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# ANALYSING THE SCOPE OF JUDICIAL REVIEW IN CONTEMPORARY ISSUES

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## I. ABSTRACT

As a keystone of constitutional democracy, judicial review plays a very important role in safeguarding the rule of law and protecting fundamental rights. This research paper aims to take a deeper look at the scope and ambit of judicial review of contemporary issues, exploring its advantages and challenges in today's legal environment. It addresses concerns about the role of the judiciary, the distribution of powers, and the delicate balance between the judiciary and other branches of government.

## II. KEYWORDS

Judicial Review, Constitution, Article 13, Judicial Activism, Fundamental Rights

## III. INTRODUCTION

Law plays a crucial role in protecting the people and providing remedies against any wrong. According to the "Social Contract Theory" of Hobbes, we have traded our rights in the form of contracts with the government to protect us from any harm.<sup>2</sup> However, it is a well-known principle that power corrupts, and absolute power corrupts absolutely.

The concept of Judicial Review has emerged to prevent arbitrary action or tyranny of the executive and legislature. It can be termed as the process under which the competent courts; Supreme Court ("SC") or High Court ("HC") exercise their power to strike down any law/rule or provisions of any statute as void-ab-initio if it goes against the very fundamental values or rights guaranteed by the Indian Constitution. It plays a role of protector & a guide in safeguarding our rights and

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<sup>2</sup> Abhinav Rana, *Judicial Review*, I-pleaders, (July 24, 2022; 4:45 PM), <https://blog.ipleaders.in/all-about-judicial-review/#Introduction>

we have adopted this from the US Constitution, after years of making improvements under the same in order to make it suitable for our Constitution, which has now altered the scope and nature of Doctrine of Judicial Review at the very core by the Apex Court.<sup>3</sup>

The three organs of government are -

1. Legislature who is responsible to make the laws,
2. Executive who is responsible for implementing the law, and
3. Judiciary who interprets the law to administer justice and ensures that the laws made or implemented by the other two organs comply with the Constitution.<sup>4</sup>

Each of these organs follows the rule of limitation/separation of power conferred by Article 50 (separation of power) of the Indian Constitution, in order to maintain a balance among the organs for the exercise of power without interfering with each other's designated role.<sup>5</sup> The scope of judicial review extends to Constitutional amendments, legislative actions and laws enacted by the legislature.

#### IV. RESEARCH OBJECTIVES

1. To analyse how the judiciary exercises its powers of judicial review in contemporary developments.
2. To evaluate the potential consequences and challenges of limited and expanded scope of the doctrine of judicial review.

#### V. RESEARCH QUESTIONS

1. Under what circumstances can the Supreme Court or High Court exercise the power of judicial review?

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<sup>3</sup> Dr. Rahul Tripathi, *Judicial Review: A Study in reference to contemporary judicial system in India*, Vol.4, IJRG, 51, 51-55, 2016, <https://docslib.org/doc/526073/judicial-review-a-study-in-reference-to-contemporary-judicial-system-in-india>

<sup>4</sup> Latest Laws, (June 7, 2023), <https://www.latestlaws.com/articles/doctrine-of-judicial-review-in-india-a-judicial-perspective-by-fayaz-ahmed-bhat>

<sup>5</sup> Raksha Yadav, *Article 50 of the Indian Constitution*, I-pleaders, (Sept. 25, 2022, 5:00 PM), <https://blog.ipleaders.in/article-50-of-the-indian-constitution/>

2. How did they exercise the power of judicial review in recent legal issues?
3. To what extent judicial review is justified without violating the doctrine of separation of powers?

## **VI. RESEARCH HYPOTHESES**

1. The scope and ambit of judicial review is not certain. In different circumstances, the judiciary had exercised the power of judicial review in a limited as well as an expanded manner.
2. This uncertainty may lead to potential challenges over insufficient or over-usage of the doctrine.

## **VII. RESEARCH METHODOLOGY**

The research methodology adopted in this paper is purely doctrinal in nature. Doctrinal research, also known as library-based research, is a distinctive method of conducting legal research that involves the study and analysis of existing legal provisions, case laws, and scholarly works. This methodology is well-suited for examining the theoretical and conceptual aspects of law and for providing a systematic exposition of legal doctrines and principles. The primary sources relied upon in doctrinal research include statutory materials, judicial precedents, and authoritative texts, while secondary sources such as commentaries, articles and legal digests are also consulted. The research process involves the identification, collection, and critical analysis of these sources to draw logical conclusions and offer insights into the legal issues under investigation. Through doctrinal research, this paper seeks to provide a comprehensive and coherent understanding of the legal framework governing the subject matter at hand.

## **VIII. LITERATURE REVIEW**

This research paper investigates the relevant key provisions of the Constitution of India including Articles 13, 32, 226, 368 etc. It also refers to various books on Constitutional Law written by renowned scholars like V.N. Shukla, M.P. Jain, P.M. Bakshi et al. The paper also has collected information and inspiration from many scholarly journals and online sources.

## IX. Historical Evolution

Judicial review, simply, is a concept in the law that allows courts to review and possibly overturn any tyrannical actions taken by the other two organs of the government.

This Doctrine has always remained an essential part of the Constitution of India, since its adoption. We can say that whenever our constitutional values and rights have been harmed, the doctrine of Judicial Review has always been there for our rescue. It has gone through a long journey of evolution and gradually shaped the significance of this doctrine in this modern environment.

In June 2022, SC permitted the Floor test in the Maharashtra Assembly Case,<sup>6</sup> whereby the question regarding the court's authority to review the Governor's decision was raised.<sup>7</sup> It was established that calling of floor test is not an unfettered discretion of the Governor, rather it must be exercised with circumspection.

In the case of *Dobbs v. Jackson Women's Health Organization*<sup>8</sup>, which overturned the previously prevalent precedent of *Roe v. Wade* (1973)<sup>9</sup>, the SC of the United States passed the verdict on abortion laws in respect of the Judicial Review.

Our Indian democracy has always involved the citizens in decision making & policy framing processes. Reference can be drawn from [Chatham House](#), that India adopted the concept of – “of the people, for the people & by the people” in the literal sense. Here, every individual is at par with responsibility and is represented in the government, ensuring fairness. Rule of law is the main pillar of our Constitution which cannot be changed and the courts upheld this position for providing equality to each and everyone. Those who hold public power must abide by democratic principles outlined in the Constitution and are accountable for their actions.<sup>10</sup>

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<sup>6</sup> Subhash Desai v. State of Maharashtra, (2024) 2 SCC 719

<sup>7</sup> Live Law, *breaking: Supreme Court Allows to conduct floor test in Maharashtra Assembly tomorrow*, <https://www.livelaw.in/top-stories/supreme-court-allows-conduct-floor-test-on-maharashtra-assembly-tomorrow-202605>, (June 29, 2022), (9:12 pm)

<sup>8</sup> 597 U.S. 215

<sup>9</sup> 410 US 113 (1973)

<sup>10</sup> Chatham house, (June 8, 2023), <https://www.chathamhouse.org/2022/04/democracy-india>.

The initial instance of the Doctrine was recorded in *Dr Bonham's Case*,<sup>11</sup> whereby due to the absence of a medical licence, the Doctor was banned from continuing the practice by the Royal College of Physicians in London. Here, the issue was regarding pecuniary bias and violation of principles of natural justice.

In the landmark case of *Marbury v. Madison, 1803*,<sup>12</sup> President Adams, a Federalist, before leaving office appointed members as judges from the same party. However, President Jefferson was against such appointments & instructed his Secretary of State, Madison, to withhold the appointment letters. A writ of mandamus from the SC by Marbury was shouted. The Doctrine of Judicial Review was established and by challenging the actions of Congress, upheld the court's authority to interpret the constitutionality of laws.

During the British colonial period, the then, Parliament introduced the Government of India Act, 1935 (Federal system) enabling the Central and State legislatures extensive powers (Judicial Review) in their respective areas, similar to the British Parliament. The Federal Court acted as an intermediary between these two governments and had the authority to examine if there were any violations of the constitutional provisions related to the distribution of powers. Although the power of Judicial Review was NOT explicitly mentioned but was implicitly entrusted with the responsibility of interpreting the Constitution and determining the constitutionality of legislative acts.

In *Bhola Prasad v The King Emperor*,<sup>13</sup> the Federal court observed that "Indian legislatures possess plenary powers of legislation, comparable to those of the Parliament itself, based on the fundamental proposition established in *Reg v Borah*.<sup>14</sup> It took a decade of knowledge & self-esteem for the Federal Court to turn into what is known as the Supreme Court of India today (after the commencement of the Constitution). The judiciary is the main pillar for maintaining the spirit of democracy by enabling a healthy system of Judicial Review enforced by the Constitution of India.

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<sup>11</sup> (1610) 8 Co Rep 114

<sup>12</sup> 5 U.S. 137

<sup>13</sup> AIR 1942 F.C.R 17 P20

<sup>14</sup> 1878 3 AC 889

## X. SIGNIFICANCE AND SCOPE

The importance of Judicial Review is for the following reasons:

- Protecting the fundamental rights of the citizens.
- Safeguarding the Liberation of the judiciary.
- Maintaining the sovereignty of the Constitution.
- Preventing misuse of supremacy by the organs of the governments.
- Federal balance is maintained between the state & centre.

The scope of Judicial Review is not absolute in nature and subjected to certain questions in the SC or HC. The Law can be questioned only if:

- a) Violating the principle of natural justice & fundamental rights of the Constitution.
- b) Provisions within the engraved laws are overstepped.
- c) Violating the official jurisdictions on limited powers conferred therein.

In this modern India, the court cannot order the public to wait for justice against any legislative dictatorship. Way before the time, the legal intellectuals proposed that even SC needs to have a power of what we today know it as in the form of Judicial Review.

In simpler terms, the courts have the authority to review laws and govern if, they are constitutional or not, but they cannot do this in a random or unlimited manner. Just like other parts of the government, even the courts & judges get their power from the Constitution and are subject to its rules. They can understand and strike down laws, but they cannot make laws themselves or give that power to anyone else besides the legislative organ. The courts also cannot declare something constitutional if, it clearly goes against the constitution. Neither the parliament nor the judiciary holds ultimate power; instead, authority is found outside them.

In *State of Madras vs V.G. Row*<sup>15</sup>, established that the courts are vested with the power of judicial review by the Indian Constitution for ensuring that government makes laws

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<sup>15</sup> (1952) 1 SCC 410

in such a way for the interest of the citizens at large and by doing so courts are not challenging the authority of lawmakers.

In *A.K. Gopalan vs State of Madras*,<sup>16</sup> emphasized the need for provisions in the constitution to prevent any unconstitutional laws. In India, the constitution is the highest authority, and it is the job of the judiciary to decide if a law is constitutional or not.

## **XI. FUNCTIONS AND FEATURES OF JUDICIAL REVIEW**

The most important functions of the Judicial Review doctrine are:

- Making the government actions to be genuine and,
- Safeguarding the Constitution from unjustified influence from the regime itself.

In order to prevent controversy, keep a check on public power & prevent abuse of power around the Doctrine, Judicial Review is perceived as 'Judicial Protection' and not as 'Judicial Control' of the administration & legislation. Even government officials can be sued in a court of law. Although there are arguments, both for and against judicial review, it continues to be a central topic in discussions on public law. It acts as a safety valve during times of crisis and conflicting interests in society. If there is a concern about the judiciary exceeding its limits, it should be addressed through informed public opinion, capable of assessing and criticizing the consequences and constitutional implications of judicial decisions.

SC decisions are binding all over the country, even the HC has to comply with such and with the vested authority to exercise the power of Judicial Review by the SC & HC under Articles 32 and 226, the fundamental rights are guaranteed. Every law, by-law, ordinance, or money bill falls within the ambient of Judicial Review. However, one interesting thing to note is that; these powers can only be applicable when cases regarding such are brought before the court and not by Suo-motu action (i.e., only when a question of law or fact arises during the case proceedings). Every bill proposed

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<sup>16</sup> 1950 SCC 228



for enactment into the law, must necessarily pass the “constitutional validity test, otherwise, it would be struck down as unconstitutional and nullified.

## XII. TRACING THE APPLICATION OF JUDICIAL REVIEW THROUGH LANDMARK PRECEDENTS

After the post-British colonial regime, land reform policies gained very important positions due to the Directive Principle of State Policies (DPSPs). During the 1950s, the majority of land was held by the Zamindars (landowners) and in order to prevent inequality in land resources, the need for land distribution aspects came into effect (Land Reforms Acts) for recovering land from Zamindars, as Article 31- right to property is regarded as a fundamental right. There have been four noteworthy judicial declarations that deal with the fight between Fundamental Rights (“FRs”) and DPSPs. These also highlight the doctrine of basic structure in the context of judicial review.

In *Sri Sankari Prasad Singh Deo vs Union of India*,<sup>17</sup> a zamindar challenged the first amendment Act, 1951 on the grounds that it violated the Right to property in the 9th schedule as this schedule cannot be a subject for Judicial Review. However, SC denied the same on the basis that amendments made under Article 13 are well within the framework of the constitutions and the word “law” therein shall be within the meaning of rules or regulations.

In *Sajjan Singh vs State of Rajasthan*,<sup>18</sup> the challenge was regarding the 17th Amendment Act on the grounds that it violated the Right to property and Article 13 but here, the SC struck down the position of Sanskari prasad case (Supra) and stated that any constitutional amendments made under Article 368 falls outside the ambient of judicial review.

In *I. C. Golaknath & Ors vs State of Punjab & Anrs.*,<sup>19</sup> a challenge regarding the 1st, 4th and 17th Constitutional amendments was carried out on the grounds of the question of law - whether it falls within the preview of Article 13 or not. The contention made

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<sup>17</sup> 1951 SCC 966

<sup>18</sup> 1965 AIR 845, 1965 SCR (1) 933

<sup>19</sup> 1967 AIR 1643, 1967 SCR (2) 762

under the Sajjan Singh case (supra) was struck down and SC stated that such amendments to the constitution are not allowed.<sup>20</sup>

Later via the 24th amendment, 1971 this judgement (Golaknath case) was nullified and such amendments were made part of the Constituent law according to the power from Article 245 and not Art. 368. From there, amendments were regarded as a law & a legislative process, with a higher power even beyond the reach of the parliaments by invoking the limitation placed upon therein. In order to deal with this difficulty, many changes via amendments were made. 25th amendment, 1971 further deals with clashes between the FRs and DPSPs, if Article 39 surpasses Articles 14, 19 & 31 and no Judicial Review will be conducted. 29th amendment, 1971 came via the land reforms in Kerala through the 9th schedule.

In *Kesavananda Bharati vs State of Kerala and Anr*<sup>21</sup>, the validity of 24th, 25th and 29th amendment was challenged (13 bench judges were formed) and from 7: 6 ratios, by upholding the 29th amendment it was concluded that:

- i. Article 368 enables the power to the parliament to amend the constitution via the laid down procedure. This was added after the 24th amendment (replaced procedure to amendments)
- ii. Nothing from Article 13 shall apply to the Article 368.
- iii. Ordinary and constitutional laws are both distinct in nature and not the same.
- iv. Doctrine of basic structure of the Constitution was introduced, whereby this cannot be altered by anyone and such doctrine shall be referred to make laws & amendments. This even provided judiciary with Judicial Review of the legislative changes to laws.

Amendments have been changed from time to time as per the changing needs and demands, by the way of 44th amendment Act, 1978 whereby right to property was made a legal right under Article 300A and was struck down from the former. Due to

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<sup>20</sup> Century Law Firm, <https://www.centurylawfirm.in/blog/judicial-review-in-india/>, (June 8, 2023), 10:45 PM

<sup>21</sup> (1973) 4 SCC 225

the revolution of the industries, Article 368 amendments were excluded from the preview of Judicial Review. We can say that Keshvananda Bharti case (Supra), changed the entire course of the future and made a history with introduction of basic structure even for Judicial Review. SC court emerged to be triumphant by making the powers of the Judicial Review strongest at its core as well as for interpreting the Constitution.

In *Indira Nehru Gandhi vs Shri Raj Narain & Anr*<sup>22</sup>, the then Prime Minister was held guilty for tampering with the electoral votes and was charged with malpractices by the SC. The enactment of the Constitutional Bill 1975 into the Law inserted Article 329A which made the elections of the Prime Minister under the ambient of Judicial Review and anything destroying the basic structure would be considered guilty of a crime against the constitution.

The importance and significance of Keshavananda Bharti case (Supra) & power of Judicial Review were realised from judgements in *ADM Jabalpur v. Shivakant Shukla*.<sup>23</sup> The SC became the social auditor for prevailing justice for the undermined citizens.

In *Minerva Mills Ltd vs Union of India*<sup>24</sup>, Clauses 4 & 5 of Article 368 was struck down on the ground that it violated the basic structure of the Constitution. These clauses enabled for unlimited amending power which was hampering & destructive in nature. This happened after the famous case of Kesvananda Bharti.

In *Waman Rao and Ors vs Union of India (UOI) And Ors*<sup>25</sup>, established for the maintenance of harmony between the FRs and DPSPs and further stated that after Kesvananda Bharti case, the amendments made to 9th schedule falls within the preview of Judicial Review.

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<sup>22</sup> (1976) 3 SCC 321

<sup>23</sup> AIR 1976 SC 1207

<sup>24</sup> AIR 1980 SC 1789, (1980) 3 SCC 625, 1981 1 SCR 206, 1980 (12) UJ 727 SC

<sup>25</sup> (1981) 2 SCC 362, 1981 2 SCR 1

In *S. P. Sampath Kumar v Union of India*<sup>26</sup> & *L. Chandra Kumar v Union of India*<sup>27</sup>, the SC concluded that power provided to the SC & HC (Articles 226 & 32) for judicial Review forms the basic structure of the constitution which cannot be abridged.

In *I.R. Coelho (Dead) By Lrs vs State Of Tamil Nadu & Ors*<sup>28</sup>, any provisions of the 9th schedule inserted after 1974 will fall within the ambit for Judicial Review on the basis that if, it destructs the purpose/ basic structure of the Constitution for which it was enacted. Administrative activities taken by the government, both at the central and state levels, can be reviewed by the judiciary to safeguard they follow the Constitution. This review helps maintain control over administrative agencies and their officials. It is important to note that when we talk about reviewing administrative actions, we include actions taken by both the Union of India (central government) and state governments. These actions are available in the form of five writs under Articles 32 & 226.

Judicial decisions are also subject to judicial review; where the court looks at previous rulings or statements made by judges to make corrections or changes. This kind of review was seen in various cases.

Golaknath case & Minerva Mills case (Supra), that we discussed in detail above also falls within the ambit of this scrutiny.

In *Rustom Cavasjee Cooper v. Union of India*<sup>29</sup>, which is also referred to as the “Bank Nationalisation Case”, there existed a legal dispute regarding the nationalisation of banks in India. The SC had to decide whether the government's action of taking over private banks without providing fair compensation violated the Constitution or not. After taking the contention SC ruled that, when the government takes over private property, it must provide fair compensation to the owners in order to ensure that people's rights are protected, and constitutional validity is upheld.

We can understand from this, that the sorts of mistakes are basically different ways to designate what occurs when a decision-maker goes beyond the power given by the

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<sup>26</sup> 1987 SCC Supp 734

<sup>27</sup> AIR 1997 SC 1125

<sup>28</sup> AIR 2007 SC 8617

<sup>29</sup> (1970) 1 SCC 248

law, or vice-versa. These categories & cases are not fixed in nature because there could always be another way to explain what the law expects and how it has not been followed.

### **XIII. KEY CONTEMPORARY ISSUES INVOLVING JUDICIAL REVIEW**

From various landmark judgments, it can be said that Indian democracy is very exclusive in its nature because our courts have blocked the parliament from amending certain provisions of the Constitution which forms the part of basic structure doctrine. Some believe that such practice by the courts takes away the very idea /powers of different branches of the Government, in turn hampering the veils of justice which in some regard can be true but not absolute. There must exist some mechanism to keep a 'check and balance' on each other's decisions.

Sir Rajeev Dhavan has opined that Keshavananda Bharti (supra) had pushed judges into exposed politics.<sup>30</sup> Various recent events and judicial decisions provide us with a peek into the powers of the SC & HC in respect of Judicial Review. Some of them have been discussed below:

#### **A. Assam's Accord Citizenship**

In a recent case of 2023, SC is going to review Sec.6A of the Citizenship Act, 1955 which was signed in accordance with the "Assam Accords" as the issue regarding its validity has been challenged that it goes against fundamental rights.<sup>31</sup>

In simpler terms fight is between the Power of the SC in respect of interpreting the laws v. the power of lawmakers in respect of making/changing laws by Judicial Review and some believe that this weakens the idea of separation of powers among the three organs of government.

#### **B. Political Matter**

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<sup>30</sup> P. K. Tripathi, "Rule of Law, Democracy and frontiers of Judicial Activism" Vol.17, JILL, 18, 17-36, 1975, <https://www.jstor.org/stable/43952930>

<sup>31</sup> Shruthi Saravanan, The Power of judicial review: tool for independence or encroachment on powers of parliament, Jan 20, 2023, <https://timesofindia.indiatimes.com/readersblog/svanlegal/the-power-of-judicial-review-is-it-a-tool-to-foster-an-independent-judiciary-or-is-it-an-encroachment-on-the-powers-of-the-parliament-49443/>

In *P.U.C.L. & others v. U. O. I.*,<sup>32</sup> here tactics towards political questions and policy matters were of discussion whereby SC stated that cases related to such matters are avoided by them until and unless it becomes a necessity for Judicial Review and can infer in special circumstances. SC also emphasized that the government must consider all available options to prevent any violence or disturbance within the framework of the Indian Constitution.

In *Kerala Bar Hotels Association vs State of Kerala*,<sup>33</sup> SC emphasized that courts to be hesitant for interfering in the state policies matter and shall only do so when they're proven to be invalid, unjust, and improper in nature, taking away the FRs of the citizens and not otherwise.

The Doctrine of Judicial Review acts as a check on the legislative, executive, and even judicial actions of the government. So, we can say that it is a permanent feature of the Indian constitution from 1973 onwards and any attempt to undermine or damage this principle would be held as unconstitutional.

Researchers have shown that even the SC of the US did not declare the constitutional amendments to be void on the grounds of limitations as from the Marbury case (supra) but India has surpassed even that rule on the ground that it is a matter of important policy and parliament alone is competent authority to decide such.<sup>34</sup>

### C. Triple Talaq

In *Shayara Bano vs Union of India*,<sup>35</sup> SC declared triple talaq as unconstitutional because this enabled autonomous power to the husband, making it illogical and violating the fundamental rights of Muslim women.

From this on, Doctrine of Manifest Arbitrariness was introduced (Justice Nariman) which means - such law seems to be subjective prima-facie then, such laws are in violation of Article 14 (guarantees equality before the law).

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<sup>32</sup> AIR 2003 SC 2363

<sup>33</sup> AIR 2016 SC 163

<sup>34</sup> Harsharan Walia, Emerging Trends of Judicial Review in India, Vol. IJSR, 11, 10-13, 2016, <https://www.ijsr.net/archive/v7i6/ART20182382.pdf>

<sup>35</sup> (2017) 9 SCC 1

#### D. Adultery and Unnatural Offences

In *Joseph Shine vs Union of India*,<sup>36</sup> SC marked history by declaring Sec. 497 of the Indian Penal Code (“IPC”) to be unconstitutional.

In *Navtej Singh Johar vs Union of India*,<sup>37</sup> the constitutional validity of Section 377 was challenged on the ground that it violates fundamental rights. The Supreme Court found that Section 377 was discriminatory towards the LGBTQ+ community and therefore, it was partially struck down.

As per the latest ruling in *Supriyo alias Supriya Chakravarty v. Union of India*,<sup>38</sup> the five-judge Constitutional bench of the Supreme Court comprising CJI D.Y Chandrachud, Justice S.K Kaul, Justice S.R Bhat, Justice Hima Kohli and Justice P.S Narasimha, with 3:2 majority; held that the right to marry is not a fundamental right and the court declined to grant right to marry same-sex or queer couples. They are free to make civil unions and build emotional, mental, and sexual relationships but there shall be NO legal status of such union unless specific law is enacted by the legislature. Since such union has no marital status, there shall be no right or entitlements as that of a heterosexual married couple including right to maintenance, right to adopt child, insurance or taxation-related benefits etc. Transgender persons in heterosexual relationships are free to marry and their union is considered a valid marriage. It is worth mentioning that the IPC has recently been replaced by the *Bharatiya Nyaya Sanhita* (“BNS”) and it has NO provisions similar to Sections 377, and 497 of IPC.

#### E. Freedom of Speech & Expression

In *Anuradha Bhasin vs Union of India*,<sup>39</sup> the issue was regarding the ban on internet services in J & K and SC by upholding the parameter of the freedom of speech and expression under Article 19(1) (a) & (g) declared such activity to be unconstitutional,

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<sup>36</sup> (2019) 3 SCC 39

<sup>37</sup> (2018) 10 SCC 1

<sup>38</sup> 2023 SCC OnLine SC 1348

<sup>39</sup> AIR 2020 SC 1308

against the FRs and ordered to revoke the same. SC emphasized that such restrictions should be necessary and proportionate to the objective they seek to achieve.

The contemporary issues are not only limited to the above-mentioned events, but also have many other facets to it such as: corruption, illiteracy, education system dysfunction, basic sanitation & ineffective healthcare system, poverty & pollution, women's safety etc.

It is extremely essential to address such matters that hinder our nation's progress. Social, political, and economic problems like corruption, crime, and poor road conditions demand immediate attention. Here, our courts play a significant role by the way of Judicial review for enforcing justice where victims are aggrieved from the injustice of cases like such. However, it is a harsh reality that there are so many cases which are yet pending in the courts for decades. According to the Carnegie Endowment for international peace, data records show pendency of cases in HC- 5.8 million alone.<sup>40</sup>

#### F. Navigating the Challenges

- Limitations of Judicial Review: The Constitution of India has provided some sort of protection and rights to the president, governors & judges of the SC & HC in regard to the policy decisions & actions of the executive organ of the government and if, they surpass such, then it can lead to judicial activism and further misuse leads to judicial overreach.<sup>41</sup> An example of such was seen in Marbury v. Madison case (supra) which we discussed earlier. These limitations placed upon are in terms of obtainability & roles because changes to the pre-established laws curtailed through constitution amounts to violation and emphasis shall be placed on separation of functions rather than the powers, enabling to overturn any unconstitutional laws passed by the legislative.

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<sup>40</sup> Pratik Datta, How to start Resolving the Indian Judiciary's long-Running Case Backlog, (June 9, 2023), (10:45 am), <https://carnegieendowment.org/2021/09/09/how-to-start-resolving-indian-judiciary-s-long-running-case-backlog-pub-85296>

<sup>41</sup> Century Law Firm, Judicial Review in India: Importance, landmark Cases and Criticism, <https://www.centurylawfirm.in/blog/judicial-review-in-india/>, (June 9, 2023).



Opinions of judges in cases are set as precedents for reference in future cases because sometimes it can so happen that Judicial decisions are negatively used for personal or political benefits, hampering justice to citizens at large. If these limitations are not carried forward; the image of the government always remains on the verge of defamation; leading to a loss of public confidence and the most essential ingredient for justice called trust. There has been an overlong debate regarding the equilibrium between judicial activism, where courts dynamically outline policy, and judicial self-restraint, where courts exercise care in intervening in political matters and because of limited knowledge and expertise, even the administrative rulings are not allowed to be overturned. Furthermore, constitutional questions should not be addressed more largely than necessary, warranting a focused tactic to judicial review (Doctrine of Strict Necessity). Another facet of limitation is entrusted upon the judicial review are constitutional limits which can be traced back from the *L. Chandra Kumar vs. Union of India and Other*, whereby the importance of judicial review for the HC on the basis of Article 226 was recognised as the basic feature drawn from Article 32 of the Indian Constitution by the SC. For this various reference was tired from such as the Administrative Tribunals Act, the Sampat Kumar Judgment, the debates of the Constitutional Assembly, and views of Dr. B. R. Ambedkar, the Chairman of the Drafting Committee of the Constitution. Apart from the above limitations, there are certain principles which may sometimes act as restrictions to the power of judicial review. Such as:

- Locus standi: aggrieved party from the decisions is enabled to file a PIL (challenge to decision) to the SC on the basis of Article 32 when the fundamental rights are so encroached upon. However, most of the PILs today are part of Private cases, causing their misuse.

- Res Judicata: restriction is placed on the filing of the same case on similar grounds in the court. Once the case has been dismissed, it becomes the finality.
- No unreasonable delay is entertained for claiming remedy, unless reasonable ground so presented.
- The courts can only review laws for clear mistakes, not for other reasons like necessity or their own judgments about what is right or wrong. They must focus on the constitutionality of the law and not consider other factors like the government's motives or policy choices.
- Collapse of Alternative Remedies: While not strictly enforced, the Supreme Court has stated that the aggrieved party must discover all possible remedies before resorting to Article 32 because the writ jurisdiction is not planned to bypass statutory procedures but should only be used as an extraordinary/ final remedy when all other remedies are exhausted or inadequate.
- Judicial Self-restraint: The concept of Judicial Review comes along with the theory of “Judicial restraint” (Judicial interpretation) in the Constitution of India. Judges only need to interpret the law and not interfere in policy making.<sup>42</sup> This in a sense, is regarded as a good feature so that the separation of power is maintained and the balance between the three organs is upheld. All the courts restrain themselves from applying new policies at their own will. During the application of judicial review, the judiciary should consider only the ideals & aspirations of the founding fathers of the Constitution, past precedents; but it should not interfere with policy making. It becomes necessary because it respects separation of powers, upholds

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<sup>42</sup> Drishtiiias, <https://www.drishtiiias.com/to-the-points/Paper2/judicial-activism-restraint-overreach>, (June 9, 2023).

recognized laws, permits lawmakers to fulfil their responsibilities without interference, and validates respect for democracy apart from maintaining peace between the three organs.

- Case Studies: In the *Re: Prashant Bhushan case*,<sup>43</sup> SC initiated a proceeding against the accused at their own will. This is a prime example of courts exercising its power beyond the permitted limits. In *Madras Bar Association v. Union of India*,<sup>44</sup> SC was of the view that the court should not strike down laws merely because they oppose court directions or guidelines. Honourable Justice Gupta believes that judicial review should be used to correct flaws in the law, but it should not intrude upon the influences of other branches of the government. In such situations, the court should practice judicial restraint and avoid going beyond its limits. In *SC advocates on Record Association v. Union of India (2015)*,<sup>45</sup> it was contented by the SC that judicial review can examine the laws in compliance with the fundamental rights presented in the Constitution. In *Almitra H. Patel and Anr. ... vs Union of India and Ors.*,<sup>46</sup> the court stated that their duty is only to instruct any institution or individual on how to carry out responsibilities according to the law and not keep a watch. In *S.R. Bommai vs Union of India*,<sup>47</sup> The judges asserted that in specific cases, political considerations outweigh judicial review, particularly regarding Article 356 of the Constitution, as determining guidelines for analysing political decisions would involve the court in the political realm, contradicting their mandate to refrain from questioning political wisdom.

### G. Present Situation of law

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<sup>43</sup> AIR 2020 SC 4074

<sup>44</sup> (2021) 7 SCC 369

<sup>45</sup> (2016) 5 SCC 808

<sup>46</sup> AIR 2000 SC 1256

<sup>47</sup> (1994) 3 SCC 1

At present courts are adopting the approach of taking cases at their own free will for the public interest even if no one is raising objections to such situations. The recent example can be traced back to the Central Vista project case whereby SC on Jan 5, 2023 denied for its involvement on the basis that there is no need for judicial review in the same as long as policies are in compliance with the Constitution.<sup>48</sup> The emergence of PIL's and Suo motu has changed the game in entirely new directions. However, they should not be used for political reasons, otherwise it amounts to as good as unfair practices and misuse of power which may amount to violation of democratic fundamentals.

Whenever cases are filed in the form of PIL or writ, courts need to mandatorily examine the inarticulate reason behind such filing because without this, it will only lead to chaos in the judiciary. Prime examples such as Citizenship Amendment Act (CAA) or the abrogation of Article 370, were opposed in court for political agendas. Even NGOs are not spared from this. Therefore, motive and intention should be prima facie examined.

Various allegations & Criticism also paved the way back at Judicial review which can be concentrated to:

- Unelected judges influence for altering the laws made by elected representatives.
- Judicial overreach, hence restraint is important.
- Its time-consuming & expensive nature and delay in solving the cases even the pending one (as we discussed earlier).
- Lack of Accountability as judges are appointed through a collegium system.
- Limited Expertise.

## H. FUTURE PERSPECTIVE AND RECOMMENDATION

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<sup>48</sup> The Indian Express, explained: How supreme Court cleared new Delhi's central vista project, <https://indianexpress.com/article/explained/central-vista-project-approved-supreme-court-verdict-explained-7133395/>, (June 10, 2023)

A democracy becomes independent when the constitutionality of the laws is also independent in its nature. As pointed out by the author Shruthi Saravanan in her article that, by exercising extreme restraint, the Indian Judiciary has failed to exercise its power properly even of the review power, leading to the acceptance of arbitrary laws.

In order, to avoid such and to maintain the effectiveness of the judiciary, striking a balance is a must. Recently in the Hijab Ban case,<sup>49</sup> even the Karnataka HC arguably had an absence of duly carrying out the responsibilities of Judicial Review. The money laundering case of 2002 is yet another example of misuse of the power of review. As earlier discussed, the case of *Dobbs v. Jackson* (supra) also counts as an example of Juridical Restraint on abortion laws.

Also, there needs to be a clear debate on judicial activism and the suitable use of Public Interest Litigations (PILs) to warrant they are not misused for political gain. NGOs that are masked behind international entities for political benefits also need to be placed under scrutiny. Rectifying the main intentions for claiming remedies should be of utter importance to ensure that it does not involve any malafide intention rather than the public good. Hence, the importance of verification; whether such cases are politically motivated or aimed at harming the common good of the people is a must.

Ultimately, review and restraint are both subject matter to limitations and both need to be exercised with great caution and care to NOT impair the fundamental rights guaranteed by the Constitution and avoid judicial overreach. The judiciary must interpret laws and choose the most appropriate principle in a limited manner.

#### **XIV. CONCLUSION, SUGGESTIONS & RECOMMENDATIONS**

After analysing the aspects of Judicial Review, we can say that, whenever government makes the law, the judiciary ensures that such enactment is fair and lawful in nature via Judicial Review. Here, courts inspect how a choice was made, rather than shifting the choice itself or assessing its facts; that means the purpose is to regulate whether the decision-making process was flawed and if the decision should be overturned or

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<sup>49</sup> *Aishat Shifa v. State of Karnataka*, (2023) 2 SCC 1

not. Passing special orders and repealing any contradictory law against the people and the constitutions is also the responsibility of the courts as such. These are needed to be in accordance with Article 13 and 368 in order to be valid in nature otherwise Judicial Review can be sought on the following grounds when the decisions are:

- Illegal in nature such as lawmaker misusing the power granted or overusing the powers beyond their jurisdiction.
- Amounts to irrationality beyond any reasonable doubt.
- Are not followed according to the procedures set out in the laws.
- Not followed as per the stated expectations e.g. (trusting in actions rather than words)

Judicial review should emphasise only on the procedure of the law and the substance brought before the court. The court's part is to only regulate if, the subject falls within the scope of the court's jurisdiction as drawn in the constitution otherwise this can lead to hampering citizens' trust in the courts as well as the government.

Even the Keshavananda Bharati case (supra) has had a reflective impact on the Indian legal system. It safeguards that any amendments or laws approved & passed by the legislature are subject to scrutiny by the judiciary, confirming their compatibility with the golden triangle and the doctrine of Basic Structure. This has strengthened the protection of fundamental rights and upheld the veracity of India's constitutional framework.

Judicial review has flickered a conversation on the balance between judicial activism and judicial self-restraint and in recent times, judicial review has grown in three main ways -

- i. ensuring fairness in administrative actions.
- ii. protecting the fundamental rights guaranteed by the constitution to citizens.
- iii. addresses disputes between the central government and state governments regarding legislative authority.

In India, separation of power, however, supersedes separation of function making it difficult to assume Judicial Review to its full extent. In some way, this allows for shared responsibility which is good for a country like ours India, otherwise can lead to deprived performance of the government. *Minerva Mills* case was the turning point of the Indian legal history, enabling for the concept of the Doctrine of basic structure of the Constitution. This doctrine plays a crucial role in maintaining a fair and balanced system of governance in our country.

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