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THE IMPACT OF JUDICIAL REVIEW ON DEMOCRATIC GOVERNANCE

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ABSTRACT

Judicial review—the power of courts to examine the constitutionality of legislative and executive actions—is widely regarded as a cornerstone of modern constitutional democracies. By enabling an independent judiciary to invalidate laws and governmental measures that violate constitutional norms, judicial review seeks to protect fundamental rights, uphold the rule of law, and maintain the balance of powers among state institutions. This paper examines the conceptual foundations, historical evolution, and practical impact of judicial review on democratic governance, with particular reference to comparative experience and the Indian constitutional framework. It argues that judicial review functions as both a constraint and a support for democracy: it constrains majoritarian power when it threatens constitutional values, yet it also reinforces democratic legitimacy by ensuring that state action remains within the bounds of a higher law. At the same time, the paper engages critically with concerns about judicial activism, counter-majoritarian difficulty, and institutional overreach, proposing criteria for principled and democracy-enhancing exercise of review powers.

KEYWORDS: Judicial review; democratic governance; rule of law; separation of powers; constitutionalism; basic structure; judicial activism.

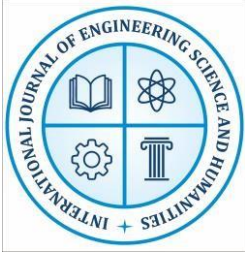
INTRODUCTION

Judicial review may be defined as the power of constitutional courts to determine whether acts of the legislature and executive conform to the constitution, and to declare them invalid to the extent of inconsistency.[5][12]

This power is typically justified on the grounds of constitutional supremacy: in a system where the constitution is the supreme law, some independent body must have authority to interpret and enforce its provisions.[12][5]

Normative defenses of judicial review stress its role in safeguarding fundamental rights, protecting minorities against majoritarian excesses, and ensuring that public power is exercised according to law rather than arbitrary will.[2][3]

By requiring governments to justify their actions in legal terms before an impartial forum, judicial



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review also promotes a culture of reason-giving and transparency, which is central to accountable governance.[13][2]

- **Historical Evolution and Models of Judicial Review**

Modern judicial review is often traced to Marbury v. Madison (1803) in the United States, where the Supreme Court asserted the power to strike down federal legislation inconsistent with the Constitution.[2]

Subsequently, different democracies have adopted diverse models of review, ranging from centralized constitutional courts (as in many European countries) to decentralized systems where all ordinary courts may engage in constitutional adjudication (as in the United States and India).[3][2]

Some systems feature strong-form judicial review, where courts' constitutional interpretations are final unless overridden by special procedures, whereas others employ weak-form or dialogic models that allow legislative responses or political review of judicial decisions. [13] [2]

These institutional choices influence how judicial review interacts with democratic processes and the extent to which courts can constrain elected branches. [3] [13]

JUDICIAL REVIEW AND THE SEPARATION OF POWERS

Separation of powers theory holds that legislative, executive, and judicial functions should be allocated to distinct institutions to prevent concentration and abuse of power. [3][5]

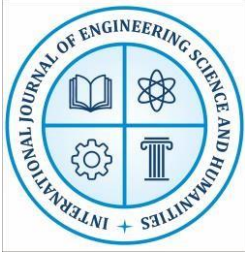
Judicial review is sometimes criticized as violating this separation by allowing unelected judges to override laws passed by democratically elected legislatures, raising the so-called counter-majoritarian difficulty. [12] [3]

Contemporary scholarship and constitutional practice often reconceive separation of powers in functional and cooperative terms, viewing judicial review as a mechanism that complements rather than displaces legislative and executive roles. [3] [12]

When courts exercise review within constitutional limits and with institutional restraint, they can strengthen the overall constitutional balance by ensuring that each branch operates within its assigned sphere and by providing a forum for resolving disputes about constitutional boundaries. [5] [3]

Table 1. Key Democratic Functions of Judicial Review

Function	Description	Governance effect
Rights protection	Enforcing fundamental and human rights against state interference	Enhances personal security, autonomy, and dignity; bolsters legitimacy of state institutions[2][3]
Rule of law enforcement	Ensuring that government action conforms to law and legal procedures	Reduces arbitrariness and corruption; promotes predictability and stability in governance[5][12]
Separation of	Policing boundaries among	Prevents concentration of power;



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powers	branches of government	encourages institutional dialogue and checks and balances[3][12]
Democratic accountability	Requiring governments to justify actions in constitutional terms	Increases transparency and responsiveness; supports informed public debate[2][13]

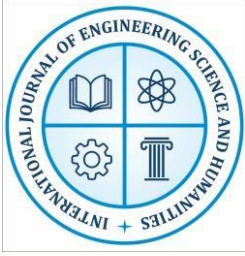
JUDICIAL REVIEW AND THE RULE OF LAW

Rule of law as a democratic ideal requires that laws be publicly known, general, non-retroactive, and applied equally, and that disputes be settled by independent courts according to pre-established rules. This principle stands as the cornerstone of every constitutional democracy, denying to those who hold political power the capacity to govern through personal fiat, insisting instead that authority be derived from, and bounded by, a publicly articulated body of law. Without institutional mechanisms to enforce this constraint, the rule of law risks becoming a formal aspiration rather than a lived reality of governance. The concept encompasses at least three distinct but interrelated demands: legality (government must act under the authority of law), certainty (law must be clear, accessible, and predictable), and equality (law must apply without discrimination to both the governed and the governors). In the absence of an independent judicial institution capable of scrutinizing governmental action against these standards, all three demands remain vulnerable to political manipulation and executive overreach.

It is within this framework that judicial review acquires its foundational democratic significance. Judicial review is central to this ideal because it empowers courts to invalidate not only executive actions but also legislation that violates constitutional guarantees or fundamental rule-of-law principles. By placing the constitution above the ordinary outputs of legislative and executive decision-making, constitutional systems recognize that certain commitments—to equality, liberty, procedural fairness, and dignity—must be insulated from the shifting preferences of transient political majorities. Judicial review provides the enforcement mechanism for this insulation, transforming constitutional text into operative legal norms that bind all branches of government. As the Supreme Court of India affirmed in *Kesavananda Bharati v. State of Kerala*, the rule of law itself forms part of the basic structure of the Constitution and cannot be abrogated even by constitutional amendment, a position that illustrates how deeply judicial review is interwoven with the very foundations of constitutional governance.

- **Judicial Review and the Discipline of Administrative Discretion**

Modern governance necessarily delegates broad discretionary authority to administrative agencies and officials, enabling them to pursue complex social, economic, and regulatory objectives. However, unchecked discretion creates structural conditions for arbitrariness, favoritism, and corruption. Through routine review of administrative action, courts can discipline the exercise of discretion, prevent manifest arbitrariness, and require decision-makers to provide reasons, thereby embedding rule-of-law values into everyday governance practices.



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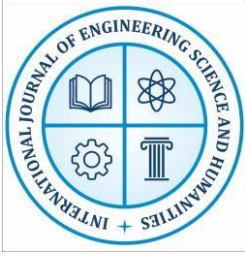
Courts achieve this disciplining function through a range of doctrines developed over decades of constitutional and administrative jurisprudence. The principles of proportionality, reasonableness, natural justice, legitimate expectation, and non-arbitrariness—all enforced through judicial review—operate as structural checks that compel decision-makers to remain within legal limits, consider only relevant factors, pursue proper statutory purposes, and articulate adequate reasons for their decisions. In India, Article 14 of the Constitution, which guarantees equality before the law, has been interpreted by the Supreme Court to prohibit arbitrary administrative action in all its forms, providing an expansive doctrinal basis for reviewing executive discretion under rule-of-law standards.

The requirement that decision-makers provide reasons is particularly significant in a democratic polity. When administrative authorities are required by judicial oversight to articulate the legal and factual bases of their decisions, they are compelled to engage in a form of structured public accountability that strengthens citizens' ability to understand, predict, and contest governmental action. This transparency requirement is itself a rule-of-law value—it ensures that government does not operate as an opaque institution beyond public scrutiny. Where courts have consistently enforced the duty to give reasons, there is evidence of a gradual cultural shift within public administration toward more deliberative and legally grounded decision-making processes.

- **Constitutional Supremacy and the Counter-Majoritarian Role**

Beyond supervising individual administrative acts, judicial review performs the structurally broader function of reinforcing the supremacy of constitutional norms over transient political majorities. Judicial review is central to this ideal because it empowers courts to invalidate not only executive actions but also legislation that violates constitutional guarantees or fundamental rule-of-law principles. Democratic politics is characterized by the alternation of governments and the competition of different social interests and values. Majorities change, and with them legislative priorities. In the absence of entrenched constitutional commitments enforced by an independent judiciary, temporary majorities may enact laws that compromise long-term constitutional values—particularly those affecting minority rights, freedom of expression, political pluralism, and the structural integrity of democratic institutions themselves.

Judicial review provides a constitutionally sanctioned counterweight to this tendency. By insisting that legislative enactments conform to the Constitution, courts reinforce the idea that democratic politics must operate within a framework of higher-order norms that no simple or even supermajority can unilaterally override. This counter-majoritarian function has been at the heart of landmark constitutional decisions in India, the United States, and across comparative constitutional democracies. The Indian Supreme Court's articulation of the basic structure doctrine in *Kesavananda Bharati*, subsequently applied in cases such as *Indira Nehru Gandhi v. Raj Narain* and *Minerva Mills Ltd. v. Union of India*, demonstrates how judicial review



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operationalizes constitutional supremacy to resist even formally enacted amendments that undermine core rule-of-law values.

- **Judicial Review as a Safeguard Against Democratic Erosion**

By reinforcing the supremacy of constitutional norms over transient political majorities, judicial review offers a crucial safeguard against authoritarian backsliding and democratic erosion. Contemporary scholarship in comparative politics and constitutional law has extensively documented that democratic decay in the modern world rarely occurs through sudden coups or violent seizures of power. Instead, it typically unfolds through gradual, legally clothed processes: the concentration of executive authority, the erosion of judicial independence, the manipulation of electoral laws, and the systematic dismantling of institutional checks and balances. These processes are frequently pursued through formally legal means, making judicial review the last institutional line of defense against their normalization.

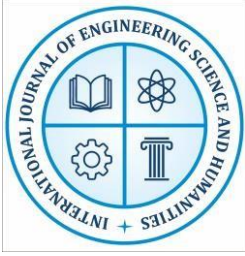
Where courts exercise review powers robustly and with fidelity to constitutional norms, they can interrupt these erosive processes at an early stage—invalidating laws that manipulate electoral boundaries, striking down emergency regulations that disproportionately curtail civil liberties, or requiring that the government justify extraordinary measures before an impartial tribunal. The experience of constitutional courts in Hungary, Poland, and elsewhere illustrates both the potential and the limits of judicial review as a guardian of democratic governance: where courts retain sufficient independence and public legitimacy, they can act as effective bulwarks against backsliding; where they are captured or undermined, the rule of law itself becomes precarious.

It is precisely for this reason that the independence, quality, and institutional integrity of courts exercising judicial review are indispensable conditions for its effective democratic function. Rule of law as a democratic ideal requires that laws be publicly known, general, non-retroactive, and applied equally, and that disputes be settled by independent courts according to pre-established rules. A judiciary that is subject to political pressure, inadequately resourced, or lacking in public confidence cannot reliably perform the rule-of-law functions that judicial review demands. Strengthening judicial independence is therefore not merely an institutional preference but a democratic necessity—a precondition for ensuring that the promise of constitutional governance translates into the reality of accountable, rights-respecting, and rule-bound public administration.

IMPACT ON DEMOCRATIC REPRESENTATION AND MAJORITARIANISM

A central tension in debates on judicial review concerns its impact on democratic representation. Critics argue that allowing unelected judges to strike down legislation passed by elected bodies undermines majority rule and democratic self-government.[3][12]

Supporters respond that constitutional democracy is not merely majoritarian; it is constrained by higher-order commitments to rights, equality, and due process that legislative majorities must respect. [2] [3]



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Judicial review can thus be seen as an institution that channels and disciplines majority power rather than simply overriding it.

By invalidating laws that discriminate against minorities or restrict political participation, courts can expand the effective scope of democratic inclusion and preserve the preconditions for meaningful electoral competition.[2][3]

This dynamic is evident in many jurisdictions where courts have struck down laws infringing on free speech, association, or fair electoral processes, thereby reinforcing rather than weakening democratic governance.[13][2]

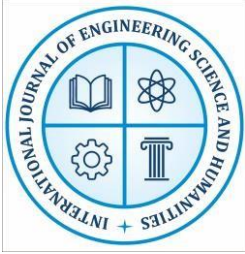
COMPARATIVE PERSPECTIVES AND CASE LAW ILLUSTRATIONS

- **Judicial Review Across Political and Legal Cultures**

Comparative studies show that judicial review operates differently across political and legal cultures, with varying implications for democracy. The manner in which courts engage in constitutional review, the breadth of their jurisdiction, the institutional models they adopt, and the political contexts within which they operate all significantly shape the role that judicial review plays in democratic governance. No single, universal model of judicial review exists; rather, a spectrum of institutional arrangements has evolved across different constitutional traditions, each reflecting distinct historical experiences, political settlements, and normative commitments.

At one end of this spectrum lies the decentralized, or American, model of judicial review, in which any court at any level may assess the constitutionality of legislative or executive action in the course of ordinary litigation. This model, rooted in the logic of *Marbury v. Madison* (1803), treats constitutional adjudication as an ordinary judicial function rather than a specialized institutional task. At the other end lies the centralized, or Kelsenian, model prevalent in continental Europe, where a dedicated constitutional court—such as the German Federal Constitutional Court or the Austrian Constitutional Court—has exclusive jurisdiction over constitutional questions referred to it by ordinary courts, legislators, or executive authorities. Between these poles lie hybrid systems, such as those of India and South Africa, which combine elements of both by allowing constitutional questions to be raised before all courts while vesting final interpretive authority in a supreme or constitutional court.

These structural differences have concrete implications for the democratic function of judicial review. Centralized courts tend to develop coherent and consistent constitutional jurisprudence more rapidly, but may be more exposed to political pressure during the appointment process. Decentralized systems generate diverse constitutional dialogue across multiple courts, but risk inconsistency and forum shopping. Regardless of institutional design, however, the legitimacy of judicial review ultimately depends on the independence, competence, and perceived impartiality of the courts that exercise it.



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- **Judicial Review in Democratic Transitions and Consolidation**

In some countries, constitutional courts have played pivotal roles in democratic transitions and consolidation by reviewing emergency powers, electoral laws, and lustration measures. The post-authoritarian and post-communist transitions of the late twentieth century provided a particularly vivid laboratory for observing the democratic functions of judicial review in action. In Central and Eastern Europe, newly established constitutional courts in countries such as Hungary, Poland, the Czech Republic, and the Baltic States were given expansive mandates to review legislation and strike down laws incompatible with newly adopted democratic constitutions. These courts frequently confronted politically charged questions involving the prosecution of former regime officials, the redistribution of property, the regulation of political parties, and the definition of citizenship rights.

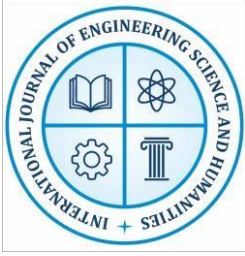
In South Africa, the Constitutional Court established in 1994 became a globally admired institution for its rigorous and principled review of legislation in the context of the transition from apartheid to constitutional democracy. Its early decisions on socio-economic rights, the death penalty, and equality demonstrated how robust judicial review could both reflect and reinforce the normative commitments of a new democratic order. Similarly, in Latin America, constitutional courts in Colombia, Brazil, and Argentina have exercised significant review powers over emergency decrees, anti-corruption measures, and electoral regulations, contributing to the gradual deepening of democratic accountability in historically fragile political systems.

In each of these contexts, the capacity of constitutional courts to review emergency powers proved particularly consequential. Governments in transition—and indeed in established democracies facing moments of political crisis—frequently resort to emergency measures that concentrate authority in the executive and suspend normal legal protections. Judicial review of such measures, where courts have the independence to exercise it effectively, serves as a critical check against the normalization of exception and the erosion of constitutional order. The willingness of a court to scrutinize emergency regulations, demand justification for their necessity and proportionality, and impose temporal limits on their duration reflects the deepest expression of the rule-of-law values that judicial review exists to uphold.

- **The Indian Experience: The Basic Structure Doctrine**

The Indian experience is particularly instructive. The Supreme Court of India has developed the basic structure doctrine, under which certain fundamental features of the Constitution—such as the rule of law, separation of powers, and judicial review itself—are beyond the reach of constitutional amendments. This doctrine, unique in its scope and normative ambition among the world's constitutional systems, represents one of the most significant judicial contributions to democratic theory and constitutional governance anywhere in the post-colonial world.

The doctrine emerged in a specific political context: the extensive use of constitutional amendments by successive governments, particularly during the 1960s and early 1970s, to



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expand parliamentary power, curtail fundamental rights, and shield redistributive legislation from judicial scrutiny. As Parliament accumulated an extensive track record of amending the Constitution to overcome adverse judicial decisions, the Supreme Court was compelled to confront a fundamental question: whether the amending power conferred by Article 368 was unlimited in its scope, or whether it was subject to judicially enforceable constitutional constraints.

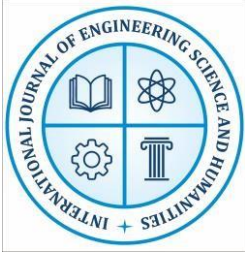
In *Kesavananda Bharati v. State of Kerala*, the Court held that Parliament's amending power does not extend to altering the basic structure, a view reaffirmed in later decisions such as *Indira Nehru Gandhi v. Raj Narain* and *I.R. Coelho v. State of Tamil Nadu*. The *Kesavananda Bharati* judgment, decided by a bench of thirteen judges in 1973 by a narrow majority, held that while Parliament has wide powers to amend any provision of the Constitution, it cannot use those powers to destroy or abrogate the Constitution's essential or basic features. The judgment did not exhaustively enumerate the elements of the basic structure, but subsequent decisions have identified among them the supremacy of the Constitution, the republican and democratic form of government, the secular character of the state, the separation of powers, the federal structure, the independence of the judiciary, and judicial review itself.

- **Landmark Decisions and Their Democratic Significance**

These decisions illustrate how judicial review can be used to resist attempts by political majorities to entrench their power or insulate themselves from legal accountability. The reaffirmation of the basic structure doctrine in *Indira Nehru Gandhi v. Raj Narain* was particularly dramatic in its democratic implications. Decided in the shadow of the Emergency period of 1975–1977, the case involved a constitutional amendment that had retrospectively validated the Prime Minister's election, thereby insulating it from judicial challenge. The Supreme Court struck down this amendment as a violation of the basic structure, holding that the principle of free and fair elections was itself a fundamental feature of the constitutional order that Parliament could not abolish.

I.R. Coelho v. State of Tamil Nadu, decided by a nine-judge bench in 2007, extended the doctrine to hold that laws placed in the Ninth Schedule of the Constitution—a device historically used to insulate legislation from fundamental rights challenges—remained subject to judicial review if they violated the basic structure. This decision reaffirmed that no legislative or constitutional mechanism could be used to create a zone of immunity from judicial scrutiny, thereby preserving the integrity and comprehensiveness of judicial review as a guardian of constitutional governance.

Taken together, the Indian experience with the basic structure doctrine demonstrates the transformative potential of judicial review in a constitutional democracy facing persistent political pressures to subordinate constitutional constraints to majoritarian will. By insisting that certain constitutional commitments are non-negotiable regardless of the political arithmetic of



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the moment, the Supreme Court of India has given enduring institutional expression to the principle that democratic governance is not merely the rule of the majority—it is the rule of law.

JUDICIAL REVIEW, EXECUTIVE POWER, AND ENFORCEMENT LAWMAKING

Recent scholarship highlights an evolving relationship between judicial review and the expansion of executive power, particularly in the realm of "enforcement lawmaking," where executive agencies effectively make policy through enforcement choices. [13]

Courts have responded by developing "managerial" tools—such as adjustments in standing, ripeness, record-keeping, and remedial doctrines—to subject executive action to more robust judicial oversight. [13]

By authorizing earlier and broader access to courts, recognizing multiparty public interest litigation, and employing remedies such as nationwide injunctions, the judiciary can check executive overreach and demand greater transparency in enforcement decisions. [12][13]

These developments suggest that even when formal legislative controls are weak or gridlocked, judicial review can provide an alternative channel for contesting and constraining executive discretion, thus contributing to democratic accountability. [13]



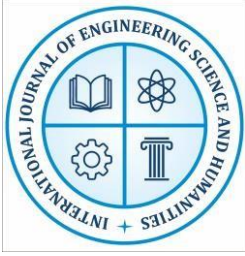
Fig. 1. Courts and Democratic Oversight

Indian Constitutional Bench Visual depictions of constitutional courts at work underscore the public and institutional dimensions of judicial review as a practice carried out in open, procedurally structured settings.

Such imagery reinforces the idea of courts as sites where governmental power is publicly justified and contested.

RISKS: JUDICIAL ACTIVISM AND DEMOCRATIC OVERREACH

Despite its democratic functions, judicial review also carries risks when courts adopt excessively activist or managerial postures that displace political processes.



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Critics point to instances where courts appear to engage in detailed policy-making, micro-managing administrative functions, or issuing broad structural directives that test the limits of institutional competence. [3] [12]

Overuse of strong remedies, such as nationwide injunctions, may create perceptions of judicial supremacy and provoke political backlash, potentially undermining respect for the judiciary and destabilizing constitutional arrangements.[13]

Furthermore, if judicial appointments and tenure are themselves politicized, review powers can be weaponized to entrench partisan preferences under the guise of constitutional interpretation.[3] [13]

- **Toward Principled, Democracy-Enhancing Judicial Review**

To ensure that judicial review supports rather than distorts democratic governance, scholars and judges advocate principles of institutional restraint, deliberative justification, and dialogic engagement with other branches.[3] [12]

Courts are encouraged to calibrate the intensity of review to factors such as the nature of the right at stake, the quality of legislative consideration, and the availability of alternative accountability mechanisms.[2][3]

Techniques such as proportionality analysis, structured reason-giving, and remedial deference (for example, suspending declarations of invalidity to allow legislative correction) can reconcile robust rights protection with respect for democratic decision-making. [2][3]

In addition, fostering a culture of constitutional dialogue—in which legislatures respond to judicial decisions through reasoned amendments or policy revisions—can transform review into a collaborative rather than confrontational mechanism of governance. [13] [2]

- **Overall Impact on Democratic Governance**

When exercised within constitutional limits and informed by principles of restraint and dialogue, judicial review strengthens core elements of democratic governance: rule of law, rights protection, accountable government, and balanced separation of powers. [2][3] [5]

Empirical and doctrinal studies show that courts have often played pivotal roles in checking emergency powers, protecting opposition rights, and preserving electoral integrity in times of political stress. [3][2]

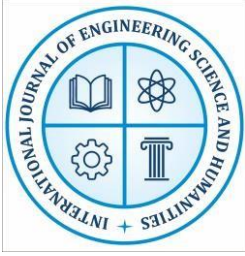
Yet the impact of judicial review is contingent rather than automatic.

It depends on factors such as judicial independence, appointment processes, legal culture, and public support for constitutionalism.[12][3]

Where these enabling conditions are weak, review may become either ineffectual or excessively politicized, with ambiguous or even negative consequences for democracy.[13][3]

CONCLUSION

Judicial review is best understood not as an anti-democratic imposition but as an institutional mechanism designed to ensure that democratic politics operate within a framework of higher-



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order constitutional commitments.

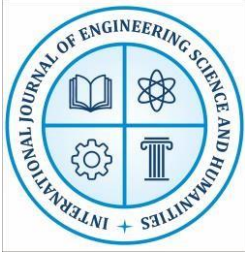
By subjecting legislation and executive action to independent legal scrutiny, it protects fundamental rights, enforces rule-of-law constraints, and maintains a balanced distribution of power among state organs.[2][3][5]

At the same time, judicial review must itself be governed by principles of constitutional fidelity, institutional competence, and respect for democratic processes in order to avoid overreach and preserve its own legitimacy.

When these conditions are met, judicial review can act as a vital, democracy-enhancing check within contemporary systems of governance.[3][13][12]

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