

Judicial Review: Upholding Constitutional Boundaries in Law Making

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Abstract- Judicial review is one of the cornerstones of modern constitutionalism, serving as the primary mechanism through which courts uphold the supremacy of the Constitution and ensure that legislative and executive actions remain within prescribed constitutional limits. The doctrine not only preserves the separation of powers but also safeguards fundamental rights and democratic values by preventing arbitrariness in law-making. While its origins are often traced to the “United States through Marbury v Madison (1803)”, judicial review has become deeply entrenched in diverse constitutional systems, adapting to their respective historical, political, and legal traditions. In India, judicial review is a constitutionally entrenched feature, deriving authority from Articles 13, 32, and 226, and reinforced through the development of the basic structure doctrine in “Kesavananda Bharati v State of Kerala (1973)”. The Indian judiciary has consistently acted as a counter-majoritarian institution, striking down legislation that violates constitutional guarantees. Conversely, in the United Kingdom, with its principle of parliamentary sovereignty, judicial review has historically been more restrained. However, the incorporation of the European Convention on Human Rights through the Human Rights Act 1998, alongside landmark judgments such as “R (Miller) v Prime Minister (2019)”, has significantly enhanced judicial oversight over legislative and executive power. This paper explores the doctrinal foundations, evolution, and contemporary significance of judicial review in maintaining constitutional boundaries in law-making. By comparing the Indian and British contexts, the study highlights the tension between parliamentary supremacy and constitutional supremacy, and examines how courts navigate this delicate balance. Ultimately, judicial review emerges as a vital safeguard for constitutional democracy, ensuring that legislative power is exercised

responsibly and in alignment with fundamental constitutional principles.

Index Terms- Judicial Review; Constitutional Boundaries; Law-Making; Separation of Powers; Constitutional Supremacy; Parliamentary Sovereignty; India; United Kingdom.

I. INTRODUCTION

Judicial review functions as a constitutional safeguard that ensures legislative and executive bodies act within their constitutional mandates. It represents the power of the judiciary to examine the constitutionality of laws, executive orders, and administrative actions, striking them down when they contravene constitutional provisions. This function is indispensable in democratic societies where unchecked legislative power could threaten individual rights and the foundational principles of governance.

The idea of judicial review is rooted in the doctrine of constitutional supremacy. Where the Constitution is the supreme law of the land, all organs of government derive their authority from it and remain subject to its limitations.² Judicial review thus becomes the institutional mechanism for enforcing this supremacy. Its theoretical foundation can be traced back to “*Marbury v Madison* (1803)”, where Chief Justice John Marshall declared, “It is emphatically the province and duty of the judicial department to say what the law is.”³ Though originating in the United States, judicial review has since become integral to constitutional systems across the globe.

In India, judicial review is explicitly guaranteed through the Constitution, particularly Articles 13, 32, and 226, enabling courts to invalidate laws

inconsistent with fundamental rights or constitutional mandates.⁴ Over time, the judiciary has reinforced its review powers through doctrines such as the basic structure doctrine, thereby limiting Parliament's power to amend the Constitution.⁵

In the United Kingdom, the position has historically differed because of the doctrine of parliamentary sovereignty, which renders Parliament's legislative acts supreme. Courts traditionally refrained from questioning the validity of primary legislation. However, developments such as the Human Rights Act 1998 and judicial decisions in cases like "*R (Miller) v Prime Minister* (2019)" indicate a gradual evolution towards stronger judicial oversight of law-making.

This paper seeks to comparatively analyse the role of judicial review in India and the UK, focusing on its significance in upholding constitutional boundaries in law-making. By examining doctrinal foundations, judicial trends, and theoretical debates, the study highlights the centrality of judicial review in protecting constitutionalism.

1. Doctrinal Foundations of Judicial Review

Judicial review rests on the principle that all state power is derived from and limited by law. It is not merely a procedural device but a substantive guarantee of constitutionalism. The doctrine presupposes two ideas: first, that the Constitution is the supreme law of the land; second, that the judiciary has the authority to ensure compliance with this supremacy.

In India, these foundations are explicitly codified. Article 13(2) declares that the state "shall not make any law which takes away or abridges the rights conferred by this Part [Fundamental Rights]," and laws contravening this mandate are void. Articles 32 and 226 confer original jurisdiction upon the Supreme Court and High Courts to enforce these rights. Dr. B.R. Ambedkar famously described Article 32 as the "heart and soul" of the Constitution, for it guarantees the enforcement of judicial review as a fundamental right.⁶ Thus, unlike many jurisdictions where judicial review emerged judicially, in India it is both textual and structural.

The historical context is vital. Having endured colonial rule marked by arbitrary laws such as the Rowlatt Act 1919, the framers recognised that majoritarian institutions could not be left unchecked. Judicial review was conceived as a mechanism of restraint against legislative and executive excess. Granville Austin observed that the Indian Constitution was a "seamless web" intertwining governance, rights, and social revolution, and judicial review was designed to hold this web together.⁷

In the UK, the absence of a written Constitution meant that judicial review developed differently. It emerged from common law principles of ultra vires: public bodies could not act beyond the powers conferred upon them by Parliament.⁸ Judicial review thus evolved primarily as a control on administrative authorities, not on Parliament itself. Dicey's theory of parliamentary sovereignty entrenched the idea that primary legislation was immune from judicial invalidation.⁹ For decades, judicial review in the UK was restricted to administrative legality and procedural fairness.

This orthodoxy has been challenged. Scholars like TRS Allan argue that the rule of law itself requires courts to subject even Parliament's authority to fundamental principles of legality. While this remains controversial, the Human Rights Act 1998 (HRA) fundamentally changed the landscape by requiring courts to interpret legislation consistently with the European Convention on Human Rights (ECHR). Although courts cannot strike down Acts of Parliament, they may issue declarations of incompatibility, placing moral and political pressure on the legislature. The HRA thus represents a shift towards rights-based constitutionalism in a traditionally sovereignty-based system.

2. Judicial Review and Separation of Powers

The separation of powers is a cornerstone of democratic governance. Judicial review is the tool by which courts police the boundaries between legislative, executive, and judicial authority. In India, separation of powers is not rigidly codified but is implied.¹⁰ Nevertheless, the judiciary has vigorously asserted its role in ensuring that Parliament and the executive remain within their limits.

The case of “*Kesavananda Bharati v State of Kerala* (1973)” is pivotal. By inventing the basic structure doctrine, the Supreme Court held that Parliament’s power to amend the Constitution under Article 368 is not unlimited; amendments destroying essential features such as judicial review, democracy, or the rule of law are invalid.¹¹ This was revolutionary: for the first time, a court declared that even constitutional amendments passed by overwhelming majorities could be judicially reviewed. The doctrine cemented judicial review as a structural guarantee against legislative omnipotence.

This approach has been reaffirmed repeatedly. In “*Minerva Mills v Union of India* (1980)”, the Court struck down amendments that attempted to curtail judicial review itself, declaring review to be part of the basic structure.¹² Similarly, in “*Indira Nehru Gandhi v Raj Narain* (1975)”, provisions immunising the Prime Minister’s election from judicial scrutiny were invalidated.¹³ These cases show that judicial review in India is not just a procedural check but a substantive constitutional principle.

In contrast, the UK adheres to a different balance. The separation of powers is traditionally flexible: Parliament legislates, the executive governs, and courts adjudicate, but judicial review of legislation is restrained by parliamentary sovereignty. Yet courts have become more assertive in controlling executive power. In “*Council of Civil Service Unions v Minister for the Civil Service* (GCHQ case)”, Lord Diplock identified three grounds of review: illegality, irrationality, and procedural impropriety.¹⁴ This expanded the judiciary’s supervisory jurisdiction over the executive.

The Brexit litigation further demonstrated the judiciary’s constitutional role. In “*R (Miller) v Secretary of State for Exiting the European Union* (2017)”, the Supreme Court held that the executive could not trigger Article 50 without parliamentary approval.¹⁵ In *Miller (No 2)* (2019), the Court declared unlawful the Prime Minister’s prorogation of Parliament for five weeks, reasoning that it frustrated the principle of parliamentary accountability.¹⁶ While these cases respected parliamentary sovereignty, they also underscored

judicial review’s importance in policing executive power within the constitutional order.

3. Judicial Review and Protection of Rights

One of the most enduring contributions of judicial review is its role in safeguarding fundamental rights. In India, rights are justiciable and directly enforceable. The judiciary has consistently expanded their scope through creative interpretation. In “*Maneka Gandhi v Union of India* (1978)”, the Court held that the procedure under Article 21 must be “just, fair and reasonable,” effectively importing substantive due process into Indian constitutional law.¹⁷ This transformed judicial review into a powerful instrument for protecting liberties against both legislative and executive infringement.

The expansion continued in cases like “*Shreya Singhal v Union of India* (2015)”, where the Court invalidated Section 66A of the Information Technology Act for restricting online speech in vague and arbitrary terms.¹⁸ Judicial review here not only protected free speech but also highlighted the dangers of overbroad legislative restrictions in the digital age. Similarly, in “*Navtej Singh Johar v Union of India* (2018)”, the Court decriminalised homosexuality by striking down Section 377 of the Indian Penal Code, demonstrating the judiciary’s willingness to protect minority rights against majoritarian laws.¹⁹

In the UK, the HRA significantly enhanced the judiciary’s role in rights protection. In “*A v Secretary of State for the Home Department* (2004)”, the House of Lords invalidated indefinite detention of foreign nationals under anti-terrorism laws, issuing a declaration of incompatibility.²⁰ Although Parliament later amended the law, the judgment underscored how judicial review serves as a platform for articulating constitutional rights.

Judicial dialogue has become a hallmark of the UK model. Courts issue declarations of incompatibility rather than striking down statutes, leaving final authority with Parliament. This mechanism balances rights protection with parliamentary sovereignty, illustrating a “weak-form” judicial review. Scholars like Mark Tushnet have contrasted this with India’s “strong-form” review, where courts directly invalidate unconstitutional laws.

Thus, while India enforces rights robustly through judicial invalidation, the UK prefers a collaborative model that respects parliamentary supremacy while amplifying rights concerns through judicial declarations.

4. Judicial Review as a Check on Legislative Power

The relationship between judicial review and legislative supremacy is fraught with tension. In India, judicial review operates as a direct check on legislative power. The judiciary has invalidated numerous statutes and amendments that violate constitutional provisions. In “*Indira Nehru Gandhi v Raj Narain* (1975)”, the Supreme Court struck down a constitutional amendment shielding the Prime Minister’s election, holding it unconstitutional for violating the rule of law and free and fair elections.²¹

Similarly, in “*Minerva Mills v Union of India* (1980)”, the Court invalidated amendments that gave primacy to Directive Principles over Fundamental Rights, reaffirming the balance as part of the basic structure. In these cases, judicial review was not merely reactive but assertive, ensuring that legislative power remains confined to constitutional limits.

This assertiveness has sparked debates about the counter-majoritarian difficulty—the tension between unelected judges striking down laws enacted by democratically elected legislatures. Critics argue that judicial review undermines democracy, but defenders maintain that it is essential for preserving constitutionalism and protecting minorities against majoritarian excesses.²²

In the UK, legislative supremacy traditionally excluded judicial invalidation of Acts of Parliament. Yet judicial dicta suggest cracks in this orthodoxy. In *R (Jackson) v Attorney General* (2005), Lord Steyn famously observed that parliamentary sovereignty is a construct of the common law, implying that courts may not uphold legislation undermining fundamental constitutional principles.²³ Though no Act has been struck down, such statements reveal judicial unease with absolute sovereignty.

The Brexit process amplified these tensions. The Miller cases affirmed the principle of parliamentary

sovereignty but simultaneously showcased the judiciary’s willingness to enforce constitutional requirements against both the executive and, indirectly, Parliament.²⁴ Judicial review thus plays a moderating role, ensuring legislative actions respect constitutional traditions even within a sovereignty-based system.

5. Contemporary Challenges and the Future of Judicial Review

Judicial review today faces significant challenges. In India, critics highlight judicial overreach where courts intervene in policy domains. Public Interest Litigation (PIL), initially designed to improve access to justice, has sometimes been criticised for judicial populism. For example, in “*Vishaka v State of Rajasthan* (1997)”, the Court created binding guidelines on workplace harassment in the absence of legislation. While praised for protecting women’s rights, the case illustrates judicial law-making, raising questions about separation of powers.

Another challenge is the backlog and inconsistency in enforcement. Despite progressive judgments, implementation often falters, diminishing judicial review’s effectiveness.²⁵ Moreover, excessive reliance on courts risks shifting accountability away from political institutions, thereby weakening democracy.

In the UK, debates focus on the proper limits of judicial power. The *Miller* decisions sparked accusations of judicial activism, with critics arguing that courts interfered in political processes.²⁶ Others praised the rulings as essential for safeguarding constitutional principles in an era of executive dominance.²⁷ The government’s proposals to reform or replace the Human Rights Act reflect ongoing tensions between rights protection and parliamentary sovereignty.²⁸

Looking ahead, judicial review will continue to evolve. In India, its future lies in balancing activism with restraint—ensuring constitutional supremacy without undermining democratic processes. In the UK, courts must carefully expand their role in protecting constitutional principles while preserving parliamentary legitimacy. Comparative constitutionalism suggests that while strong-form

review ensures certainty, weak-form review fosters dialogue. Both models, however, converge on the central idea: judicial review remains indispensable for upholding constitutional boundaries in law-making.

II. CONCLUSION

Judicial review emerges as an indispensable mechanism for maintaining constitutional boundaries in law-making. By empowering courts to scrutinise the validity of legislative and executive actions, it upholds the supremacy of the Constitution and protects democratic values. The comparative analysis of India and the United Kingdom reveals both shared concerns and fundamental differences in the scope of judicial review.

India exemplifies strong-form judicial review, constitutionally entrenched in Articles 13, 32, and 226, allowing courts to invalidate laws and even constitutional amendments that transgress the basic structure. This has positioned the judiciary as the ultimate guardian of constitutional supremacy, though critics warn of judicial overreach. The Indian experience shows how judicial review can serve as a counter-majoritarian check on Parliament while reinforcing rights and democratic accountability.

The UK, conversely, operates within the framework of parliamentary sovereignty, limiting judicial power to interpretative techniques and declarations of incompatibility under the Human Rights Act 1998. Yet, landmark cases such as *Jackson* and *Miller* demonstrate an evolving trend: courts are increasingly willing to assert their role in safeguarding constitutional principles against executive excesses.⁴ While they stop short of invalidating parliamentary statutes, their interventions underscore the judiciary's growing role in constitutional governance.

The comparative lesson is that judicial review functions differently depending on the constitutional design, but its purpose remains universal — to prevent the abuse of legislative power and to protect constitutionalism. As democracies confront new challenges, from populist politics to global crises, judicial review will remain a vital safeguard ensuring

that law-making respects both the rule of law and the sovereignty of the people.

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