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# JUDICIAL REVIEW AND CONSTITUTIONAL COURTS: A GLOBAL COMPARATIVE STUDY

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## ABSTRACT

This article provides a global comparative study on the concept, scope, and models of judicial review as exercised by constitutional courts across different legal systems. Prima facie, judicial review serves as a vital tool in a modern democracy to limit the arbitrary use of power by checking the constitutional validity of legislations, executive actions, and constitutional amendments.

The study explores the general procedures of review, including exceptions to the doctrine of *Locus Standi* and the application of judicial surgery through the doctrine of severability or complete annulment. It contrasts the decentralized (American) model and the centralized (European/Kelsenian) model, while identifying the Indian framework as a unique hybrid model that retains key characteristics of both systems.

Furthermore, the article provides a detailed breakdown of the status of judicial review across three major legal traditions: the Common Law system (United Kingdom and Canada), the Civil Law system (France and Germany), and the Islamic legal system (Pakistan, Iran, and Saudi Arabia), where the principle of repugnancy ensures conformity with divine law.

Finally, the study examines the Indian context under Articles 13, 32, and 226, highlighting landmark precedents like *A.K. Gopalan*, *Balsara*, and *Romesh Thappar*, and evaluates how the Basic Structure Doctrine renders judicial review as an unamendable core of the Indian Constitution. The article concludes that while there is no "one-size-fits-all" approach, judicial review remains the essential check to uphold the supremacy of the constitution over political expediency.

**Keywords:** Judicial Review, Constitutional Courts, Comparative Study, Basic Structure Doctrine, Doctrine of severability, Models of Judicial Review, Legal Systems.

## 1. JUDICIAL REVIEW: SUBSTANCE AND APPROACH

The term judicial review *prima facie* refers to the process by which the constitutionality of legislation or any action on part of the government is determined by a competent court i.e. a constitutional court. These actions primarily include; statutes made by the Legislature, Executive orders and also the judicial decisions. Thus Judicial review acts as a limitation to the arbitrary use of power by any organ of the government beyond the constitutional sanction.

However, the power of judicial review is conferred solely upon the Judiciary, which acts as an interpreter of the laws. Therefore, the courts play a vital role in the process of reviewing the actions of the government in its due course of governance and ensure their adherence to the constitutional norms.

### 1.1 The Scope of Judicial review

In its widest sense, the scope of **judicial review** refers to the extent of the power of judiciary to intervene in the state actions. This power of the judiciary however, is limited to act as a body which ensures strict adherence to the constitution. The scope of judicial review is focused primarily on three dimensions of the state actions:

- **Legislations:** Reviewing the constitutional validity of the enacted laws, amendments and statues passed by the legislative bodies.
- **Executive actions:** Ensuring that the organs of the state executive does not exercise arbitrary power and acts only in accordance with the law and the constitution and not beyond its jurisdiction of operation.
- **Constitutional amendments:** In India, this power extends to even reviewing constitutional amendments to ensure that they do not disturb the basic structure<sup>1</sup> of the Constitution.

### 1.2 EFFECTS OF JUDICIAL REVIEW OVER GOVERNMENTAL ACTIONS

When a court exercises its power of judicial review over the governmental actions, the possible

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<sup>1</sup> *Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.*

effects include:

- The court may uphold a governmental action, for instance a legislation, if it is found to be constitutional and in accordance with the jurisdiction of the legislating body.
- If the courts, find these actions unconstitutional, the effects include:
  - i. In case of legislative actions; the courts can declare a part of the legislation void and uphold the rest of the legislation to continue its operation, or
  - ii. Declare the whole legislation unconstitutional, making its validity in terms of operation null and void.
  - iii. In case of executive actions; the courts can over-rule the administrative orders that are ultra-vires or even cease them from being operational.

### **1.3 THE GENERAL PROCEDURE OF JUDICIAL REVIEW – SEVERABILITY OR ANNULMENT**

The procedure of judicial review begins at the determination of maintainability and *Locus Standi* of an action that was challenged. Once the maintainability of such challenge has been established, the courts further look upon the *Locus Standi* of the party that has challenged the action. In general, the *doctrine of Locus Standi* states that only a person who was injured or directly affected by an action can bring upon a suit against such an act; but the scenario of judicial review stands as an exception to this doctrine. Under the judicial review, an action can not only be challenged by a person who was affected, but also by a person who finds interest against such an action. This exception ensures that the *doctrine of Locus Standi* does not obstruct the challenges arising against legislations or administrative actions, which affect the public at large from being heard by the courts.

Therefore, once the court finds the required standard of maintainability and *Locus Standi*, the next step includes the examination of the *vires* (authority) of the challenged action. If the court finds a particular action which is under review as *ultra-vires*; i.e. beyond the authority sanctioned by the constitution or in contrary to its basic structure, in cases of legislations, it can

exercise the power of judicial surgery<sup>2</sup>, to sever a part of the legislation holding it unconstitutional while keeping the rest of it operational. At the same time, if the court finds it difficult to sever a particular part of the legislation, then the whole legislation can be deemed unconstitutional making it completely inoperative.

In the cases of executive actions such as administrative orders; if the court finds a particular action *ultra-vires* (beyond the sanctioned authority), the courts can completely cease such an order, holding them inoperative and void. Similarly, in the case of Constitutional amendments, if an amendment is found to be contrary to the fundamental rights or the basic structure of the constitution, judicial review enables the courts to declare such an amendment null and void.

#### **1.4 WHICH COURTS CAN EXERCISE THE POWER OF JUDICIAL REVIEW**

A court, as a judicial body alone possesses the authority to exercise the power of judicial review. However, under most of the contemporary legal systems, not every court holds the authority to exercise the power of judicial review. Only the apex layers of the judiciary of a country hold this authority as a specialized jurisdiction. Therefore these courts alone hold the authority to adjudicate over constitutional cases and are known as the Constitutional courts.

The term “constitutional courts” refers to the high level judicial bodies of a country, whose jurisdiction primarily constitutes Constitutional review to ensure that the laws, enactments, executive functions and all the actions of the government are completely in accordance with the constitution, the supreme law of any country. While the structures of these courts vary from country to country and constitution to constitution, their core structure and the functions remains the same throughout all the legal systems. Irrespective of the legal system, any constitutional court in general is primarily responsible for the scrutiny of government actions to check their validity and *vires* (authority), protection of the fundamental rights, ensuring every government body acts in its own jurisdiction and settling inter body disputes (eg. Legislative vs. executive). Unlike the traditional courts these courts are primarily concerned with the “question of law and constitutionality” rather than the questions of fact.

#### **1.5 MODELS OF JUDICIAL REVIEW**

There are mainly two different ways, countries exercise this power of judicial review; they are:

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<sup>2</sup> Doctrine of severability

- **Decentralized Model of judicial review:** This model is also known as the American model. In this system, there is no specific provision of a constitutional court, and all the bodies of the judiciary possess the authority to exercise the power of judicial review along with the traditional jurisdiction over civil and criminal disputes. This model primarily opines that all the bodies of the judiciary hold the authority to validate and review the constitutionality of an action that was challenged, while the decision of the apex court i.e. the Supreme Court will be considered final and binding in an appeal. This model of judicial review obtains its legality from the principles established in the case of *Marbury V Madison*<sup>3</sup>. Furthermore, the sixth article of the Constitution of America<sup>4</sup> empowers all the officers of the judiciary and executive to uphold its constitution explicitly authorizing all the bodies of the judiciary to act as a Constitutional Court. This model of Constitutional review is similarly observed in many other countries like Canada, Australia and Japan<sup>5</sup>.
- **Centralized Model of judicial review:** This model is also known as the European or the Kelsenian Model<sup>6</sup>. In this model of judicial review, a separate and centralized judicial body known as a “constitutional court” operates to exercise the power of judicial review. These courts alone are separated from the hierarchy of the judiciary and exercise the duty of constitutional reviewing. Unlike the traditional courts, the jurisdiction of these courts is strictly limited to Constitutional challenges alone and is exempted from adjudicating over civil or criminal disputes unless a question of constitutionality is expressly involved.
- **The Indian context:** The concept of judicial review was adapted into the Indian Constitution<sup>7</sup> from the United States. However, the Indian model is considered to be a hybrid of both the decentralized model and the centralized model. It exhibits the key characteristics of a decentralized model by passing down the power of judicial review to the Supreme Courts<sup>8</sup> and the High Courts<sup>9</sup> along with their jurisdiction to adjudicate over civil and criminal disputes; at the same time this power of Judicial review is strictly

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<sup>3</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (USA).

<sup>4</sup> The Constitution of the United States, art. VI (USA).

<sup>5</sup> The Constitution of Japan, arts. 76 and 81 (Japan).

<sup>6</sup> Hans Kelsen, "Who Should Be the Guardian of the Constitution?" 2(1) *Journal of Jurisprudence* 1 (1931)..

<sup>7</sup> The Constitution of India, art. 13.

<sup>8</sup> The Constitution of India, art. 32.

<sup>9</sup> The Constitution of India, art. 226.

centralized to the upper courts alone, while the lower levels of judiciary are completely excluded from exercising this power. This model of judicial review in India separates it from both the decentralized model of America and the centralized model of Europe, creating a hybrid-model of judicial review by retaining the key characteristics of both the models.

### **1.6 The role of courts in Judicial Review**

Since the courts are the only organs of a government, which are entrusted with the duty of judicial review, they play the most important role in ensuring the constitutionality of the actions of the government in all the aspects of governance. These bodies of the government are vital in protecting the supremacy of the constitutions along with the principles of rule of law thereby, ensuring that all the laws and the other aspects of governance are completely in accordance with the Constitution, the supreme law of any nation. The courts in the due exercise of this power, maintains a check over the functioning of the other bodies of the government, making sure no organ acts *ultra-vires* of its jurisdiction. The sole responsibility of the courts is to uphold the constitutional principles alone whenever an action of the government is challenged.

### **1.7 Essentiality of Judicial Review**

The Power of judicial review is considered a vital tool in a modern democracy. Under various legal systems, this power of the courts is considered an inseparable part of the constitution. Through judicial review, the courts act as a limitation to the arbitrary exercise of power by the organs of the government, thereby preventing the tyranny of the government. The judicial review system ensures that all the actions of the government, at all times, strictly adhere to the constitutional standards, thereby, upholding the supremacy of the Constitution as the apex law of the land.

## **2. STATUS OF JUDICIAL REVIEW UNDER VARIOUS LEGAL SYSTEMS**

Although the power of judicial review is a common feature in most modern constitutions, the structure and functioning of this power can differ from one country to another and from one legal system to another.

Below is a detailed overview of the status of judicial review within different constitutions that operate under various legal systems. These systems include:

- Common law system
- Civil law system
- Islamic law system

## **2.1 Status of Judicial Review under the Common Law System**

The term "Common Law" refers to a legal system that operates in countries that were once under British rule during the medieval and colonial periods. These countries are generally known as Commonwealth countries. The laws of these nations are largely influenced by English legal principles and show a close resemblance in terms of structure and operation to the English law. The common law system is primarily based on legal precedents and relies on past court decisions made based on customs, equity, and the principles of natural justice. However, this was the pure form of common law, which is not currently practiced. The modern principles of common law place greater emphasis on legislation and the constitution, which serve as the basis for judicial decisions and government actions.

The countries that apply the common law system include the United Kingdom, Canada, and other European countries.

Below is a breakdown of the status of judicial review in each of these country's constitutions:

- **Judicial review in UK (United Kingdom):** Since the United Kingdom does not have a written constitution; the power of judicial review derives its authority from common law principles rather than a specific constitutional document.

In UK, judicial review operates under the doctrine of ultra-vires and follows the Kelsenian model. It primarily functions as an administrative process focused on the legality, rationality, and procedural fairness of executive actions rather than the invalidation of primary legislation. Under the Civil Procedure Rules<sup>10</sup>, claims are initiated in the High Court (Administrative Court), where claimants must first obtain permission by demonstrating "sufficient interest" or locus standi. Specialized judicial review is carried out by the Upper Tribunal under the 'Tribunals, Courts and Enforcement Act 2007<sup>11</sup>' for areas such as immigration and taxation.

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<sup>10</sup> Civil Procedure Rules, 1998, S.I. 1998/3132, r. 54.1 (UK).

<sup>11</sup> The Tribunals, Courts and Enforcement Act, 2007, s. 15 (UK).

Appeals progress to the Court of Appeal and ultimately to the Supreme Court, which serves as the final authority on significant constitutional matters, as established by the Constitutional Reform Act 2005<sup>12</sup>. Throughout this process, courts apply the common law doctrine of ultra vires and statutory provisions such as the Senior Courts Act 1981<sup>13</sup> for remedies, alongside the Human Rights Act 1998 to ensure that public authorities act in accordance with the European Convention on Human Rights.

• **Judicial review in Canada:** The exercise of judicial review in Canada includes both the evaluation of the constitutionality of legislation and the oversight of administrative actions, ensuring that all governmental exercises of power are in line with the "Rule of Law."

This model is primarily grounded in the Constitution Act, 1982<sup>14</sup>, which establishes the constitution as the supreme law of the land, rendering any inconsistent statute ineffective. Additionally, the Canadian Charter of Rights and Freedoms<sup>15</sup>, explicitly authorizes courts with appropriate jurisdiction to provide appropriate and just remedies for the violation of protected rights. The standard of review was recently clarified in the landmark case of *Vavilov (2019)*<sup>16</sup>, which establishes a presumption of "reasonableness" for administrative decisions, while reserving a "correctness" standard for constitutional questions and matters of fundamental importance to the legal system.

The authority to exercise judicial review is distributed among a decentralized hierarchy of courts, depending on their jurisdiction within the federal or provincial framework.

Provincial Superior Courts have inherent jurisdiction to review actions of provincial administrative bodies and handle constitutional challenges. In the federal sphere, the Federal Court and the Federal Court of Appeal have exclusive original jurisdiction over federal boards, commissions, and tribunals, as stipulated by the Federal Courts Act. Ultimately, the Supreme Court of Canada serves as the highest court, providing final and binding decisions on appeals concerning the constitutional validity of laws and the jurisdictional boundaries of administrative entities.

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<sup>12</sup> The Constitutional Reform Act, 2005, s. 40 (UK).

<sup>13</sup> The Senior Courts Act, 1981, s. 31(1) (UK).

<sup>14</sup> The Constitution Act, 1982, s. 52(1) (Canada).

<sup>15</sup> The Canadian Charter of Rights and Freedoms, s. 24(1) (Canada).

<sup>16</sup> *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 S.C.C. 65 (Canada).

## 2.2 Status of Judicial Review under Civil law system

The Civil Law system, also known as the **Continental or Roman model**, is a legal tradition primarily founded upon “codified statutes” rather than judicial precedent. In this system, the legislature possesses the sole authority to enact comprehensive written codes, such as the “Napoleonic Code”, which serves as the primary source of legality for resolving disputes. Unlike the Common Law model, the judiciary operates under an interrogational system, where judges act as active fact-finders and investigators tasked with applying the relevant code to the facts of a case. Consequently, judicial decisions do not establish binding precedents (*stare decisis*), but are instead considered persuasive and specific to the parties involved. This model of law is observed in numerous jurisdictions globally, including France, Germany, Japan, and Mexico, prioritizing systematic consistency and top-down legislative authority over incremental, judge-made law.

- **Judicial review under the constitution of France:** The status of judicial review under the Constitution of the Fifth Republic is characterized by a bifurcated system that distinguishes between the oversight of administrative actions and the constitutional scrutiny of primary legislation. The “Constitutional Council” (*Conseil constitutionnel*) possesses the exclusive authority to review the constitutionality of statutes, deriving its primary legality from the French Constitution<sup>17</sup>. While Article 61 provides for *ex-ante* review prior to the promulgation of a law, the Constitutional Reform of 2008 introduced the *Question Prioritaire de Constitutionnalité* (QPC) under Article 61-1, allowing for *ex-post* review of existing laws that allegedly infringe upon guaranteed rights and freedoms. Conversely, the review of administrative legality is vested in the Administrative Courts, with the Council of State (*Conseil d’État*) serving as the apex court for ensuring executive conformity with the law and general legal principles. In this dualistic model, the “Court of Cassation” and the “Council of State” act as intermediary gatekeepers, determining the merit of constitutional challenges before referring them to the Constitutional Council, which remains the final and binding arbiter of legislative validity.
- **Judicial review under the constitution of Germany:** The framework of judicial review in Germany, often referred to as the Kelsenian or European model, is

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<sup>17</sup> The Constitution of the French Republic, 1958, art. 61 (France).

characterized by a centralized system of constitutional oversight anchored in the “Basic Law” (*Grundgesetz*). This model vests the exclusive authority to invalidate legislation in a specialized “Constitutional Court,” distinguishing it from ordinary courts that resolve civil, criminal, and administrative disputes. The Federal Constitutional Court deriving its legality from the Basic Law<sup>18</sup> serves as the apex body with the power to adjudicate “abstract reviews” initiated by political organs and “concrete reviews” referred by ordinary judges<sup>19</sup>. Furthermore, the system explicitly authorizes individual citizens to file a Constitutional Complaint<sup>20</sup>, if they allege a violation of their fundamental rights by any public authority. While ordinary courts are mandated to interpret laws in conformity with the Constitution, they must suspend proceedings and defer to the Federal Constitutional Court whenever the validity of a statute is at issue, ensuring that the final and binding determination of constitutionality remains concentrated within this single, specialized judicial body.

### 2.3 Status of Judicial Review under the Islamic Legal System

The Islamic legal system, known as Sharia, is a divine legal framework based mainly on the Quran and the Sunnah, the teachings and practices of the Prophet Muhammad.

It is also supported by other sources like Ijma (consensus among scholars) and Qiyas (analogical reasoning). This system covers all areas of life, including religious rituals (Ibadah) and social interactions (Muamalat), and functions as both a religious and legal guide. The way Sharia is applied varies across different countries. In some, such as Saudi Arabia, Iran, and Afghanistan, Sharia serves as the main source of both civil and criminal law. In others, like Egypt, Pakistan, and Malaysia, it coexists with other legal systems, such as common or civil law. In secular nations like India and the Philippines, Sharia is only applied to personal matters, such as marriage, inheritance, and family disputes, affecting the Muslim community.

In countries following an Islamic legal system, judicial review is based on the idea that any human-made laws or government actions must be in line with the divine authority of Sharia, as found in the Quran and Sunnah.

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<sup>18</sup> The Basic Law for the Federal Republic of Germany, 1949, arts. 93 and 94 (Germany).

<sup>19</sup> *Ibid.*, art. 100.

<sup>20</sup> The Basic Law for the Federal Republic of Germany, 1949, art. 93(1)(4a) (Germany).

According to this system, if a law or government action goes against Islamic principles, it is considered invalid from the start. This requires a strong mechanism for reviewing laws against Sharia, known as "Shariat review." In Pakistan, this process is formally established through the Federal Shariat Court, which is empowered by the Constitution<sup>21</sup> to check whether a law conflicts with Islamic teachings. Likewise, in Iran, the Guardian Council—made up of Islamic scholars—reviews new laws before they are passed to ensure they align with both the Constitution and Sharia. In Saudi Arabia, while there is no central constitutional court, the Board of Grievances (Diwan al-Mazalim) acts as the administrative judiciary and has the authority to review government decisions for compliance with Islamic law. In mixed-system countries like Egypt and Malaysia, Sharia benches are often established within higher courts to ensure that legal decisions adhere to Islamic principles. This structure supports the Rule of Law in Islamic states, interpreting it through the lens of religious conformity and preserving the constitutional framework of these nations.

### **3. STATUS OF JUDICIAL REVIEW UNDER THE INDIAN CONSTITUTION WITH RESPECT TO THE OTHER CONSTITUTIONS**

#### **3.1 The Constitutional Framework for Judicial Review in India**

Under the Indian constitution, the legal provisions for judicial review are mentioned expressly in the article 13 of the Constitution of India<sup>22</sup>, which states that the laws which are inconsistent with the provisions of the constitution will be held void to the extent of such an inconsistency. The Constitution also made provision to regulate the future laws that are to be enacted<sup>23</sup>, such that the upcoming legislations are always enacted in accordance with the Constitutional provisions. Furthermore, the Constitution empowers the judiciary to act as a body to exercise the power of judicial review to ensure the actions of the legislative bodies and also the executive and administrative bodies are completely in accordance with the norms established by the Indian Constitution. The Indian Constitution, under Article 32 and Article 226, empowers the Supreme Court and the High Courts to exercise writ jurisdiction and to exercise the power of judicial review over the actions of the government. Furthermore, it is an established principle under the Indian constitution that whenever a part of a law or any legislation is found to be inconsistent with the constitutional provisions, the courts through the process of judicial

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<sup>21</sup> The Constitution of the Islamic Republic of Pakistan, 1973, art. 203D (Pakistan).

<sup>22</sup> The Constitution of India, art. 13.

<sup>23</sup> *Ibid.*, art. 13(2).

surgery<sup>24</sup>, can hold a specific part of the legislation void and inoperative, thereby enabling the rest of it to continue its operation.

### 3.2 Precedents upholding the power of Judicial review

Following the enactment of the Indian Constitution, the validity of judicial review over other government organs was frequently questioned. The Supreme Court, through various landmark judgments, interpreted and upheld the extent of this power:

- **A.K. Gopalan v. State of Madras<sup>25</sup>** : In challenging the Preventive Detention Act (1950), the Court found Section 14 unconstitutional for prohibiting the disclosure of detention grounds. By applying the **Doctrine of Severability**, the Court voided only the offending section while keeping the rest of the Act intact, establishing the operational validity of the doctrine under the Constitution.
- **State of Bombay v FN Balsara<sup>26</sup>** : In this case, the Supreme Court of India was asked to strike down the Bombay Prohibition Act 1949. While the Court found that certain specific provisions of the Act were unconstitutional, it held that these "bad" parts could be removed without making the whole Act unworkable. Consequently, only the offending sections were declared void, while the rest of the prohibition law remained valid. This was a land-mark case which expressed the possibility of separating an invalid provision of legislation particularly, without striking down the whole.
- **Romesh Thappar v State of Madras<sup>27</sup>** : In this case, the Supreme Court struck down the Madras Maintenance of Public Order Act 1949, which had been used to ban the entry and circulation of the petitioner's journal, 'Cross Roads', in the State of Madras. This case demonstrated a limitation to the *doctrine of severability*, where the unconstitutional part of the act cannot be separated from the legislation, thus the Act was struck down completely.

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<sup>24</sup> Doctrine of severability.

<sup>25</sup> *A.K. Gopalan v. State of Madras, AIR 1950 SC 27.*

<sup>26</sup> *State of Bombay v. F.N. Balsara, AIR 1951 SC 318.*

<sup>27</sup> *Romesh Thappar v. State of Madras, AIR 1950 SC 124.*

### 3.3 Judicial Review and its purview under the Basic Structure Doctrine

When the constitutional amendments are sought to be validation the relationship between the said amendments and judicial review assumes paramount importance. It is a matter of constant observation and discussion that the relationship between Article 368 and judicial review is governed by the Basic Structure Doctrine<sup>28</sup>. Under Article 368 the Parliament is given the constituent power to amend the Constitution; however, the power to amend is not absolute, as any amendment can be challenged before the courts. The amendment would have to be tested on the premise as to whether the said amendment either takes away or dilutes any of the essential features of the Constitution. These essential features are the Basic Structure of the Constitution, and hence the Basic Structure Doctrine carves out a very significant role for the Judiciary. It is well settled under the said Doctrine that the amendments cannot either take away or even dilute the powers of the Judiciary so as to deprive it from striking down any legislation or action whether executive or legislative that is not in conformity with the Constitution. Since the day the Constitution came into force, the courts have always been viewed as the final arbiters on the question whether even a super majority of the people's representatives can change the democratic, secular or federal character of the country. Thus, at preprimary stage, every amendment remains provisional until it receives sanctity and the seal of approval from the Judiciary. Thus, the provisions of the Constitution, although an living document meant to be adapted to suit the evolving needs of the citizens of a democracy, cannot be allowed to change at the whims and fancies of the various organs of state.

### 3.4 Comparative Study of Judicial Review under the Indian Constitution and other Constitutions.

Judicial review is a common characteristic of most global constitutions. However, the mechanism and the procedures of judicial review can differ significantly between countries and as a result some of its characteristics may also differ between countries and between constitutions. The current study compares the major characteristics of the judicial review in some of the constitutional systems of the world.

#### 1. Source of Power and Scope

- **India:** The power is found in the Constitution of India (Articles 13, 32 and 226). The power

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<sup>28</sup> *Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461, p. 1535 (per Sikri, C.J.)*.

is quite extensive and not only can the courts scrutinize the actions and decisions of the executive as well as ordinary legislation, but even constitutional amendments can be challenged if they undermine the 'Basic Structure' of the country.

- **UK:** Judicial review is restricted by the concept of Parliamentary Sovereignty, under which primary legislation is rarely (if ever) challenged. In practice Judicial Review is confined to challenges against secondary legislation and administrative acts and decisions, and although there are powers granted under the Human Rights Act to issue a 'declaration of incompatibility' (by which the highest courts recognize that a provision in Legislation is inconsistent with a provisions of the European Convention on Human Rights) no power to subsequently invalidate the primary legislation is granted.

- **Canada:** Sovereignty of Power is based on the Charter of Rights and Freedoms. Canada's judiciary enjoys significant review powers, but under Section 33 of the Charter, the federal or provincial legislatures may circumvent some judicial declarations for a temporary period in order to assert legislative ultimate authority.

- **Germany:** Authority centralized in the Federal Constitutional Court. Review can be for abstract or concrete grounds; i.e. it is possible for the Court to test the validity of a law in isolation and also when that law is relevant to an on-going legal dispute.

- **France:** France used to be a country where constitutionally protected human rights could be found to be contravened by ordinary legislation during the review process conducted by the Conseil Constitutionnel (Constitutional Council), at the instance of Parliament or of the Government. Prior to 2010, this was an 'a priori' review process. Since 2010, by virtue of the QPC mechanism, it is an 'a posteriori' review process during which anyone can challenge the invalidity of ordinary legislation on grounds that it infringes human rights enshrined in the Constitution.

- **Islamic Constitutions:** In countries with Islamic constitutions, the application of a Principle of Repugnancy prevails. This approach is put into practice by specialized bodies, such as the Federal Shariat Court of Pakistan, which monitors and reviews all secular laws to ensure that none contravene the injunctions of Islam. In practice, the Shariat law becomes the supreme law of the land and the ultimate reference point for all other laws.

## 2. Nature of the Reviewing Body

- **India:** Diffused and Integrated. India incorporates judicial review into its system through both the Supreme Court of India and High Courts across the country. Both organs are invested with guardianship over the Constitution, embodying a unified guardian.
- **UK:** Major constitutional matters are handled by Ordinary Courts, namely the Administrative Court of the High Court of Justice of England and Wales, using the ordinary rules of law and applying principles of statutory construction rather than the strictures of proceedings before a specialized constitutional commission.
- **Canada:** Follows a Diffuse Model under which any court with competent jurisdiction may find that a law is inconsistent with the Constitution; the Supreme Court of Canada is the final authority that will have the last word on such constitutional challenges.
- **Germany:** Concentrated and Specialized model. Only the Federal Constitutional Court has the power to rule that a law is unconstitutional, thus providing uniformity in the interpretation of the Constitution and withholding from ordinary courts the power to invalidate legislation.
- **France:** Political/Quasi-Judicial. The “Conseil Constitutionnel” is a body separate from the regular judiciary and is composed of legal experts and former politicians which serves to maintain the delicate balance of powers in the state.
- **Islamic Constitutions:** Often uses a Hybrid or Theocratic body. These institutions frequently consist of both traditional secular judges and Islamic jurists (Ulema) who possess the specific expertise required to interpret religious law.

## 3. Standard of Scrutiny

- **India:** Originally centered on "Procedure Established by Law," but judicial interpretation has expanded this to include "Substantive Due Process." This means courts check if a law is not just legally enacted, but also fair, just, and reasonable.
- **UK:** Focuses on “procedural propriety” and "Wednesbury unreasonableness<sup>29</sup>." The court examines if a decision was so irrational that no reasonable authority could have

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<sup>29</sup> *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*, [1948] 1 KB 223 (United Kingdom).

made it, alongside proportionality regarding human rights.

- **Canada:** Relies heavily on the "Oakes Test"<sup>30</sup>. This judicial framework determines if a government's limitation of a Charter right is "demonstrably justified," ensuring the objective is important and the means are proportionate.
- **Germany:** The cornerstone is the "Principle of Proportionality". The court meticulously analyzes whether a government measure is suitable, necessary, and balanced against the fundamental rights of the individual.
- **France:** Historically prioritized the separation of powers, avoiding interference with the legislature. Modern scrutiny now focuses on "fundamental principles," ensuring laws respect the core republican values and human rights.
- **Islamic Constitutions:** Scrutiny is based on "Divine Law". The courts assess whether a statute aligns with the *Maqasid al-Shari'a* (objectives of Sharia), specifically looking for conformity with the Quran and the Sunnah.

#### 4. Impact of Rulings

- **India:** Laws declared unconstitutional are voided. Most jurisdictions in India, including those that follow the common law, apply the Doctrine of Severability to the laws, which means only the part of the law that is void is struck down and the remainder of the law continues to have effect.
- **UK:** Courts are unable to set aside primary legislation. However, where a court finds primary legislation to be incompatible with a Convention right, it must make a 'declaration of incompatibility', which can have 'profound political consequences' and puts Parliament or the relevant government minister under a political pressure to issue corrective legislation. The declaration does not of itself affect the operation of the primary legislation until the legislative body concerned has had an opportunity to the legislation.
- **Canada:** Inconsistent laws are declared to have "no force or effect" but in order to avoid a void; the courts grant a "suspended declaration" and give the government a

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<sup>30</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103 (Canada).

reasonable amount of time to enact compliant legislation.

- **Germany:** Decisions have the force of law. A judgment of a court that has struck down a statute is binding on all state organs and directly removes the law from the legal system.
- **France:** A law that is unconstitutional cannot be promulgated; furthermore, if challenged “a posteriori” the law is repealed from the date of the decision and cannot be applied.
- **Islamic Constitutions:** If a law is deemed by the constitution to be “repugnant” to Islam then it can be rendered unenforceable until the government corrects the legislation within a specified timeframe to make it compliant with Islamic principles.

## 5. Amenability of Judicial review

- **India (Unamendable Core):** Judicial review is considered part of the "Basic Structure" of the Constitution. According to the landmark *Kesavananda Bharati*<sup>31</sup> (1973) and *Minerva Mills*<sup>32</sup> (1980) cases, Parliament has the power to amend the Constitution under Article 368, but it cannot abolish judicial review, as doing so would destroy the Constitution's essential identity.
- **UK (Legislatively Alterable):** Due to Parliamentary Sovereignty, Parliament theoretically has the legal authority to limit or even abolish judicial review through an Act of Parliament. However, courts often interpret such "ouster clauses" very narrowly, and judges have suggested that judicial review is a "constitutional fundamental" that they might protect even against clear legislative intent.
- **Canada (Temporary Override):** While the Constitution itself is hard to amend, Section 33 (the "Notwithstanding Clause") allows legislatures to enact laws that operate "notwithstanding" certain Charter rights for renewable five-year periods. This effectively suspends judicial review on those specific grounds for the duration of the override, though it does not permanently remove the power from the Constitution.

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<sup>31</sup> *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

<sup>32</sup> *Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789.

- **Germany (Perpetually Protected):** The German Basic Law contains an "Eternity Clause" (Article 79(3)), which prohibits any amendment that affects the core principles of democracy, the rule of law, and the separation of powers. Because judicial review is essential to these principles, it is legally immune from amendment or removal.
- **France (Procedurally Protected):** The *Conseil Constitutionnel* generally refuses to review the substance of constitutional amendments, viewing the "constituent power" (the people/legislature amending the constitution) as supreme. While judicial review could technically be modified via a formal constitutional revision, the Council's role is seen as a necessary safeguard for the Republic's institutional balance.
- **Islamic Constitutions (Theologically Entrenched):** In systems like Pakistan or Iran, the power to review laws for "Repugnancy to Islam" is often woven into the state's religious identity. Removing this power would require a fundamental shift in the state's Islamic character, making it politically and legally nearly impossible to strip away without replacing the entire constitutional framework.

## CONCLUSION

This comparative study demonstrates that while judicial review is a universal hallmark of the rule of law, its institutional "DNA" is uniquely shaped by the political and cultural history of each nation. The analysis reveals a diverse spectrum of judicial authority: from the unyielding protection of the "Basic Structure" in India and the "Eternity Clause" in Germany, to the dialogic models of the United Kingdom and Canada, where legislative intent is given greater weight. Furthermore, the inclusion of Islamic constitutionalism highlights a specialized "repugnancy" model that harmonizes secular governance with religious supremacy.

The research concludes that there is no "one-size-fits-all" approach to judicial oversight. Instead, the strength of a constitutional framework lies in its ability to balance the will of the majority with the protection of the individual. Whether through diffuse, centralized, or preventive mechanisms, judicial review remains the essential check against the arbitrary exercise of power. As global legal systems face new socio-political pressures, the continued evolution of these mechanisms will serve as the definitive measure of a nation's commitment to constitutionalism and the enduring supremacy of law over political expediency.