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Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to

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Mrs.S.Kalpna

Assistant professor of Law

Mrs.S.Kalpna, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

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JURISTROCRACY ON THE FACET OF CONSTITUTIONALISM & BUREAUCRACY

Authored By- 1. Nimisha Shaswat¹

2. Dr. Amita Arora²

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 Research Scholar, UILS, Chandigarh University

² Assistant Professor, UILS, Chandigarh University

1. Introduction

Indian courts have interpreted the constitution and carved out space for themselves where the authority within Indian politics actually raises some interesting and challenging questions for the way we think about jurisprudence and the legitimacy of judicial review. The conditions under which the judicial review becomes more effective and authoritative, the way in which different courts construct a narrative of their own authority, and of course in American jurisprudence this is a very big debate and arguably in the difference of *originalist vs pagamalist*.¹ The experience of expansion of judicial power in India but more generally worldwide where it's raising some interesting challenges for the way we think about jurisprudence and potentially legal theory. It's become the embodiment of Walt and the pure essence of the Supreme Court is that '*nothing escapes its power*'. It exercises its constitutional review and declares even duly enacted constitutional amendments unconstitutional. But it's increasingly supervisory executive agencies, it is become the agency of governance as opposed to simply agency of interpreting the law and in some sense this increasing of the power and importance of supreme court is not an exception as Warren harsel argued in a very interesting book called '*Towards Juristocracy*'², this seems to be a global trend, courts relative to legislatures are becoming much more powerful institutions. Courts function in what we normally thought of as estarcy governance function is increasing and harshsls thesis is that impart the rise of what he called Juristocracy because it is a way of taming the radicalism of democracy from the law. His fine example was South Africa and essentially when it becomes to losing power in a democratic process, they invest in more and more authority in what you might call the non-elective institutions to regulate the function of governance. This argument is not persuaded in the Indian context because of the following two reasons, first being the absorption below the politics, the deeply the democracy actually does, in fact, challenge the privileges but does not affect its economic infrastructure.

The world has seen the fast development of constitutionalism and judicial review at both the domestic and supranational levels during the last few decades. Constitutional supremacy, a principle that has long been bedrock of the American political order, is currently shared by over 160 countries and many supranational bodies around the world in some form or another.

¹ What is Originalism/Textualism?, available at: <https://www.lexology.com/library/detail.aspx?g=c9148c01-ae9c-44f5-8ac6-a225f8ca1187> (Last Modified February 15, 2016)

² Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* 286 (Cambridge, Mass, Harvard University Press, 2004).

The majority of these countries have recently adopted a constitution or a constitutional reform that includes a list of justiciable rights and some sort of active judicial review.

As a result, constitutional courts and judges have emerged as key translators of constitutional provisions into guidelines for public life, as well as a primary forum for articulating and addressing foundational political questions that define collective boundaries or pierce the heart of entire nations.

Along with this significant growth in the 'conventional' constitutional arena, a phenomena known as 'new constitutionalism' has evolved, according to experts (e.g. Gill 1995a, 2003). This phenomenon is most commonly associated with the spread of a set of quasi-constitutional supranational treaties and institutions that place global economic governance beyond democratic control and promote uneven development by favouring transnational corporations over the world's economic hinterlands.³

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.

1.1. JURISTROCRACY

The term Juristrocracy is not defined anywhere and by any scholar. It means “*Juristocracy*” in the sense that judges have intervened in the process of policymaking and other domains that have traditionally been reserved for the political branches.⁴

1.2. Why This Rise To Juristrocracy Is A Global Phenomenon?

There are five large disjunctions that are always present the judicial powers in any context open up more forcefully:

1.2.1. *Nexus between law and order:* In some way it is fair to call law is a mortal form of theodicy which is it's a way of ordering a world to try and render its ethical rationale. In India, the phrase law and order was used previously. But the first

³ Ran Hirshal, “New Constitutionalism and World Order” (United Kingdom, Cambridge University Press, 2014)

⁴ Id

challenge for any court is to expand its jurisdiction greatly is also vertical as pointed out the word order does not repeat and it does not echo the meaning of the term law. Order is what law on its own cannot achieve. Order is law plus something else also called sacrifice the perpetual supplement that must be destroyed so that order may exist so the world cannot live by law alone and it must destroy outside law not being institutionalized but increasingly law is been asked to create order in its own in circumstances where its increasing power to create it. But when a law becomes an instrumentality of order the likely outcome sometimes not that we will get more order but it is that we will undermine the integrity of the law and the dilemma the courts face is innocence hovering and I think one domain where we see this most is innocence in the domain of emergency powers and in the domain of preventive detention.

This is the one area where for all the Indian supreme court's magnificent achievements. There is some sort of empirical which that India has some preventive detention laws, operation of lots of emergency laws in different parts of the country including Kashmir, north-east but also other areas. Law has the ability to regulate those other laws is extremely limited. A lot of attention recently has been placed that the Supreme Court has intervened in for example judicial cases pertaining to the Gujrat riots where the court has tried to force somekind of judicial proceedings against extrajudicial killings against in some cases of preventive detention but it is still the exception, not the norm. one of the reason is that what the court realizes that the political significance of letting the executive lets its way in extra-judicial killings cases⁵ like Gujrat is far higher for unity and integrity of the country what the courts think than another part of the country particularly the north-eastern and arguably in Kashmir.

So, the question of the relationship between the structure of legality and the structure of violence which is why the law is there to protect from the state still remains open one. But the reason why it is a question and why it began this connection between law and order is because it is the place where you can point out the limitation of law at one level. In a polity that imparts claiming for order,

⁵ "Extra Judicial killings violate constitutional values, rule of law", available at: <https://theleaflet.in/extra-judicial-killings-violate-constitutional-values-rule-of-law/> (Last Modified April 6, 2022)

the court can go in so far in restoring the integrity of law in that situation and law is at one level meant to liberate you from fear but the law itself in that sense can also be a source of particularly in claiming order. But this is not just in India but also there is lots of turning point in worldwide.

1.2.2. *Nexus between Law and Authorities:* Rule of law is a mode of relationship that postulates an office within the authority to make law. Rule of law in some senses depends upon the recognition of the authority of enactive laws. Decisions are obligatory because they are prescribed by the right kind of authority. But one of the questions that are raised is in much of positivist writing on authority where authority is a purely formal conception which means recognition by which you recognize what is duly enacted authority is. But if we convert the question of authority into empirical question what are the circumstances under which citizens will recognize the authority of one set of institutions more than the authority of more set of institutions?

In practice in most jurisdictions what is happening in India that courts and legislature are the most competitive in interpreting the constitution and being the final authority on it but there is a sensor which man will argue in the last 30 years that the court has acquired the upper hand in that context over ownership of the constitution. There is no compelling theoretical reason that could actually justify this. And to think about the empirical conditions under which courts acquire this authority.

1.2.3. *Relationship between law and representations:* Contrary to stand its construction of positivist, positive, and law the essence of authority and law is not sovereignty at command it is represented as Hobbes clearly saw the sovereign authority depending upon his being are representative in some senses. Law would have no authority unless we saw in it our own will coming back to us in some kind of alienated majesty. The Centric problem of judicial review is in what sense is the law that we live under as interpreted by courts “ours”. The problem is that courts are in the following dilemma which is that we are increasingly seen as the

antidote to representative politics as rightly pointed out by John Hershel.⁶ Because representative politics is either corrupt or fraud politically economically reasons unable to address significant problems so in the sense courts stake on more and more functions than representative politics does. But so far representative politics is under stress the question becomes even sharper well in what sense do courts then represent us?

Now often what courts do in construction on authority and Indian judges have done in construction authority where they appeal to the people in two kinds of ways one is the very familiar idea of appealing to the conscience of the people which is the conception of the sovereignty of the people which is something over above what finds in majorities express. So when courts intervene they really are intervening in the integrity of the democratic process so that sovereignty of the people can be protected against the transient majorities and Secondly, it makes sense in a lot of contexts to protect democratic institutions against subversion by transient majorities.

But there is another context where appeal to people is made which is context wide which is what you are appealing to is implicitly some idea that what you are enacting honestly through the court, law, or through the interpretation of the constitution is what the people want. Where it can be seen throughout the judgments delivered by Krishna Ayer where he pleases the people's wants as a kind of arbitrator of a people's wishes. It's not a trivial fact of Indian jurisprudence that it actually appeals in this kind of way and the phrase populist which often used for politicians where India is one of the few countries where it is used for the judges. It is used in America as well but the context is that judges are the elected officials.⁷

1.2.4. *Question of the relationship between law and justice:* This question can be construed in two different ways one is the Presque way in which we think of legal institution which is legal institution provide access to justice. It is clear in Indian context way that there is a paradox at the heart of the authority of Indian judiciary

⁶ Supra 2

⁷ Id

namely that people look upon particularly the supreme court as an institution to save us from deprivations of representative politics. One of the things that we are not paying attention to is we are not asking the question is that Are those people who would be litigating actually going to the courts? When we look at the pendency rate in courts where billions of cases are pending in the Sub-ordinate court and another in the Apex Court and we say India is all litigated given the range between law and conflict.

The formal institution of laws is not being used where the paradox of judicial authorities is in the run. So an interesting question arises what happens when the court pronounces it as a matter of right? What effect does it actually have both on litigants' behaviour and public policy?

One of the striking things that are founded in the two domains of right which is health and education rights which is almost 95% of the cases basically come from two high courts in India Delhi and Mumbai. In the paradox institution of Indian courts, you can have the institution to head as an authority because it is the antidote to the corruption of representative practises, but it does not have authority because it was designed in the first place to provide access to justice in courts of law, which is the beginning of the legitimacy of courts as we go along.

1.2.5. Relationship between law and legitimacy: By legitimacy, it means normative relationship, So that it can ask the question is that a kind of policy which people would accept as based on the reasons which they could actually share. And one of the things that are to be found in one of the court's reasoning is that it's not all clear what it would be mean for courts to think of a public reason in that democratic area. In some senses that they are not doing so makes you worry about the legitimacy of their decisions. So the question remains the same what happens after the court pronounces something, there is no enforcement study for the same but the court's enforcement rate is arguably not more impressive than the executive and legislatures. It is premature to conclude that the courts have empirically secured the legitimacy as such that their pronouncement can be treated as an authoritative reason for us citizens in the polity to action several cases in the environment, the court's interventions don't seem to embody that conception of public reason where have you asked this question will all those who have affected by this decision?

One of the things that judicial power expansion has done is raise some very important questions related to the link between law and normative creation in society.

Constitutional interpretation so technically in the formal legal language of Indian judge, the court is also acting under the law and constitution. The court claims its authority impart because

there is higher law and constitution above it. it means in practice that essentially Justice Krishna Ayer also used this phrase that constitution is something which is created daily by the acts of judges so in that sense a constitutional practice is not something that is again given a sort of antecedent of the activities of particular judges and then holding where this idea is very enactment, particularly in a medical context where there genuine fear that it turns out that emperor has no clothes what would happen to the construction of judicial authority but as a point comparative jurisprudence in comparative constitutionalism it is interesting how if you like clear judges are willing to be that is in fact what they are doing namely the sense creating constitutional purposes. the third interesting trend again in the judge's own reflection these Fantini the triumph of pragmatism is submitted. if you look at American debates and others including South Africa, Australia, UK⁸, what is striking here is the consensus almost that seems to be marching that the only way you can think about the authority of law is not through the formal categories that are just outlined by the author where all authority is representation separation of powers. The authority of law will depend very crucially upon its ability to achieve the social ends now this is the question that what are these ends that the law is trying to achieve how does it arrive at the determination of that. Now one answer which would be in a sense the normatively compelling answer that most jurisprudence would like to be working in one that there are certain model principles to which a particular constitutional tradition commits you to and in part what judges are doing elaborating on those principles even when they make a plate with the precedent they are very only in the sense right rediscovering a new meaning to that you can discover the meaning of principle even though it has you know even though you are convinced that it did exist.⁹ Supreme court is actually done a wonderful job in a sense that it has got mostly right in political terms when to asserts its authority and when to withdraw ,when to asserts its authority in a way in which actually made some difference and when to simply sort of refrain from exercising its formal power but the last sort of tool which is one to what extent can one think of judicial review in a different society, not to the traditional jurisprudential dance but to simply as institutional choice available to societies to mage conflict and the ways in which courts are better able to manage conflict actually by issuing what we keep court should be doing which is first principle-based reasoning and instead allowing a kind of political modus vivendi to work itself slowly and overtime.¹⁰

⁸ James Grant, "The Rise of Juristocracy" 34 *TWQ* 16-22 (2010)

⁹ *Supra* 2

1.3. THE SPECTATER OF JURISTOCRACY

Was Keith Ewing the first scholar to coin the word '*Juristocracy*' to explain how unelected judges may undermine democratic countries under the guise of professed principles like 'the rule of law' and 'human rights protection'?¹¹ Although it appears in the title of Ran Hirschl's well-known work, it was published ten years later.¹² It now appears on a regular basis. Hirschl was used by the sub-editors of a Rod Liddle article for a piece he wrote for the Spectator in July 2012, using Hirschl as a way into criticising judges from the populist right's standpoint.¹³ In his criticism on a recent Supreme Court judgement on abortion, Jon Holbrook uses the term "*should alarm democrats*."¹⁴ There are a lot of Hirschl-related or Hirschl-inspired pages about it on Google, but no Keith Ewing. Adam Tomkins, who was Ewing's colleague at the time the chapter that seems to have coined the term appeared, acknowledges Ewing's parentage in his *Our Republican Constitution*¹⁵, but Hirschl himself does not, despite citing the chapter where it appears.¹⁶

Because it is self-evident that "*the sheer scale of contemporary society*" makes it impossible "*for us all to participate in decision-making*,"¹⁷ (more on this later), we are compelled to embrace representative government "*as a practical necessity*," and so the second essential principle "is simply that in [such] a system... the representatives must be picked by the community they claim to serve."¹⁸

Writing at a period when '*New Labour*' was only beginning to emerge, and after its leader John Smith delivered a major speech on constitutional change in March 1993¹⁹, Ewing believes that any such change in the UK:

*"Would represent a monumental historic retreat, a step backwards from democracy to the creation of what could only be regarded as a juristocracy, a system of government predominantly by lawyers and judges, from participation in which the great bulk of the people would be permanently and irrevocably excluded."*²⁰

¹⁰ Carol Nackenoff, "Is There A Political Tilt to 'Juristocracy'?", 65 Issue 1 *MLR* 139-151 (2006).

¹¹ KD Ewing, 'The Bill of Rights Debate: Democracy or Juristocracy in Britain?' in KD Ewing, CA Gearty and BA Hepple (eds), *Human Rights and Labour Law. Essays for Paul O'Higgins* (London, Mansell, 1994) 147– 187.

¹² R Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism* (Cambridge, Mass., Harvard University Press, 2004).

¹³ R Liddle, '*Rise of the Juristocracy. Why have we handed unelected judges so much power?*' *Spectator* (London, 7 July 2012)

¹⁴ J Holbrook, '*Another step towards Juristocracy*' (Spiked, 11 June 2018)

¹⁵ A Tomkins, *Our Republican Constitution* (Oxford, Hart Publishing, 2005) 7 (fn 25).

¹⁶ *Supra* note 121

¹⁷ *Ibid*, at 149

1.4. DEMOCRACY V. JURISTROCRACY

The key question of this thesis will be the impact of a Constitutional Court within a democracy. In American legal doctrine, the justification for constitutional judicial review has gotten a lot of attention. *BICKEL* kicked off the discussion by introducing the concept of the '*counter majoritarian dilemma*.' Judicial review is anti-majoritarian since it permits judges to overturn popular will. It allows a small minority of people to overturn legislative choices through court verdicts. As a result, this thesis will aim to shed some light on the subject and will address some of the more pressing issues surrounding constitutional judicial review.

1.5. THEORIES ON CONSTITUTIONAL LAW

The most important legal views on constitutional law are summarised in this chapter. These theories laid the groundwork for the constitutionalist movement. They influenced how people viewed the concept of 'law.' First, *KELSEN's Pure Theory of Law (1.5.1)*, which introduces the concept of the basic norm, will be discussed. Following that, *ALEXY* will explain the difference between rules and principles (*1.5.2*).

1.5.1. PURE THEORY OF LAW

KELSEN's effect continues to be felt today. His view on positive law in general is contained in his work '*The Pure Theory of Law*'²¹. In this section, I'll give a quick rundown of *Kelsen's* ideas on the topic of this thesis.

According to *KELSEN*, the purpose of law science is norms.²² They determine whether particular actions are legal or illegal. Something ought to happen, or a human being ought to behave in a certain way, according to a norm. As a result, the legal order is a normative order of human behaviour: a set of rules that govern how people behave.²³ The legislative process is made up of a sequence of acts that, when taken together, form a norm.²⁴ *KELSEN* distinguishes between an act's subjective and objective meanings. The subjective meaning of every act directed at another's behaviour is referred to as 'ought.' This does not, however, imply that the act has that significance objectively.

¹⁸ *Ibid*, at 150.

¹⁹ D Erdos, *Charter 88 and the Constitutional Reform Movement: A Retrospective* (2009) 62 Parliamentary Affairs 537–551.

²⁰ Ewing 'The Bill of Rights Debate' (n 1) 182.

This 'ought' is deemed a norm only if the act of will also possesses the objective meaning of a 'ought'.²⁵ If it has been invested with this meaning, if it has been allowed by a standard, the ought, which is the subjective meaning of an act of will, is also the objective meaning of this act. As a result, the standard that authorises the objective meaning has the status of a higher norm.²⁶ KELSEN gives an excellent example: a gangster's order to turn over a certain amount of money has the same subjective meaning as a tax official's order: an individual must pay something.

An order, according to KELSEN, is a collection of norms whose unity is defined by the fact that they all share the same basis for being valid: the basic norm.²⁷ A legal order's standards govern human behaviour. More specifically, it governs a person's behaviour in respect to one, several, or all other people. These norms are usually coercive in nature. They use coercion to respond to some undesired events: they impose an evil on the responsible individual, such as the loss of life, health, liberty, or economic values. By linking a coercive act to the opposing action, norms compel a specific behaviour. As a result, law regulates human behaviour in two ways: positively, in the sense that norms command a certain behaviour and thus prohibit the opposite behaviour; and negatively, in the sense that norms do not attach a coercive act to a certain behaviour, thus neither prohibiting nor commanding the behaviour.²⁸

Constitutional courts, according to KELSEN, were designed as entirely negative legislators.²⁹ Because KELSEN regarded law as any formation of general standards, an invalidation ruling alters the content of the set of legal norms, although in a negative way.³⁰ Members of parliament are 'positive legislators,' meaning they make laws freely, subject only to constitutional limits, as opposed to the formal legislator.³¹ Simultaneously, KELSEN acknowledged that if a constitution contains open-ended, enforceable rights, the distinction would be obliterated by constitutional courts. KELSEN's theory has proven to be correct, as I will show later on³². In today's world, constitutional courts are far from being a 'negative' legislator.

²¹ The original title is *Reine Rechtslehre*, first published in Vienna in 1934 by Deuticke.

²² H. KELSEN, *The Pure Theory of Law* (translation by M. KNIGHT of KELSEN's *Reine Rechtslehre*, 1934), 4 (Berkeley, University of California Press, 1967).

²³ H. KELSEN, *The Pure Theory of Law*, Berkeley, University of California Press, 1967, 4.

²⁴ *Ibid* at 6.

²⁵ *Ibid* at 7.

²⁶ *Ibid* at 8.

²⁷ *Ibid* at 31.

1.5.2. A THEORY OF CONSTITUTIONAL RIGHTS

ALEXY agrees with KELSEN that norms are expressions of what *'ought to be.'* The concept of a *'norm,'* according to ALEXY, encompasses two types of norms: regulations and principles.³³ Principles are rules that demand something to be accomplished to its fullest extent.³⁴ They can be satisfied to varied degrees, depending on legal and factual possibilities. They can also be described as *'optimization commands'* in this sense.³⁵ Fundamental rights, for example, might be thought of as principles: they should be realised to the maximum extent feasible, according to legal and factual constraints. Rules, on the other hand, are standards that are either met or not met.³⁶ If a rule applies, you must follow it exactly as written. In other words, rules are *'definitive orders'* that demand something to be done in a specific way.³⁷ As a result of this divergence, a disagreement between regulations and a dispute between principles must be handled differently.

1.6. JUDICIALIZATION OF POLITICS

A *'Judicialization of politics'* trend is defined as *"the use of courts and judicial procedures to resolve key moral dilemmas, public policy issues, and political controversies"*³⁸.

Beyond the *'standard'* idea of judge-made policymaking, the growing political relevance of courts has also broadened. Some of the most contentious and divisive political debates have been brought before courts. This has been accompanied by the belief that judges, rather than politicians, should make these important judgments.³⁹

HIRSCHL distinguishes three types of *'political judicialization.'*⁴⁰ The extension of the realm of courts in determining public policy outcomes through constitutional rights jurisprudence is a second, more tangible type. It is frequently utilised by right claimants who challenge policy choices "from below" since it focuses on procedural justice and formal fairness in the decision-making process

²⁸ Ibid at 42

²⁹ H. KELSEN, *"La garantie juridictionnelle de la constitution (la justice constitutionnelle)"*, RDP 1928, 227.

³⁰ This contrasts with the American classical view of constitutional adjudication, according to which a judicial holding of unconstitutionality amounted to an authoritative statement that the statute was void ab initio. L.P.CLAUS and R.S. KAY, *"Constitutional Courts as 'Positive Legislators' in the United States"*, American Journal of Comparative Law 2010, volume 58, 481

³¹ A.S. SWEET, *"Constitutional Courts"*, in M. ROSENFELD and A. SAJÓ (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012, 819.

³² Infra no. 80.

³³ R. ALEXY, *A Theory of Constitutional Rights*, 45 (Oxford, Oxford University Press, 2002)

³⁴ Id at 47

³⁵ R. ALEXY, *"On the Structure of Legal Principles"*, Ratio Juris. 2000, volume 13, 295.

³⁶ R. ALEXY, *A Theory of Constitutional Rights*, Oxford, Oxford University Press, 2002, 47.

Finally, judgements about political conflicts that define entire policies fall under the third type of judicialization. HIRSCHL refers to these decisions as '*mega-politics*.'

In election matters, the judicialization process has become more visible. Courts have been requested to rule on issues such as party funding, campaign money, and the approval of specific parties or candidates⁴¹. The Belgian Court of Cassation, for example, has banned the right-wing group Vlaams Blok in Belgium.⁴²

Without the assistance of powerful political players, the judicialization of politics would not have happened.⁴³ Politicians may also benefit from referring issues to courts: it allows them to delegate accountability and lessen personal or electoral risk.⁴⁴ It can also be used by the opposition to obstruct and harass the government.⁴⁵

1.7. IS JUDICIAL REVIEW UNDEMOCRATIC?

Judicial review has both supporters and detractors. The discussion began with the counter majoritarian challenge and has only grown in popularity since then. In some ways, it's only natural to challenge the legitimacy of judicial review. It cannot be argued that constitutional courts are intrinsically undemocratic; they are inextricably related to the democratisation process. It's an unavoidable contradiction that comes with democratic constitutionalism.

KELSEN himself recognised the threat of Constitutional Courts that would begin to operate as positive rather than negative legislators. When a court is tasked with resolving basic rights conflicts, it is compelled to balance. And balancing is a type of legislative discussion.

³⁷ R. ALEXY, "*Constitutional Rights and Proportionality*", *Revus: Journal for Constitutional Theory and Philosophy of Law* 2014, volume 22, 52.

³⁸ R. Hirschl, "The New Constitutionalism and The Judicialization of Pure Politics Worldwide", *Fordham Law Review* volume 75, 721 (2006)

³⁹ *Ibid* at 722.

⁴⁰ R. Hirschl, "The New Constitutionalism and The Judicialization of Pure Politics Worldwide", volume 75, 722 – 725 (*Fordham Law Review* 2006)

⁴¹ *Ibid* at 729.

⁴² Cass. 9th of November 2004, AR P.04.0849.N/1

⁴³ *Supra* note 267 at 744.

The emergence of new constitutionalism, as well as the growing popularity of constitutional review around the world, has greatly boosted the power of constitutional courts. Although Kelsen was correct in foreseeing a Constitutional Court's shifting role when allowing it the power to resolve disputes over fundamental, open-ended rights, it is apparent that most democracies have accepted these Courts as constructive legislators. It has resulted in a fundamental shift in modern democracies: the classical theory of separation of powers is no longer strictly relevant. Constitutional Courts blur the lines between legislative and judicial authority. They are institutions that provide as a platform for legislators to be held accountable, and they have the power to veto measures that infringe on persons' legitimate interests.⁴⁶

In order to respect an individual right, the majority's will must sometimes be changed. However, it's possible that merely using the label 'undemocratic' isn't totally justified. The phrase "*undemocratic*" is used by most opponents of judicial review judges to mean "*not elected*" or "*not responsible*." As a result, judges are less powerful than politicians. Is it, however, fair to hold judges to legislative standards? Furthermore, elections may be given an excessive amount of weight. Elections, it could be claimed, are too blunt, too infrequent, and raise too many concerns for electoral deliberation to be an effective means of holding legislators accountable for violations of rights.⁴⁷ In their own ways, judges can be held accountable for their rulings and therefore receive some 'democratic credit.' This can be done, for example, by making their choices public, which reveals the logic behind a decision and exposes judges to criticism if they fail to present adequate reasoning.

Furthermore, judicial review may be the most effective means of ensuring the effectiveness of a Constitution.⁴⁸ If fundamental rights and their protection against possible violations are so important, a specialised court is the most reasonable alternative. In the end, constitutionalism refers to the concept of being ruled by a Constitution. This, in my opinion, is best accomplished through involvement and dialogue.

⁴⁴ Id

⁴⁵ Ibid at 745

⁴⁶ M. Kumm, "Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law", volume 7, 368(German Law Journal 2006)

1.8. Conclusion

The relationship between the Belgian Constitutional Court and the Belgian legislator has evolved since its inception in the 1980s. Initially, the lawmaker was extremely sceptical of this new entity. This improved for the better over time. The Supreme Court's verdicts serve as a "*signalling function*" to legislators, allowing them to better their legislation.⁴⁹

The utilisation of constitutional court interpretations is one of these signalling roles. By employing the method of interpretation, the Court defers to the legislator the judgement on whether a fresh legislative initiative is required. In general, preliminary judgements contain more interpretations.

The establishment of legislative lacunae is a second signal from the Constitutional Court to the legislator. Preliminary rulings⁵⁰ were used to fill in all legislative gaps. As a result, the Court could only establish them in the past.⁵¹ However, in case 191/2014, the Court was able to identify a current legislative gap. The Constitutional Court was entitled to rectify the lacuna itself and invite the referring judge to apply the contested articles in accordance with the Constitution because it was classified as a "intrinsic" lacuna. As a result, the Court clearly behaved as a co-legislator, broadening the reach of the challenged law. Even if the referring judge is able to '*plug the gap*' himself because the Constitutional Court was able to prove the flaw in sufficient detail, legislative intervention may be preferable to permanently remove the flaw from the legal system. After all, a new legislative move will undoubtedly increase legal certainty.

KELSEN, the contemporary Constitutional Court's spiritual father, was opposed to enshrining fundamental rights inside a Constitution. A Constitution, in his opinion, should be created in a material sense, regulating solely the creation of new legal standards.

Despite this, KELSEN's warning has gone unheeded. Its widespread success can be attributed to a variety of things. It can be understood as a response to authoritarian regimes and flagrant violations of human rights during World War II. Furthermore, Constitutional Courts were an important instrument for constitutional drafters who were dealing with various relational contracting issues. When political opponents are in power, constitutional courts can be used to restrain them.

To summarise, there are numerous compelling reasons for constitutional drafters and policymakers to establish a Constitutional Court. Constitutional Courts may play an important function for rulers even in totalitarian nations. It demonstrates how effective these Courts may be as policy instruments.⁵¹ Case 003/2015 and 020/2015.

Furthermore, the success of Constitutional Courts is cyclical. It's a winning strategy that lives on its own success. As a result, other countries are more inclined to follow suit. This is known as constitutional borrowing or constitutional education. This is bolstered even more by globalisation.

Proportionality analysis is used by Constitutional Courts in order to resolve intra-constitutional tensions. This strategy provides a clear analytical framework for balancing many opposing concepts. A principle dispute cannot be settled by declaring one of the principles invalid; rather, one of the principles must be outweighed. However, this exposes courts as legislators: they frequently must make decisions comparable to those made by legislators. Due to the intrinsic subjectivism of balance; this method of judicial law-making has sparked controversy. Furthermore, the conventional notion of separation of powers is beginning to lose its validity. Instead, the three branches are gradually forging a more cooperative paradigm.

⁴⁷ A. Lever, "Democracy and Judicial Review: Are They Really Incompatible?", *Perspectives on Politics* volume 7, 810(2009)

⁴⁸ M. Cappelletti, "Judicial Review of the Constitutionality of State Action: its Expansion and Legitimacy", 256 – 266(*South African Law Journal* 1992)

⁴⁹ A. Goris, K. Muylle and M. Van Der Hulst, "*Twintig jaar Arbitragehof v. wetgever: van wantrouwen naar dialoog*", TBP 2005, 256.

⁵⁰ Case 191/2014, 003/2015 and 020/2015.