to implement land redistribution. The Supreme Court countered these amendments in 1967 when it ruled in the Golakhnath v. State of Punjab case that Parliament did not have the power to abrogate the Fundamental Rights, including the provisions on private property. On February 1, 1970, the Supreme Court invalidated the government-sponsored Bank Nationalization Bill that had been passed by Parliament in August 1969. The Supreme Court also rejected as unconstitutional a presidential order of September 7, 1970, that abolished the titles, privileges, and privy purses of the former rulers of India's old princely states.62

In reaction to Supreme Court decisions, in 1971, Parliament passed the Twenty-fourth Amendment empowering it to amend any provision of the constitution, including the Fundamental Rights; the twenty-fifth Amendment, making legislative decisions concerning proper land compensation non-justifiable, and the twenty-sixth Amendment, which added a constitutional article abolishing princely privileges and privy purses. On April 24, 1973, the Supreme Court responded to the parliamentary offensive by ruling in the Kesavananda Bharati v. the State of Kerala case that, although these amendments were constitutional, the court still reserved for itself the discretion to reject any constitutional amendments passed by Parliament by declaring that the amendments cannot change the constitution's “basic structure.”63

During the 1975-77 Emergency, Parliament passed the forty-second Amendment in January 1977, which essentially abrogated the Keshavananda ruling by preventing the Supreme Court from reviewing any constitutional amendment with the exception of procedural issues concerning ratification. The forty-second Amendment's fifty-nine clauses stripped the Supreme Court of many of its powers and moved the political system toward parliamentary sovereignty. However, the forty-third and forty-fourth amendments, passed by
the Janta government after the defeat of Indira Gandhi in March 1977, reversed these changes. In the Minerva Mills case of 1980, the Supreme Court reaffirmed its authority to protect the basic structure of the constitution. However, in the Judges Transfer case on December 31, 1981, the Supreme Court upheld the government's authority to dismiss temporary judges and transfer high court justices without the consent of the chief justice.\textsuperscript{64}

The Supreme Court continued to be embroiled in controversy in 1989, when its US$470 million judgement against Union Carbide for the Bhopal catastrophe resulted in public demonstrations protesting the inadequacy of the settlement. In 1991 the first-ever impeachment motion against a Supreme Court judge was signed by 108 members of Parliament. A year later, a high-profile inquiry found Associate Justice V. Ramaswamy “guilty of wilful and gross misuses of office and moral turpitude by using public funds for private purposes and reckless disregard of statutory rules” while serving as chief justice of Punjab and Haryana High Court.\textsuperscript{65} Despite this strong indictment, Ramaswamy survived parliamentary impeachment proceedings and remained on the Supreme Court after only 196 members of Parliament, less than the required two-thirds majority, voted for his ouster.

During 1993 and 1994, the Supreme Court took measures to bolster the integrity of the courts and protect civil liberties in the face of state coercion. In an effort to avoid the appearance of conflict of interest in the judiciary, Chief Justice Manepalli Narayanrao Venkatachaliah initiated a controversial model code of conduct for judges that required the transfer of high court judges having children practicing as attorneys in their courts. Since 1993, the Supreme Court has implemented a policy to compensate the victims of violence while in police custody. On April 27, 1994, the Supreme Court issued a ruling that enhanced the rights of individuals placed under arrest by stipulating elaborate guidelines for arrest, detention, and interrogation.\textsuperscript{66}
Moreover, Parliament and the Supreme Court of India are poised for a confrontation over the issue of expulsion of 11 members of parliament (MPs) involved in cash-for-question scam. The legal-constitutional question pertains to the exclusive jurisdiction of Parliament over its authority to define its privileges and manner to protect and maintain it. The phenomenon of the legislature versus the judiciary is not new to Indian democracy. Indira Gandhi made a series of attempts through 24th, 25th and 42nd constitutional amendments to establish supremacy of parliament over the judiciary. She even tried to demoralise the highest judiciary by appointing a junior judge as the chief justice superseding senior judges. The matter could be settled with the enunciation of the 'basic feature doctrine' in the Kesavananda Bharati case of 1973. The kernel of this judgement is that the Indian constitution has certain basic features, which hold a transcendental position and which cannot be altered by either Parliament or Supreme Court. This judgement was able to establish supremacy of the constitution but only with respect to its ‘basic features.’

The other vibrant and dynamic democracies of the world have also gone through the process of confrontation between the legislature and the judiciary. However, they have settled it in the process of constitutional development. Britain, a classic case of a parliamentary system, easily established legislative supremacy. Parliament is not only supreme vis-à-vis other organs of government but it is supreme vis-à-vis constitution as well. In the British model, the legislative supremacy is also established by the fact that the constitution is unwritten and the one chamber of the legislature, House of Lords, acts as the highest judiciary of the land. The federal constitution of the United States is organised on the principle of supremacy of the constitution. Its supreme court, therefore, enjoys absolute and extensive power of judicial review. No law of the land is beyond judicial scrutiny.

But the case of the Indian constitution is typical because of the adoption of parliamentary and federal features simultaneously. Parliamentary form of
government hints at legislative supremacy. But the federal nature of the constitution makes it imperative that the highest judiciary is able to exercise the power of judicial review. The roots of the present problem also lie in the design of the Indian constitution.

On December 12, 2005, eleven MPs, ten from the Lok Sabha and one from the Rajya Sabha belonging to mainstream political parties (six from the Bharatiya Janata Party (BJP), three from the Bahujan Samaj Party (BSP), and one each from the Congress and the Rashtriya Janata Dal) were shown in a sting operation on a private TV channel (Aaj Tak) being paid for raising a question in parliament.

Parliament responded quickly by expelling all the eleven MPs who figured in the sting operation. The Lok Sabha constituted a special (enquiry) committee and the Rajya Sabha referred the matter to the ethics committee of the house. On the report of the special committee of the Lok Sabha and ethics committee of the Rajya Sabha, both the houses expelled the tainted members and terminated their membership by a motion of each house. The motion was passed on the last day of the winter session, December 23, 2005, amidst a walkout by the BJP, the main opposition party in the Lok Sabha. The BJP already in trouble because of leadership crisis, factional fighting, ideological vacillation, and its vitiating relations with the Rashtriya Swayamsevak Sangh was deeply disturbed. Six out of eleven MPs belonged to the BJP and two of them were ministers in the erstwhile BJP-led national democratic government at the centre.

One expelled member from the BSP, Raja Ram Pal challenged the decision of the Lok Sabha speaker in the Supreme Court on two grounds: procedural and legal. His expulsion resolution was not carried on the report of the Privileges Committee of the Lok Sabha. His expulsion was not based on any of the grounds of disqualification specifically mentioned in Article 102 of the constitution and section 8 of the representation of the People's Act 1951. The
Supreme Court served a notice on the Lok Sabha speaker on January 16, 2006. The court also referred the matter to a constitutional bench of five judges.

The Lok Sabha speaker, Somnath Chatterjee called an all-party meeting on January 20, 2006. It was unanimously decided in the meeting that it was the privilege of the house to take disciplinary action against its own members. The expulsion from the house was very much within that disciplinary action. It was further held that the Speaker of the Lok Sabha was the sole custodian of the rights and privileges of the house and, hence, not answerable to the judiciary for his role in that capacity. The BJP in the meeting favoured that the Speaker should not appear personally before the Court but should send his representative to present his views before the highest court. The then speaker, Chatterjee, later on briefed the media, ‘Even if I go there, that cannot lead to the honourable court to assume or to exercise the power in respect of those matters exclusively conferred on Parliament.’ He also clarified that ‘the Constitution was clear on the jurisdictions of the pillars of democracy’ and suggested, ‘Let us keep within our lakshman rekha.’

The Supreme Court seems in a mood to interpret the powers, privileges and immunities of parliament that remain un-codified so far. On the other hand, Parliament insists that it being the sole custodian of its rights and privileges it is within its right to define its privileges and immunities. The whole episode has certainly triggered a new kind of situation that has serious implications of which two are legal-constitutional. First pertains to immunities of the legislature from judicial intervention in its proceedings. Second relates to defining powers and privileges of the legislature and its members. Is Parliament the sole interpreter of its powers and privileges? Or, is this power of parliament subject to judicial scrutiny?

Articles 105 and 122 of the Indian constitution clearly restrict the judiciary from intervention in the business of the legislature. Article 122 (1) states, ‘The validity of any proceedings in Parliament shall not be called in question on the
Article 122 (2) explains, ‘No officer or member of Parliament in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.’

Article 105 (2) gives judicial immunities to the conduct and behaviour of any member of Parliament: ‘No member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee therefore, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.’ Article 194(2) grants the same immunities to the members of the state legislative assemblies.

The second issue pertains to the powers and privileges of the legislature and its members. Article 105 explains the powers and privileges of Parliament and its members; and Article 194 replicates the same provision for the legislative assembly and its members. Article 105 (1) gives freedom of speech in Parliament and Article 105 (2) gives immunity to freedom of speech and freedom to vote in the house and its committees from judicial proceedings. But other rights and privileges of the house and its members are left un-codified. Article 105 (3) reads ‘In other respects, the powers, privileges and immunities of each House, shall be such as may from time to time be defined by Parliament by law, and, until, so defined, shall be those of that House and of its members and committees immediately before the coming into force of section 15 of the Constitution Forty-fourth Amendment Act 1978.’ Before this amendment, it was provided that powers, privileges, and immunities of Parliament and its member shall be those of the House of Commons as it was before the commencement of the Indian constitution.

The root of the present controversy lies in the above two issues and related provisions of the Constitution. The BSP MP has challenged in the Supreme
Court the power of the house to terminate his membership on the grounds other than that provided in Article 102 and section 8 of the representation of the People's Act 1951. The Lok Sabha insists that its disciplinary jurisdiction over its member has constitutional immunities from judicial intervention as explained in the Articles 105 (2) and 122 of the Indian constitution. Judicial precedents on the issue of parliamentary privileges and judicial immunities to proceedings of the legislature suggest divided opinion.

In *PV Narasimha Rao v. State (CBI)*, the Supreme Court took the position as per Article 105 (2), ‘The bribe-taker MPs who have voted in Parliament against the no-confidence motion are entitled to protection of Article 105(2) and are not answerable in a court of law for alleged conspiracy and agreement.’ However, ‘The bribe-takers could be proceeded against by Parliament itself.’ This judgement clearly established that parliament is the sole arbitrator of its business and proceedings and the judiciary cannot come in this matter. This judgement has not been superseded by another judgement reversing the position.

The judicial interpretation of powers and privileges of the legislature and its members has not been consistent. In a special reference no. (1) 1964, the Supreme Court observed that the legislature in India unlike the House of Commons does not enjoy the power to regulate its own constitution. Hence, the Indian legislature does not have the same powers and privileges as enjoyed by the House of Commons.

**Conclusion:**

An analysis of above issue of controversial relationships between the two major organs of government has, led us to conclude that there is an ardent need for establishing proper checks and balances in the governmental system so that no organ can supersede other. The legislative function is the primary responsibility of parliament as the elected body representing the people. Judges may be constructive and purposive in the interpretation of legislation, but must
not usurp Parliament's legislative function. Courts should have the power to declare legislation to be unconstitutional and of no legal effect. Judges should adopt a generous and purposive approach in interpreting a Bill of Rights or Fundamental Rights.

In order to restore good governance in any political system it is inevitable to maintain coordinative relationships between the two pivotal branches of the government. However, there may be circumstances where the appropriate remedy would be for the court to declare the incompatibility of a statute with the Constitution, leaving it to the legislature to take remedial legislative measures. This again warrants the system of checks and balance to be put in place so that no single institution gets to dominate the power structure at the cost of others. Therefore, instead of getting bogged down in such meaningless rhetoric as clash amongst institutions, it is necessary to give every state organ what is its due as defined in their respective constitutions. After judiciary has won its independence, it is now for the legislature to follow suit. In order to attain the goal of good governance, everyone, especially judges, parliamentarians, lawyers as well as entire society should have access to human rights education and value for it.
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9. Ibid.
15. Bellamy, op. cit., p. 163.
22. Brettschneider, op. cit., p. 158.
25. Ibid.
   accessed 24 May 2006
49. Ibid.
51. Ibid p.85


72. Article 105 (3) and Article 194 (3), Constitution of India.