CONTENTS

Terms and Abbreviations.........................................................i
Table of Cases...........................................................................ii

CHAPTER I: INTRODUCTION

1. Confrontation of Two Notions of Designing a Constitutional Review System..............................................3
2. Decline of Parliamentary Sovereignty; Development of Constitutional Review.................................................4
3. Functions and Pitfalls of Constitutional Review.................................................................6
4. Plan of the Study........................................................................9
5. Conceptualization of Terms and Expressions.................................................................9
   5.1. Constitutional Review, Constitutional Justice, and Judicial Review........................................10
   5.2. Constitutional Court...............................................................10
   5.3. Judicial Activism.......................................................................10
   5.4. A Priori Review vs. a Posteriori Review............................................11
   5.5. Centralized Review vs. Decentralized Review........................................11
   5.6. Constitutionalism......................................................................12
   5.7. Separation of Powers..................................................................12
   5.8. Rule of Law.............................................................................13
6. Research Questions and Problems.........................................................13
7. Objectives of the Study.................................................................15
8. Hypotheses of the Study.................................................................16
9. Significance of the Study.................................................................17
10. Methodology Adopted.................................................................18
11. Sources..................................................................................18
CHAPTER II: THEORETICAL FRAMEWORK

Introduction.................................................................26
1. Kelsen: Devising the Constitutional Court..............................26
2. Cappeletti: Distinguishing Two Models of
    Constitutional Review......................................................29
3. Favoreu: Highlighting the European Constitutional Courts..............32
4. Designing a Constitutional Court for New Democracies..................36
   4.2. Horowitz: Suggesting a Carefully Designed
       Constitutional Court......................................................42
Conclusion........................................................................45

CHAPTER III: CONSTITUTIONAL REVIEW IN THE UNITED
STATES OF AMERICA AND FRANCE

Introduction.......................................................................50
Part One: Constitutional Review in the United States of America .........51
1. Background of Constitutional Review in the United States..............51
2. Structure of Constitutional Review Body in the United States...........55
   2.1. Federal District Courts.................................................55
   2.2. Federal Courts of Appeals............................................56
   2.3. The Supreme Court....................................................56
       2.3.1. Composition of the Supreme Court.........................56
2.3.2. Jurisdiction of the Supreme Court…………………..58

   3.1. Organizational Domain……………………………………….59
   3.2. Inclusion Domain………………………………………………….60

4. Constitutional Adjudication Procedure in the United States…………………..60
   4.1. Exceptional Unconstitutionality………………………………….60
   4.2. Injunction…………………………………………………………61
   4.3. Declaratory Judgment……………………………………………………61

5. Supreme Court’s Judgments and their Effects……………………………..62

6. Some Main Principles of Judicial Review in the United States……………….64
   6.1. Freedom of Speech………………………………………………….64
   6.2. Due Process of Law…………………………………………………65
   6.3. Equal Protection……………………………………………………66
   6.4. Contract Clause……………………………………………………66
   6.5. Commerce Clause………………………………………………….67

7. A Glance at the Performance of the Supreme Court of the United States…………………………….67
   7.1. Reinforcement of the Federal System Supremacy……………………68
   7.2. Socio-economic Issues………………………………………………….71
      7.2.1. Rights of the Black…………………………………………….71
      7.2.2. Individual Rights and Freedoms…………………………………73
      7.2.3. Economic Interpretations………………………………………..76

8. Criticisms of the Supreme Court’s Performance…………………………….78

Part Two: Constitutional Review in France…………………………………...80
1. Background of the Constitutional Review in France…………………………80
2. Organization of the Constitutional Council…………………………………84
   2.1. Appointment of the Council’s Members……………………………..84
   2.2. Qualifications of the Members: Independence of the Council……………….85
3. Power of the Constitutional Council to Review the Laws……………………87
CHAPTER IV: CONSTITUTIONAL REVIEW OF THE ACTS OF LEGISLATURE IN INDIA

Introduction ...........................................................................................................114

Part One: Historical Background of Judicial Review in India .....................115
1. Origins of Judicial Review ...........................................................................115
2. Independence of India and Establishment of Judicial Review System ....117

Part Two: Generalities of the Indian Constitutional Courts .........................121
1. Structure of the Indian Constitutional Courts and its Relevant Issues ...121
   1.1. Hierarchy of the Courts in India ..........................................................121
   1.2. Composition of the Indian Constitutional Courts ..............................122
1.2.1. Composition of the High Courts..............................................122
1.2.2. Composition of the Supreme Court........................................122
2. Legal Position of the Indian Constitutional Courts.............................123
  2.1. Position of the High Courts.....................................................123
  2.2. Position of the Supreme Court.................................................123
3. Independence of the Courts........................................................126
  3.1. Qualifications of the Judges.....................................................126
  3.2. Appointment of the Judges.......................................................127
  3.3. Tenure of the Judges ..............................................................133
  3.4. Removal of the Judges ............................................................134
  3.5. Transfer of the Judges ............................................................135
  3.6. Other Provisions on Judicial Independence..................................137
  3.7. Serious Dangers on Judicial Independence in India........................138

Part Three: Scope and Limitations of Judicial Review in India..............140
1. Scope of Judicial Review..........................................................140
  1.1. Fundamental Rights; Judicial Review of the Ordinary Laws........140
    1.1.1. Concept of Fundamental Rights and its Classification........140
    1.1.2. To Whom and against Whom Available?..............................142
    1.1.3. Waiver of Fundamental Rights..........................................143
    1.1.4. Justiciability of Fundamental Rights................................144
      1.1.4.1. Prospective or Retrospective?..................................145
      1.1.4.2. Doctrine of Eclipse..............................................147
      1.1.4.3. Doctrine of Severability......................................149
      1.1.4.4. Rule of Prematurity............................................150
    1.1.5. Remedies of Violation of Fundamental Rights:
      Writ Jurisdiction of the Courts..........................................151
      1.1.5.1. *Habeas Corpus*...............................................153
      1.1.5.2. *Quo Warranto*.................................................153
1.1.5.3. *Mandamus* ................................................................. 154
1.1.5.4. Prohibition ................................................................. 155
1.1.5.5. *Certiorari* ................................................................. 155

1.2. Basic Structure; Judicial Review of the Constitutional Amendments ................................................................. 156
1.2.1. Before the 24th Constitutional Amendment ...................... 157
1.2.2. After the 24th Constitutional Amendment ......................... 158
1.2.3. After the *Kesavananda Bharati* Case .............................. 159

2. Limitations of Judicial Review ........................................... 162
2.1. Detention without Charge or Trial and Procedure Established by Law ................................................................. 162
2.2. Declaration of Emergency ................................................. 163
2.3. Power of Parliament to Amend the Constitution .................. 164
2.4. Martial Law ........................................................................ 165
2.5. Laws under Articles 31(A) and 31(B) .................................. 166
2.6. Directive Principles ............................................................ 167
2.7. *A Posteriori* Review ......................................................... 170

**Part Four: Constitutional Adjudication Procedure and Decisions of the Courts** ................................................................. 171

1. *Locus Standi* ........................................................................ 171
1.1. Traditional Rule ................................................................. 171
1.2. Public Interest Litigation (PIL) ............................................ 171
1.2.1. Origins and Importance of PIL ....................................... 172
1.2.2. Types and Procedure of PIL .......................................... 174
1.2.3. Limitations in PIL Cases ................................................. 177

2. Procedure of Appeal in Constitutional Matters ....................... 178

3. Decisions of the Supreme Court ............................................ 179
3.1. Political Views of the Judges in Decision Making .................. 179
3.3. Report of Decisions ............................................................ 184
Part Five: A Glance at the Role and Performance of the Indian Constitutional Courts

1. Pre-Emergency Period
   1.1. Right to Property
   1.2. Interrelationship of Fundamental Rights
      1.2.1. The *Gopalan* Approach
      1.2.2. The *Cooper* Approach

2. Emergency Period
   2.1. Emergency, Constitutional Amendments, and Judicial Review
      2.1.1. The 38th Amendment Act
      2.1.2. The 39th Amendment Act
      2.1.3. The 42nd Amendment Act
   2.2. Consequences of the Amendment Acts

3. Post-Emergency Period
   3.1. Heart of the Changes: Rejection of *Gopalan* Approach
      3.1.1. The *Maneka Gandhi* Approach
      3.1.2. The *Bachan Singh* Approach
      3.1.3. Post-*Maneka* Development
   3.2. Religion and Secularism
      3.2.1. Election Cases
      3.2.2. Dispute over a Sacred Site; *Ayodhya* Case
      3.2.3. Women’s Rights and Personal Law
   3.3. Protective Discrimination; Job Reservation
      3.3.1. Reservation more than 50 Percent and Reservation in Promotion
      3.3.2. Reservation in Technical and Specialist Posts
   3.4. Controversies over Judicial Activism

Conclusion
CHAPTER V: CONSTITUTIONAL REVIEW OF THE ACTS
OF LEGISLATURE IN IRAN

Introduction……………………………………………………………………...244

Part One: Historical Background of the Iranian Constitutional
Review System…………………………………………………………………245

1. Oppositeness of Shariah and Law……………………………………...245
2. Second Article of the Supplementary Constitution and
   Considering of Shariah Review…………………………………………250
3. Lack of a Constitutional Review System in the
   Constitutionalism Era……………………………………………………252
4. Constitution of the Islamic Republic and Establishment
   of the Guardian Council………………………………………………...253

Part Two: The Guardian Council and its Position and Role
in the Iranian Constitutional Review System……………………………255

1. Generalities of the Guardian Council…………………………………….255
   1.1. Legal Position of the Guardian Council……………………………255
   1.2. Duties and Powers of the Guardian Council……………………….256
2. Structure and Organization of the Guardian Council…………………257
   2.1. Composition of the Council and its Relevant Issues………………257
   2.1.1. Required Qualifications of the Guardian
         Council Members…………………………………………………258
   2.1.1.1. Fiqh and their Qualifications……………………………….258
   2.1.1.2. Jurists and their Qualifications…………………………….259
   2.1.2. Manner of Appointing the Council Members and
         their Tenure…………………………………………………………260
   2.1.2.1. Manner of Appointing the Members………………………..260
   2.1.2.2. Tenure of the Members……………………………………….261
2.1.3. A Critique on the Guardian Council’s Independence;
       Manner of Appointment and Tenure of the Members………..…..262
2.2. Internal Organization of the Guardian Council

2.2.1. Sessions

2.2.2. Managing the Sessions

2.2.3. Manner of Vote-taking

   of the Majlis and its Respective Issues

3.1. Deadlines for the Council’s Review

3.1.1. Deadline for the Ordinary Bills

3.1.2. Deadline for the Urgent Bills

3.1.3. Deadline for the Bills passed in the In-camera Sessions

3.2. Effect of the Guardian Council’s Review on
   the Acts of the Majlis

3.2.1. Confirmation of the Acts

3.2.2. Silence of the Council

3.2.3. Discretion of Inconformity of the Act

3.3. Shariah Review over the Laws of the Past Regime

3.3.1. Different Interpretations of Article 4

3.3.2. Examination and Analysis of the Interpretations
   of Article 4

3.4. Limitations of the Constitutional Review

4. A Glance at the Guardian Council’s Performance since
   its Formation

4.1. Deployment of the Iranian Political Parties and their Policies after the 1979 Revolution

4.1.1. A Short Look at the Right Wing’s Viewpoints

4.1.2. A Short Look at the Left Wing’s Viewpoints


4.2.1. The Period before Amendment of the Constitution in 1989
4.2.1.1. Issue of the Urban Land Act...........................................296
4.2.1.2. Discretionary Punishment (Tazirat) Case..........................298
4.2.1.3. Some Articles of the Public Punishment Act......................303
4.2.1.4. Issue of the Key Money or Good Will............................305
4.2.1.5. Issue of the Appeal Deadline......................................307
4.2.1.6. Story of the Labor Act..............................................310
4.2.2. The Period after Amendment of the Constitution.................314
  4.2.2.1. Eliminating Public Prosecutor’s Offices and
          Establishing General Courts........................................315
  4.2.2.2. Approbatory Supervision and the Parliamentary
          Election Acts..........................................................318
  4.2.2.3. ‘Selection’ in the Administrative Lexicon....................325
  4.2.2.4. Issue of the Conditional Legislation..........................331
  4.2.2.5. Double Standard Treatment.....................................335
4.3. A Critique on the Guardian Council’s Performance..................337

Part Three: The Expediency Council and its Position and Role
in the Iranian Constitutional Review System................................342
1. History of the Expediency Council’s Formation............................342
2. Structure and Organization of the Expediency Council..................344
   2.1. Composition of the Council...........................................344
   2.2. Commissions of the Council..........................................345
   2.3. Secretariat of the Council.............................................345
   2.4. Consultations of the Council.........................................346
3. Powers and Duties of the Expediency Council.............................346
4. Expediency Council’s Engagement in Legislation
   Process and its Reasons..................................................347
5. Controversies over the Expediency Council’s
   Engagement in Legislation................................................350
6. Rejecting the Notion of Expediency Council’s Right
   to Legislation.............................................................352
6.1. General Reasons ................................................................. 352
6.2. Specific Reasons .............................................................. 355
7. Interpretive Opinion of the Guardian Council: Reliability of
   the Expediency Council’s Approvals ........................................ 359
Conclusion ............................................................................. 361

CHAPTER VI: CONCLUSION

1. Summary of the Chapters ..................................................... 366
2. Findings of the Study .......................................................... 380
3. Suggestions and Recommendations ...................................... 384
   3.1. Suggestions and Recommendations for the Iranian System .... 384
   3.2. Suggestions and Recommendations for the Indian System .... 386
4. Further Studies ................................................................... 388

BIBLIOGRAPHY ................................................................. 389