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## *The Role Of Judicial Review In Constitutional Democracies: A Comparative Study*

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### ***Abstract***

*Judicial Review is an important feature of the Constitution which ensures that the legislative and executive actions align with the Constitution. The origination of judicial review lies with the U.S. system. The focus of this research is to understand the crucial role of judicial review in constitutional democracies with specific mention of comparative analysis with different constitutional democracies. The paper defines Judicial review, its various forms including the concrete and abstract review and how it serves as a pivotal principle through which the legislative and executive actions conform to constitutional principles, thereby safeguarding fundamental rights and maintaining the separation of powers. Further, the paper provides a detailed comparative perspective of how judicial review is implemented in key democracies such as of United States, the United Kingdom, and India. Each jurisdiction presents unique approaches to judicial review, reflecting differing constitutional traditions and legal philosophies. The paper concludes by discussing common challenges faced by these democracies, such as the balance between judicial intervention and democratic decision-making, the legitimacy of unelected judges in constitutional matters, and the consistency of judicial review practices across different legal systems. It delves into the evolving nature of judicial review, tracing its historical origins, its expansive scope and its implications for democratic governance and the need.*

**Keywords:** *Judicial review, constitutional democracies, United States, United Kingdom, India, comparative legal analysis.*

## 1. Introduction

Judicial Review is a constitutional principle which assesses the legality of legislative, executive and judicial actions. It is the power of the court to determine whether the specific actions of the legislature, executive or administrative organs violate provisions of existing laws as a consequence of which, if found inconsistent with the constitution, the court may declare such laws, regulations and decisions unconstitutional and further null and void.

Judicial Review embodies the principle, "**Fiat Justitia Ruat Caelum**" that is, justice must be pursued no matter the consequences by making sure that the actions of the legislature and executive are not inconsistent with the Constitution.<sup>1</sup> Judicial review plays a pivotal and important role in a constitutional democracy by upholding the principle of the supremacy of the Constitution by keeping the legislative and executive actions under scrutiny. The legislature and executive branch cannot take any action or decision that is arbitrary and unjust. It maintains a federal equilibrium creating a balance between the central and the state governments by ensuring that no constitutional limits are exceeded. The judicial review is required to safeguard fundamental rights.

### 1.1. Research Objectives

The objective of this research is to understand and analyze the role of judicial review in different constitutional democracies and compare mechanisms, impacts, and institutional contexts of various constitutional democracies to identify similarities and differences across jurisdictions. This study would help us explore the evolution of judicial review and find out the potential challenges to judicial review.

### 1.2. Research Questions

This research is subject to the following questions and it will try to answer them in the best possible ways:

- How has judicial review evolved in various jurisdictions?
- How does judicial review function in various constitutional democracies?
- What are the similarities and differences in its application and impact?
- What are the challenges faced by various jurisdictions to implement judicial review?

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<sup>1</sup> Sonu Shankar, "The Concept Of Judicial Review And Its Importance In Upholding The Constitution", available at <[The Concept Of Judicial Review And Its Importance In Upholding The Constitution \(legalserviceindia.com\)](https://legalserviceindia.com)> (last visited on Sept. 14, 2024)

### 1.3. Methodology

The research is made based on a literature review of various research papers, texts, articles, legal frameworks and analysis of judicial decisions in different constitutional democracies.

## 2. Evolution of Judicial Review in Constitutional Democracies

Judicial review originated and started developing from an English practice of reviewing the bylaws of corporations which were repugnant to the England laws. It was justified by Edward Coke and other English judges during the late 16<sup>th</sup> and early 17<sup>th</sup> century as a practice based on an understanding that a delegated authority possessed only limited legislative power. Because early colonial settlements were initially structured as corporations, this practice was extended to the American colonies. At the advent of the 18th century, it was stated that American colonial law could not be repugnant to the laws of England. This constitutional limit was used by the Privy Council but the meaning of repugnancy to the laws of England was always contested. After 1776, in place of “the laws of England,” post-Revolutionary lawyers substituted the “constitution.” State courts reviewed state legislation for repugnancy to new state constitutions.<sup>2</sup>

The word judicial review was first used in **Dr. Bonham's Case**.<sup>3</sup> Where Dr Bonham was forbidden to practice as he did not have a license from the Royal College of Physicians for the same. This case is also known for the violation of the Principles of Natural Justice due to Pecuniary bias. As Dr. Bonham was fined for not having a license, the fine he paid was distributed between the king and the college itself.

Afterwards, it was summarized in the case of **Marbury V. Madison**.<sup>4</sup> In this case, the term duration of President Adam (Federalist party) came to an end and Jefferson who was an anti-federalist came to power. On his last day, he appointed the judges from the federal party. Jefferson after coming to power, opposed this. So he stopped Madison, who was the secretary of state from sending the appointment letter to the judges. Justice Marbury, who was one of the judges, approached the Supreme Court and filed a writ of mandamus. The Court refused to entertain this plea and opposed the order of the legislature, i.e. Congress and hence by this way, the US Supreme Court developed the doctrine of judicial review.

Judicial review ensures that whatever has been written down in a constitution is upheld and all laws and government actions must be in conformity with the principles and values enshrined in the Constitution. Courts serve a check on the powers of the other two organs of the government, i.e., legislature and executive with the help of judicial review. This helps maintain a balance of power

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<sup>2</sup> Mary Sarah Bilder, “Idea or Practice: A Brief Historiography of Judicial Review” Digital Commons @ Boston College Law School (2008)

<sup>3</sup> 8 Co. Rep. 107 · 77 Eng. Rep. 638

<sup>4</sup> 5 U.S. (1 Cranch) 137

and prevents any one branch from becoming more powerful or dominant and checks them in check ensuring the supremacy of the constitution.

### 2.1. Judicial Review in India

Judicial review has been termed as the ‘heart of the constitution’ by Dr. B.R. Ambedkar. Article 13 of the Indian Constitution is said to be the charter of the Judicial Review. Article 13 of the Constitution incorporates “Judicial Review of Post constitution and Pre- constitutional laws”. Article 13(2) states “The union or the States shall not make any law that takes away or abridges any of the fundamental rights, and any law made in contravention of the aforementioned mandate shall, to the extent of the contravention, be void.”<sup>5</sup> This Article provides teeth to the fundamental rights and makes them justifiable. It declares all the laws whether pre-Constitutional or post-Constitutional, void if they are found inconsistent with or in violation of the fundamental rights. Thus, the article deals with the impact of Fundamental Rights on state action. Various other constitutional provisions provide explicit mention of Judicial Review which includes Articles 13, 32, 131-136, 141, 143, 226, 245, 246, etc.

Judicial Review was first interpreted in the case of *Emperor v. Burah*.<sup>6</sup> Where the constitutionality of the legislative Act enacted by the Governor General Council was questioned as it exceeded the power given to him by the Imperial Parliament. The principle was founded on the Rule of Law and The Government of India Act, of 1858 and The Indian Council Act, of 1861 imposed some restrictions on the powers of the Governor General in the Council but there was no provision for judicial review. The court had only the power to implicate. The Indian courts recognized judicial review with certain limitations.

There is no express mention of judicial review in The Government of India Act, of 1935, however, the Constitution of India, 1950 explicitly established the same. The power of Judicial Review has been given to the High Courts and the Supreme Court of India under Articles 226 and 32 respectively, which can declare a law unconstitutional if it is found inconsistent with any of the provisions of Part III of the Constitution. Under Article 13, the most important doctrines of Judicial Review like the Doctrine of Severability and, Doctrine of Eclipse were established:

- **Doctrine of Severability**

Where only a part of the law is inconsistent with or contravenes the fundamental right, that part shall be void under Article 13 and not the whole of the law. The Courts apply the doctrine of severability or separability to separate the valid portion of the law from the invalid portion.

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<sup>5</sup> Article 13 (2) of the Indian Constitution

<sup>6</sup> (1878) ILR 3 Cal 64

In “*A.K. Gopalan v. State of Madras*”<sup>7</sup>, the SC struck down section 14 of the Preventive Detention Act, of 1950 as violative of Article 22 of the Constitution.

In “*Kihota Hollohon*”<sup>8</sup>, the Court ruled that the principle of severability could be equally applied to a composite amendment which contained amendments in provisions which did not require ratification by States as well as, amendments in provisions which required such ratification.

- **Doctrine of Eclipse**

If an amendment of the fundamental right enacted after the commencement of the Constitution, the shadow cast on that law was removed, the law would be revived and operative. The doctrine means that inconsistent law does not simply become dead but becomes eclipsed, for the time being by the fundamental right. The effect of the later amendment was to remove the shadow to make the law free from all blemish or infirmity.

In “*Bhikaji Narain Dharkras v. State of M.P.*,”<sup>9</sup> Authorization was given to the State Government to exclude all the private motor transport operators from the field of transport business. A part of this law was void at the commencement of the Constitution as it violated the provisions of Article 19 (1) (g) and also wasn’t justified under the provisions of Article 19 (6) of the Constitution. 1<sup>st</sup> Amendment Act of 1951 amended Article 19 (6) and permitted the Government to monopolize any business. The SC held that after the amendment of clause (6) of Art. 19, the impugned Act ceased to be unconstitutional and became operative and enforceable.

### **Judicial Review and Basic Structure**

The concept of ‘Basic Structure’ was developed by the judiciary to protect the basic rights and the ideals of the Constitution. It was first time developed in the case of *Shankari Prasad v. Union of India*,<sup>10</sup> Where the First Constitutional Amendment, 1951 was challenged as it violated Part III (Fundamental Rights) of the constitution. The SC held that the Parliament has the power to amend any part of the Constitution under Article 368. In 1967, in the case of *Golaknath v. State of Punjab*,<sup>11</sup> The SC held that the Parliament cannot amend the Part III of the Constitution.

Finally, in 1973, in the case of *Kesavananda Bharti v. State of Kerala*,<sup>12</sup> The validity of the Constitutional 24<sup>th</sup>, 25<sup>th</sup> & 29<sup>th</sup> Amendment Acts was challenged and the Court by majority

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<sup>7</sup> AIR 1950 SC 27.

<sup>8</sup> 1992 SCR (1) 686, 1992 SCC SUPL. (2) 651

<sup>9</sup> AIR 1955 SCR (2) 589

<sup>10</sup> AIR 1951 SC 458

<sup>11</sup> AIR 1967 SCR (2) 762

<sup>12</sup> AIR 1973 SC 1461, 1973 4 SCC 225

overruled Golakh Nath's case and held that the 24<sup>th</sup> Amendment does not broaden the amending power of the Parliament. The Court held that there are inherent limitations on the amending power of Parliament and Article 368 and it does not confer power to amend the Constitution's essential elements or the basic features or structure of the Constitution. The essentials of the basic structure are as follows:

- Supremacy of the Constitution
- Democratic and Republican form of government
- Separation of Powers between the Legislature, the Judiciary and the Executive.
- Secular and Federal Character of the Constitution.
- Unity and Integrity of the Nation.

In the case of "*Indira Nehru Gandhi v. Raj Narain*"<sup>13</sup>, the SC struck down clause 4 of Article 329-A which was inserted by the 39<sup>th</sup> Amendment, 1975 because it was beyond the amending power of the Parliament as it destroyed the basic structure of the Constitution. With this judgment, the SC has added the following basic features to the previous list:

- Rule of law.
- Judicial Review.
- Democracy which implies a free and Fair Election.
- Jurisdiction of SC under Article 32 is also a basic feature of the Constitution.

Under the Indian Constitution, Judicial Review is mentioned in the following three ways;

1. Judicial Review of Constitutional Amendments
2. Judicial Review of Parliament
3. State Legislation and also Judicial Review of Administrative actions of Executives.

The purpose of judicial review is summarized as follows:

- **To establish fairness in administrative action**
- **To protect the guaranteed constitutional fundamental rights**
- **To rule on questions of legislative competence between the Centre and States** (The judicial review of administrative action can be exercised on grounds of illegality, Irrationality, Procedural impropriety, Proportionality, and Unreasonableness)

## 2.2. Judicial Review in the United States

The American Constitution is written and federally democratic and is based on the Rule of law. It provides for separation of powers with checks and balances which are its heart and soul. One of the

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<sup>13</sup> AIR 1975 SCC (2) 159

fundamental processes in America to determine the validity of law is Judicial Review. In the USA, the judiciary keeps a check on the actions of Congress and if any of the action of the President is found contrary to the Constitution, then the judiciary has the power to declare it null and void.

The first American decision to recognize judicial review was the case of “*Bay and Singleton*”<sup>14</sup> Which in 1787 by SC of North Carolina’s predecessor. Two landmark decisions given in this regard were “*Hylton v. US*”<sup>15</sup> Where the Carriage Act of 1794 which imposed tax was challenged. The carriage tax was held to be unconstitutional. The court made this decision by applying the power of judicial review. Chief Justice Chase observed that “I must determine whether the court constitutionally possesses the power to declare an Act of the Congress void on the ground of its being contrary to and in violation of the Constitution, but if the courts have such powers, I am free to declare it but in a clear case.”<sup>16</sup>

Another landmark case of judicial review is “*Marbury v. Madison*”<sup>17</sup>. In this case, the term period of President Adam belonging to the Federalist Party came to an end and Jefferson, the anti-federalist came to power. On his last day, Adam appointed the members of the federal party as judges. But when Jefferson came to power, he was against this. So he stopped Madison the secretary of state from sending the appointment letter to the judges. Marbury, one of the judges, approached the Supreme Court and filed a writ of mandamus.

**Issues raised in the case were:**

1. Does the Supreme Court have original jurisdiction to issue writs of Mandamus?
2. Can Congress expand the scope of the Supreme Court’s original jurisdiction beyond what is specified in Article III of the Constitution?

The court held that it has no jurisdiction to issue a writ of mandamus because to issue the writ of Mandamus, the court should have the appellate jurisdiction. The court refused to entertain the plea and first opposed the order of the legislature, i.e. Congress and thus the US Supreme Court developed the doctrine of judicial review. The court held that Congress cannot expand the scope of the Supreme Court’s original jurisdiction beyond the scope of Article III of the Constitution. Supreme Court has the authority to review acts of Congress and determine whether they are valid or not. It is the inherent power of the Supreme Court to determine the validity of any law. This judgment was the foundation of the power of judicial review in the United States.

The concept of judicial review has its foundation in the doctrine that the Constitution is the Supreme law. The main objectives of Judicial Review in USA were to declare the laws

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<sup>14</sup> 1 N.C. 5 (1787) or 1 Martin (N. Car.) 42 (1787)

<sup>15</sup> 3 U.S. (3 Dall.) 171 (1796)

<sup>16</sup> 3 U.S. (3 Dall.) 171 (1796)

<sup>17</sup> 5 U.S. (1 Cranch) 137

unconstitutional if they are contrary to the Constitution, to defend the valid laws which are challenged to be unconstitutional, to protect and uphold the Supremacy of the Constitution by interpreting its provisions, to save the legislative functions of Congress being encroached by other departments of the Government, to check the action of Congress and the State Legislature for them delegating the essential legislative functions to the executives or to check Congress from delegating its legislative function to the State Legislatures.

### **Objects of Judicial Review in the US:**

1. To declare the laws unconstitutional if they are inconsistent with the US Constitution.
2. To defend the valid laws which are challenged to be challenged.
3. To protect and uphold the supremacy of the Constitution by interpreting the provisions.
4. To save the legislative function of Congress from being encroached upon by other organs of the government.
5. To maintain checks and balances over the actions of Congress and State legislature for them delegating the essential legislative functions to the executives or to check Congress from delegating its legislative function to the State Legislatures.

### **The Constitutionality of judicial review in the US**

Although, judicial review is not expressly recognized in the US Articles 3 and 4 of the Constitution imply the power of judicial review.

- **Article III** gives the Supreme Court judicial power over all cases arising under the Constitution.
- **Article VI** says that the Constitution is the “supreme law of the land” and implies that other laws are only valid when they’re “made in pursuance” of the Constitution.

Judicial review now has a much wider scope in the United States. In “*Brown v. Board of Education*”<sup>18</sup>, the Supreme Court struck down the racial segregation in public schools. Judicial review was used by SC in “*Obergefell v. Hodges*,”<sup>19</sup> To recognize the same-sex marriages performed lawfully.

### **2.3. Judicial Review in the United Kingdom**

The foundations of judicial review in the United Kingdom lie in the case of “*Dr. Bonham v. Cambridge University*.”<sup>20</sup> This case has its origins back in the 17<sup>th</sup> century. It was decided in 1610

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<sup>18</sup> 347 U.S. 483

<sup>19</sup> 576 U.S. 644

<sup>20</sup> 8 Co. Rep. 107 · 77 Eng. Rep. 638



by Lord Coke. The UK system was earlier based on Legislative supremacy and Parliamentary Sovereignty, so there was a very limited scope of judicial review but with the enactment of the Human Rights Act 1998, the scope of judicial review widened. There is no written Constitution in the UK so the principle of “Parliamentary Sovereignty” dominates the constitutional democracy in the UK.

Judicial review in England has historical roots dating back to medieval times when the King’s Bench had the authority to review decisions made by lower courts and officials. The principle that the courts could review the legality of administrative actions began to take shape, though it was not formally established. In the 17th Century, in the case of the *Postnati (1608)*, an early case where judicial review was applied to issues of legality regarding the Crown’s actions. Then, in *Entick v. Carrington*<sup>21</sup> This is a landmark case in which the court established the principle that government officials could not act beyond the powers granted to them by law. It set a precedent for protecting individual rights against unlawful searches and seizures. In *R v. Somerset County Council*,<sup>22</sup> There was a demonstration of the judiciary’s role in reviewing administrative decisions, though the scope of review was still somewhat limited.

With the incorporation of the ECHR, the **Human Rights Act 1998** was incorporated. It allowed individuals to challenge public authorities’ actions that were incompatible with the rights guaranteed by the ECHR. This Act significantly expanded the role of judicial review by enabling the courts to review legislation and administrative actions for compatibility with human rights.

Judicial Review is a part of UK Constitutional law that helps the people to challenge the power exercised by a public body. Government is subject to the jurisdiction of ordinary common law courts. The doctrine of ultra vires is prevalent in the UK under which the decisions of a public authority can be set aside if it exceeds the powers provided by Parliament.

The purpose of Judicial review in the UK is to prevent the misuse of power by the executive as well as to prevent individual rights. Judicial review is followed by the following Remedies in the UK:

- Quashing order
- Prohibiting order
- Mandatory order
- Declaration
- Injunction
- Damages

Recently, the government introduced the **Judicial Review and Courts Bill in July 2021** which received royal assent and became law on April 28, 2022. The Act makes the following changes to Judicial review in the UK:

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<sup>21</sup> (1765) 19 St Tr 1029

<sup>22</sup> [1998] Env LR 111

1. Giving the courts the power to avoid suspended and prospective-only quashing orders.
2. Reviewing the judgment in R(Cart) v. The Upper Tribunal so that decisions of the Upper Tribunal are no longer eligible for judicial review.
3. Many procedural changes in the court system are also made via this Act.

#### **4. Scope of judicial review in the US, UK and India:**

1. The scope of judicial review is much wider in India in comparison to the UK and the US because the US Constitution is most rigid and concise in nature, The Indian Constitution is open to amendments and very flexible in nature. The words and expressions in the Indian constitution are exact and precise. On the other hand, the UK has no written constitution and because of judicial review is very limited in the UK.
2. India: Articles 13, 32, 131-136, 141, 143, 226, 227, 245, 246 and 372 give express mention of judicial review. In the US, Articles III, IV, and V incorporate the power of judicial review and constitutional supremacy and all laws are subject to the Constitution. Whereas in the UK, no express provision as there is no written Constitution.
3. In India, Article 13 provides for “Judicial Review of Pre- constitutional as well as Post-Constitutional laws” whereas there is no such provision for judicial review of pre-constitutional laws in the United States and United Kingdom.
4. The term” Due Process of Law “extends the power of judicial review in the US which helped SC in working with strict caution in determining the constitutionality of the legislative Act on substantive grounds as well as procedural grounds. In India, the term “procedure established by law” is expressly provided in the Constitution under Article 21 which says that the Court can declare void acts on the substantive grounds only. The court cannot make laws in India because it’s not the role of the judiciary, The Court can only interpret and determine the law, but in the US judges made laws exist, judges strictly scrutinize the law and if they are found invalid then they declare void and make a judge-made law which is always existence in the US.
5. In India, courts formulated various doctrines like the doctrine of severability and the doctrine of eclipse etc., these doctrines are also implicitly incorporated in the US. But in the UK, there is no scope for these doctrines due to the absence of judicial review of legislative Acts.

#### **5. Criticism of Judicial Review**

Judicial review is very essential for any constitutional democracy, but it has been criticized and challenged for various reasons.

- **Overreach of Judicial Review:** The judicial review is sometimes criticized for Judicial Overreach where the judiciary starts encroaching upon the domain of the legislative and executive branches of the government. The other two organs of the government, i.e., legislative

and executive keep each other in check and they cannot exceed their powers because the judiciary is there to keep an eye on them but when it comes to the judiciary, who keeps the judiciary under check? The answer would be the constitution and the people but judges are not elected representatives of the people. They could misuse their power of judicial review with nobody to question as they are provided with immunity. Judicial overreach is very common nowadays where the judges have exceeded their powers.

- **Delay and Expense:** “Delayed justice is denied justice.” Critics also argue that the process of judicial review can be time-consuming and expensive, which can result in delayed justice for the citizens. This can be particularly problematic in cases where the government is trying to implement urgent policy measures.
- **Lack of Accountability:** As already stated in the first point the judicial check is subject to the constitution. The judiciary is accountable to the constitution and the people but it is argued that it is not accountable to the people in the same way as the elected representatives of the people since the judges are appointed through a collegium system, they are not accountable to the citizens, and their decisions cannot be easily challenged, sometimes which can result in judicial overreach and no action can be easily taken in this regard.
- **Limited Expertise:** It is argued that judges may not have the necessary expertise to make decisions in certain complex policy areas, such as economics or science. This can result in limited policymaking on the part of the judiciary and hinder public confidence in many instances.

## 6. Conclusion

Judicial review is a crucial aspect of any Constitutional democracy to check the validity of laws and protect the rights of people. The Indian Constitution is much wider in scope and open for judicial review whereas if we talk about judicial review in the US and U, they have limited reach of judicial review. The US system incorporated provisions such as Articles III, IV and V for judicial review whereas in the UK, there is no express recognition of judicial review as there is no written constitution. Although, various steps have been taken to add judicial review to the legal system. Judicial review is also subject to challenges and criticism from various quarters. Judicial review is subjected to many challenges which include the undermining of the judicial process which leads to judicial overreach, hindering judicial independence and is often time-consuming and expensive. However, judicial review is necessary for a constitutional democracy as it protects the fundamental rights of citizens and ensures that the government is working in consonance with the Constitution. The judiciary has to strike a balance between these two perspectives as a consequence.

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